

## **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 “H-WAVE” OR A ROSE BY ANY OTHER NAME<sup>1</sup>**

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

After a hard day denying benefits I arrived at the Lobby Bar to find two extremely irate lien claim representatives, Larry and Lenny Lien of the 8600 Group, aka Dr. Nickelsberg’s henchmen for hire.

Not only were Larry and Lenny at the Lobby Bar, but they had been joined by Ron Summers, George the Bartender’s workers’ compensation attorney, as well as George’s primary treating physician, Dr. Nickelsberg.

This cartel of chicanery were visibly upset about something which seemed cause enough for celebration, so I ordered a *double* Beefeater’s martini, straight up with two olives from Kim, the Hyatt’s breathtakingly beautiful cocktail waitress.<sup>2</sup>

I’m a firm believer that if lien claimant representatives are upset, there must be some good on this earth after all! Based on the rather boisterous and lively conversation down at the end of the bar I knew it was a joyous occasion indeed!

I ordered a round of cocktails from Kim for the cartel and headed over in their direction to implant myself into their rather animated conversation.

The Lien brothers began by explaining that for years they had represented a durable goods company by the name of “Z-Wave Incorporated.”

According to Larry and Lenny, Z-Wave Incorporated developed and patented a sort of super TENS unit.<sup>3</sup>

The “Z-Wave” device was marketed to applicant primary treating physicians, like Dr. Nickelsberg, who also happened to be their biggest customer.

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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 Beefeater’s martini straight up (which means no ice) is best served at 38 degrees Fahrenheit.

<sup>3</sup> Short for transcutaneous electrical nerve stimulation, a TENS unit uses an electrical current to stimulate nerves for “therapeutic purposes,” which is open for debate.

All applicants that Dr. Nickelsberg diagnosed with an orthopedic injury were given a prescription for the “Z-Wave” device and Z-Wave Incorporated would then submit their billings for the device directly to the insurance carrier.

It was the position of Larry and Lenny that even though the “Z-Wave” device was basically a super TENS unit, it was not covered by the Official Medical Fee Schedule and therefore, the usual and customary charge of Z-Wave Incorporated would prevail.

As I was listening to the odyssey of the “Z-Wave” device from Larry and Lenny Lien, I thought to myself that this was an extraordinary build-up of medical expense for a treatment that perhaps had never been proven effective.

Pursuant to the ACOEM Guidelines even a TENS unit has questionable value or validity.

However, according to Larry and Lenny Lien one man’s invalid treatment is another man’s successful business venture.

Considering this back-story of the “Z-Wave” device by Larry and Lenny Lien, I wanted to know why they were so somber and upset tonight.

Ron Summers, who was listening to all of this with an acrimonious look on his face, broke in and told me that today the Board had issued a death blow to the “Z-Wave” device not to mention the profit margin of Z-Wave Incorporated.

On November 8, 2010, the Board issued its decision in *Armineh Markarian v. State of California Department of Motor Vehicles, State Compensation Insurance Fund* (ADJ2509874) in which the Board denied the lien claim of Electronic Waveform Lab, Inc., makers of the H-Wave device.<sup>4</sup>

Ron explained that the “Z-Wave” device is similar in its effect to the H-Wave device.<sup>5</sup>

In *Markarian* the defendant asserted they had issued timely Utilization Review denials of the recommendation of the primary treating physician, Dr. Philip Sobol, advising the applicant to utilize an H-WAVE home care unit.

The lien with respect to the H-Wave home care unit was initially allowed by the Workers’ Compensation Judge (WCJ), but this Findings and Award was reversed by the Board stating in relevant part as follows:

There is no medical evidence in this record which would establish that the medical equipment recommended by Dr. Sobol was reasonable and necessary. Defendant UR physician, Dr. Pegram, did note that the approval of a trial use of an “e-stim” would be based upon physician documentation of the extent and

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<sup>4</sup> The *Markarian* case can be obtained via e-mail upon request.

