CAIIA Status Report

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July 2017

Howell Update
Credit to Tyson & Mendes, San Diego, CA

The landmark decision in *Howell v. Hamilton Meats & Provisions, Inc.* (2011) 52 Cal.4th 541, 129 Cal.Rptr.3d 325, drastically reduced recoverable medical specials in personal injury cases where plaintiff's medical bills were covered by health insurance. One response from the plaintiffs' bar has been an increase in cases where plaintiffs have treated on a lien basis in situations where the plaintiff had healthcare coverage available and where plaintiff did not have coverage. Courts have recently held the full amount of the medical bills remains admissible in situations where an uninsured plaintiff receives lien-based treatment. See *Uspenskaya v. Meline* (2015) 241 Cal.App.4th 996, 194 Cal.Rptr.3d 364.

In these cases, the battle is just beginning once plaintiff signs a lien agreement for his or her treatment. *Howell, supra*, at p. 555 instructed, "[t]o be recoverable, a medical expense must be both incurred and *reasonable*." The trier of fact, whether it be the court or a jury, will consider the evidence as to what is "reasonable." Consequently, expert opinion testimony as to the reasonableness of medical bills can be critical to reduce medical special damages as demonstrated in the very recent Court of Appeal decision from the Second District, *Goel v. Regal Medical Group, Inc.* (May 23, 2017) 2017 WL 2242981.

You Don't Always Get What You Want

The plaintiff, hereinafter "Goel," is the medical corporation for cardiologist Dr. Sanjiv Goel. Goel provided emergency intervention procedures to four patients at a local hospital. Previously, Goel terminated all insurance contracts he had with health care insurers. Regal Medical Group, Inc., hereinafter, "Regal," covered the four patients under a medical plan. Goel billed Regal $275,383.16 total for services provided to the four patients. Regal paid $9,660.86. Goel sued Regal for difference.

The sole issue in this decision was the "reasonable and customary value" of his services. Dr. Goel testified he set the amounts for the services billed based upon his training and practice, skill set, his opinion as to the value of his services, and personal risk for exposure to radiation performing the procedures. He also introduced evidence of what he was paid for his services when his charges were undisputed. Regal offered expert opinion testimony based on methodology determining the fair market value of the services provided by referencing a regional database and by comparing the amounts paid by Regal to Goel with amounts paid by Medicare.

The trial court found in favor of Regal, crediting the testimony of their expert. Goel appealed, contending the trial court erred in admitting the expert's testimony because Medicare rates were irrelevant, as were the rates other providers charged or were paid. Goel relied on the decision in *Children's Hospital Central California v. Blue Cross of California* (2014) 226 Cal.App.4th 1260, 172 Cal.Rptr.3d 861. The Court of Appeal here determined Goel's interpretation of the decision in *Children's Hospital* was too narrow.

Evidence As To The Market Value Of Services Should Always Be Relevant

The Court of Appeal interpreted the decision in *Children's Hospital* to "…require consideration of a 'wide variety of evidence' bearing upon the reasonable value of those services." *Goel v. Regal Medical Group, Inc.* (May 23, 2017) 2017 WL 2242981, at *5. The trial court has great latitude in determining relevancy. The Court of Appeal declined to hold Medicare rates were irrelevant as a matter of law or that the trial court should have been limited to a consideration of the fees accepted by Goel in the determination of the reasonable value of the services. The parties remain free to argue their contentions as to the probative value of the evidence. Those arguments, however, should not prevent relevant evidence from being admitted.

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CAIIA Newsletter
CAIIA Office
PO Box 168
Burbank, CA 91503-0168
Website: www.caiia.com
Email: info@caiia.com
Tel: (818) 953-9200

Editor: Sterrett Harper
Harper Claims Service, Inc.
(818) 953-9200
harperclaims@hotmail.com

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California Association of Independent Insurance Adjusters, Inc.

President's Office

PO Box 28148

Anaheim, CA 92809-0138

Email: steve.washington@sbcglobal.net

Immediate Past President
Paul Camacho, RPA, ARM, Mission Adjusters, So. Lake Tahoe, CA
mail@missionadjusters.com

President
Steve Washington – Washington & Finnegan, Inc., Anaheim, CA
steve.washington@sbcglobal.net

Vice President
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San Diego, CA
pat@reviewandconsulting.com

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mail@reliantclaims.com

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khillcompany@aol.com

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pvaughan@pacbell.com

TWO YEAR DIRECTORS

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Thornhill & Associates, Inc.
Chatsworth, CA
neal@thornhillandassociates.com

Eric Sieber
E.J. Sieber and Co.
Rancho Cucamonga, CA
EJSieberco@gmail.com

OF COUNSEL

Mark S. Hall Esq., HALL LAW FIRM

24881 Alicia Parkway, Suite E-500

Laguna Hills, CA 92653

T. 949.297.8444

F. 949.855.6531

mark@halllawfirm.org

President's Message

Roller Coasters are Scary

Steve Washington
CAIIA President

I am not a roller coaster fanatic by any means. In fact, they scare the *bejeezus* out of me. I am usually white knuckled with my eyes closed, like the last time I rode Ghost Rider at Knott's Berry Farm with my daughter. Of course, she had no problems or issues, just a lot of fun. My nerves were shot for days.