<sup>5</sup> H-Wave therapy is another form of electrical stimulation that allegedly purports to have therapeutic properties.

nature of the prior conservative care, the results of that care and the reason the conservative care was inadequate. Dr. Sobol has never submitted medical reports which document applicant’s need for the H-Wave, as opposed to a TENS Unit, or the effectiveness of applicant’s use of the H-Wave.

In *Markarian* the lien claimant introduced into evidence something called an “H-Wave Patient Outcome Report,” which was a survey conducted by an H-WAVE consultant (talk about independent corroboration) who gathered testimonials from the applicant after they had used the H-WAVE for one year. The survey purportedly offered a response from the applicant regarding improvement in function and reduction of pain.

With respect to this self-serving survey the Board dismissed this as follows:

“This report is not medical evidence, as there was no evaluation consistent with the requirements of the Appeals Board Rule 10606.”<sup>6</sup>

The Board went on to note:

“There is nothing in this record to establish that Dr. Sobol evaluated applicant subsequent to her use of the H-Wave to show that its use was medically efficacious.”

It is important to note that in this case the Board has not ruled on the effectiveness of H-Wave but has only criticized the primary treating physician for not explaining the effectiveness of H-Wave in terms of restoring the applicant’s functional capacity, such as range of motion and ability to return to work.

### **A JOLT OF REALITY**

At the recent DWC seminar in Los Angeles, I stopped by the H-Wave Exhibit Booth and at my request, was hooked up to an H-Wave device.

I was told that the effectiveness of the H-Wave device depends on the instructions given to the patient, as well as the patient’s cooperation, as the H-Wave device should be operated for no less than 30 minutes.

Both the TENS unit and the H-Wave device are based upon electrical stimulation to the muscles but the makers of the H-Wave device claim that it is more effective than that of a TENS unit because it uses a signal more closely in tune with the type of Waveform found in nerve signals.

The H-Wave device instructions claim that the proper utilization of H-Wave can reduce pain and/or re-train muscles resulting in lessening of a patient’s dependency on opioids or addictive

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<sup>6</sup> WCAB Rules and Procedure §10606 sets forth the requirements for admissibility of medical reports which mandates that the examining physician must examine the applicant, take a detailed history, provide a diagnosis and the list goes on.

pain medications. The problem is that it is the responsibility of the applicant’s primary treating physician to ensure that H-Wave, TENS units or other electrical stimulators are used properly to achieve the desired result. Certainly getting an applicant off narcotic medication is to be desired. However, making sure they get effective and valid treatment should be as important as well.

After buying another round of cocktails for the Lien brothers, they told me that their client, “Z-Wave” Incorporated, was devastated by the Board’s decision in *Markarian*.

At this, I thought to myself that the Workers’ Compensation Appeals Board was doing an excellent job at implementing not only the reforms of SB 899 but the ACOEM Guidelines that were implemented as of January 1, 2004.

The key to effective medical treatment is the phrase “functional improvement” and not the number of chiropractic, acupuncture and/or therapy visits (shake and bake therapy) received by an injured worker.

The function of Utilization Review is to not only approve those physical modalities and/or treatment that have been proven to be effective but also to monitor functional improvement after treatment.

The ACOEM Guidelines favor active rather than passive modalities of treatment and encourage the approval of additional treatments (physical therapy, chiropractic treatment, acupuncture) if functional improvement is demonstrated by the treating physician.

This is the way medical treatment functions in real life and this is the way it should be in workers’ compensation.

**Disclaimer:**

All characters, companies and contraptions at the Lobby Bar, such as “Z-Wave” Incorporated and the Z-Wave device, are fictional products of my imagination. Only Kim, George and I remain constant and real.

What is not imaginary, however, is the upsurge of durable goods on the market which absolutely do no good for injured workers but on the other hand give security of employment to lien representatives while at the same time aggravating employers and carriers.

In *Markarian*, the Board could have simply reversed on the fact that there was no appeal of the defendant’s timely Utilization Review denials. As you and I know though, UR denials under the Board’s holding in *Willette* can only be appealed by the applicant and/or his attorney – not lien claimants. However, the Board chose to send a message and this message has been received.

Make mine a double, George.

-Joe Truce