So, what does make a roller coaster fun and why do people enjoy riding them? The answer is simple; the feelings evoked on a coaster - whether fear or fun - are feelings difficult to emulate without involving *real* danger.

The scientific data indicates in high stress situations, a "fight or flight" reaction is usually activated. Adrenaline pumping experiences secrete "feel-good" chemicals in the brain, most notably dopamine and endorphins, to allow quick reflexes and improved perseverance. Dopamine and endorphins serve specific functions in stressful "do or die" situations. Dopamine is considered the anticipation chemical, the one that prepares and motivates people to follow through with actions while endorphins take effect in the present to encourage perseverance. Endorphins can be considered "push-through" chemicals.

A relatable example of both chemicals at work is running. Dopamine builds motivation to start running while endorphins keep the person moving. After running for a half mile, what keeps a person going? Endorphins. Endorphins are chemicals that activate opiate receptors, causing euphoria, making it easier for the person to complete the activity. This is what people call "runners' high". Although now a days, my knees just hurt.

Similar reactions happen on roller coasters in a shorter period. The dopamine helps get the rider on and up the lift, and then the euphoric endorphins kick in creating an intense abundance of excitement and pleasure. Anyway, that's what the gurus say…. I must be out of endorphins.

And, roller coasters are getting more and more scary and just plain crazy. Since the Matterhorn opened at Disneyland in 1959, there have been two prominent classifications of roller coasters – wood and steel. Now, nearly 50 years later, there's a new beast to tackle – the hybrid coaster. Rocky Mountain Construction, or RMC, is a construction company based in Hayden, Idaho that is dominating the coaster industry with their relatively new track design – the I-box track. The coaster's structure is made of wood but the track is made of steel, thus allowing for the maneuvers of popular steel coasters while holding the spectacle of classic wood coasters. In other words, it's better for twists, turns and inversions. As one enthusiasts told me; "the head chopping effect of a classic woodie mixed with the ejector air time of a steel coaster creates the perfect synergy."

So, there you have it. Don't forget this summer vacation to take your kids to Dollywood to ride Lightening Rod. But I wouldn't ride it myself, on suggestion of my cardiologist.

Steve Washington

CAIIA President 2016-2017

Washington & Finnagan, Inc.
Steve.washington@sbcglobal.net

NEWS FOR OUR MEMBERS

SAVE THE DATE

The CAIIA is proud to be exhibiting at or sponsoring the following upcoming events:

September 13-15, 2017	Claims Conference of Northern California, Sacramento, CA
September 28, 2017	CAIIA Annual Meeting, location TBD
October 17, 2017	CPCU Educational Event, Studio City, CA
March 6-7, 2018	Combined Claims Conference, Garden Grove, CA

News of Members

The Status Report and all of the CAIIA send their condolences to **Jeff Caulkins, former President of the CAIIA and owner of John S. Rickerby Company, Glendale, CA,** and his family on the passing of Jeff's father, John Wesley Caulkins.

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Conclusion

While the *Children's Hospital* and *Goel* decisions did not involve personal injury claims, they are nonetheless instructive in defending claims for medical specials. The Court of Appeal in *Children's Hospital* quoted *Howell*, *supra*, in support of the proposition that a provider's charges for services alone do not determine the market value of the services. "[A] medical care provider's billed price for particular services is not necessarily representative of either the cost of providing those services or their market value." *Children's Hospital, supra* at p. 1275.

Similarly, in personal injury claims, the defense must challenge the testimony of the medical provider who rubber stamps full lien amounts as the reasonable value of treatment. As in the *Goel* case, providers commonly treating plaintiffs on a lien basis and charge amounts far above the fair market value of those services. Many jurors are aware of the discrepancy between what medical providers charge and are paid, and are receptive to testimony consistent with their experience.

Where the medical bills have not been paid, plaintiffs will argue the full lien amounts are admissible at trial. However, the door remains open for the defense to rebut those amounts with expert witness testimony. Based on the *Goel* decision, the defense expert should continue to analyze Medicare reimbursement rates as an indicator of the reasonable value of medical treatment based on what providers accept as payment in full from a variety of payors for the specific treatment at issue in the case.

Happy 4th of July to you and yours!

Failure to Have Treatment Records Reviewed by Expert Precludes Summary Judgment on Genuine Dispute Doctrine

Credit to: Haight, Brown and Bonesteel, Los Angeles, CA

Editor's Note: This shows that the investigation must never stop and that the insurer in a first party case must place the insured's interest at the same level as its own.

In *Zubillaga v. Allstate Indemnity Company* (No. G052603, filed 6/19/17), a California appeals court ruled that triable issues about the insurer's reliance on expert medical opinions precluded summary judgment on the genuine dispute doctrine in a bad faith lawsuit arising out of an underinsured motorist ("UIM") claim.

In *Zubillaga*, the insured was injured in an accident with an underinsured motorist. She saw a chiropractor and an osteopath, complaining of back pain. She had a MRI and received a recommendation for further chiropractic treatment and over-the-counter medications.

After settling for the other driver's $15,000 limit, the insured's attorney made a UIM claim to Allstate and submitted $17,645 in bills with a demand for the $35,000 balance of her UIM limit. Allstate made an offer of $9,367 by determining $14,367 as the reasonable and customary amount for the treatments, adding $10,000 for general damages and subtracting the $15,000 the insured had received from the other driver's insurer.

The offer was rejected and the insured's attorney again demanded the policy limit, providing an additional evaluation from a board certified orthopedic surgeon who recommended steroid treatments and weight loss. The surgeon's charge added $1,200 to the medical bills, prompting Allstate to increase its offer to $10,000.

That was rejected with a demand for the policy limit or for arbitration, which then commenced. In discovery, the insured produced additional records from a physician pain specialist who had recommended epidural injections, medication and physical therapy. The physician estimated the epidural injections from $15,000 to $60,000. Based on the new information Allstate reevaluated the insured's claim as worth $27,084 which, after deduction of the other driver's $15,000, resulted in an offer of $12,084.

Allstate then obtained a defense medical examination, with Allstate's expert detailing his disagreements with the insured's experts, in particular the opinion calling for epidural injections.

With arbitration approaching Allstate's counsel requested any additional records and received a report from a physician who had subsequently given the insured an epidural injection, with bills for $7,900. The medical bills submitted then totaled $26,455, and Allstate offered the insured $14,500. The insured's counsel provided a further report from the physician who gave the epidural injection recommending more injections, physical therapy and medications.

Allstate did not have the reports or recommendations from the physician who gave the epidural injection reviewed by its own expert, but did increase its valuation of the insured's claim to $30,584 which, after the other driver's $15,000 was deducted, resulted in an offer of $15,584.

The claim proceeded to arbitration, where the insured's counsel submitted a report that had never been produced to Allstate showing the results of leg raise tests that counsel argued proved the necessity for epidural injections. The arbitrator found for the insured and awarded her the $35,000 balance on the policy, which Allstate paid.

In the subsequent bad faith lawsuit Allstate was granted summary judgment on the genuine dispute doctrine, with the trial court stating: "The decision to not offer any more money was based on the [DME's] determination that Plaintiff did not need expensive epidural injections. Defendant is entitled to rely on this expert report. Allstate had legitimate bases for disputing Plaintiff's claim in regards to the need for future epidural shots. This was not a case where Allstate was simply unwilling to pay off on a policy; rather, on the table was an offer for $12,084.... It does not appear unreasonable that Defendant did not offer up the entire $35,000 at this point since Defendant's [DME] concluded Plaintiff's treatment thus far had been excessive and epidural injections were unnecessary."

But the appeals court disagreed and reversed the summary judgment, stating:

"When Allstate moved for summary judgment, it presented evidence consisting primarily of declarations, medical records and correspondence, which spelled out in considerable detail the entire adjustment process as it unfolded. Allstate argued, and the court agreed, the evidence revealed a reasonable and good faith dispute about the value of plaintiff's claim, particularly as it related to her claimed need for epidural injections, based upon the opinions of Allstate's medical expert, Legome.

The problem is the undisputed facts show Legome's opinions were rendered in October and November 2012, but Allstate continued to rely on them through the arbitration in September 2013, without ever consulting with Legome again or conducting any further investigation. In the meantime, plaintiff had received one lumbar steroidal epidural injection that cost $6,850, and Soni had recommended three

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Going and Coming Rule

Credit to Low, Ball, Lynch, San Francisco, CA

Michael J. Sumrall, et al., v. Modern Alloys, Inc. ; Court of Appeal, Fourth Appellate District (April 13, 2017)

California Jury Instruction No. 3724 sets forth the Going-and-Coming Rule – Business Errand Exception, which states: "in general, an employee is not acting within the scope of employment while traveling to and from the workplace. But if the employee, while commuting, is on an errand for the employer, then the employee's conduct is within the scope of his or her employment from the time the employee starts on the errand . . . ."

Defendant Modern Alloys Inc. employed Juan Campos as a cement/mason finisher who was paid hourly for an eight-hour shift which began and ended at his worksite where he performed his work. Modern Alloys expected Campos to first arrive at its yard before going to the worksite. Campos would drive one of the company's trucks filled with construction materials and also his co-workers to the worksite. On October 7, 2010, when Campos was driving from his home to Modern Alloys' yard, he collided with plaintiff Michael Sumrall. Sumrall filed a complaint against Modern Alloys, alleging respondeat superior liability for Campos' negligence. The trial court granted Modern Alloys' motion for summary judgment, finding that Campos was commuting to his work and was not acting within the scope of his employment. The Court of Appeal disagreed because it could not state as a matter of law that the employee was not on a business errand when he commuted from his home to the employer's yard. The Court of Appeal reversed the trial court's grant of Modern Alloys' motion for summary judgment.

The Court found a material triable issue of fact as to the location of Campos' workplace. It was undisputed that Campos drove his own vehicle from his home to Modern Alloys' yard, making it reasonable to infer that Campos was on a normal commute. It was also undisputed that Campos drove Modern Alloys' truck, employees and materials from its yard to the worksite, and was not paid until he reached his worksite, making it reasonable to infer that Campos was on a business errand for the benefit of his employer. Since the Court could make two reasonable inferences from the facts, the Court could not affirm the trial court's grant of summary judgment. A jury must consider and weigh all of the facts and circumstances to determine what is considered Campos' workplace, the yard or the actual worksite. The Court could not state as a matter of law that Campos was not on a business errand for the benefit of Modern Alloys when the collision occurred because a jury needs to answer questions about his "workplace" to determine whether Campos was on a business errand.

COMMENT

There is a genuine issue of fact as to what is the worksite in this case. If a jury determines the worksite was the yard, then the going and coming rule would apply. If a jury determines the worksite was the actual jobsite where the employee performed his work, then the employee's drive to the yard could be considered a business errand, and the employer would be subjected to liability.

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more, if drug therapy proved ineffective. Soni estimated these injections would each cost $12,000, and the medications and physical therapy would each cost $6,000 per year.

Because it never asked Legome to review Soni's epidural treatments and recommendations, Allstate's continued reliance upon Legome's opinions as the basis for disputing the medical necessity or reasonable value of those treatments and recommendations may have been unreasonable."

The appeals court went on:

"Of course, Allstate was not obliged to accept Soni's treatments and recommendations 'without scrutiny or investigation.' [] To the extent it had good faith doubts, Allstate had the right to further investigate the basis for plaintiff's claim by having Legome reexamine his 2012 opinions, having another physician review all of plaintiff's medical records and offer opinions, or, if necessary, having plaintiff further examined by Legome or another defense doctor.

What Allstate could not do, consistent with the implied covenant of good faith and fair dealing, was to ignore Soni's treatments and recommendations, without adequately investigating them. [] To be clear, we are not saying Allstate breached the implied covenant. We are saying a reasonable jury could conclude it did so."

Consequently, the summary judgment for Allstate was reversed and the matter remanded for trial.

GARAGRAM

Credit to: Garrett Eng, Long Beach, CA

It was a dark morning before sunrise. One car rear-ended another. The allegation was that the lead car was driving with its lights off, so the striking car could not see the lead car until it was too late. GEI was brought in to shed some illumination upon the situation.

Our expert inspected the lead vehicle. It sustained major damages from a rear impact.

The trunk lid, rear panel and floor, taillight assemblies, rear quarter panels, and rear bumper assembly were heavily damaged.

The left and right side taillight assemblies each included three bulbs per side for turn signal, brake, running light, and backup functions.

There is a general principle for determining if a bulb with a filament was on or off at the moment of impact. If a light is off then the spring shaped filament is cold. If a cold filament is subjected to a violent shock, such as a collision, the hard brittle filament will break sharply and will generally not be bent or deformed from its own weight. In contrast, if the light is on, the filament will be hot. A hot filament is much softer, more flexible, and more pliable. If a hot filament is subjected to a violent shock, the filament will elongate and stretch under its own weight. When it cools, it does not return to its original shape, it cools in that stretched or elongated shape.

The left taillight lens and housing were examined. The left side outer bulb had an orange globe and the orange paint was deteriorating. The bulb was still intact with white discoloration on the inner surface.

This discoloration was a result of the water on the damaged filaments. The condition of the filaments indicated that the bulb was illuminated at the time of impact.

The left side middle bulb was broken. The lower of the two filaments was mostly missing; the break pattern appeared that the filament was cold (not illuminated) at the time of impact. The upper filament was found distorted, indicating it was illuminated at, or shortly after, its glass globe was broken.

The left inner bulb (back-up light) was found with its globe intact and showed no distortion, indicating it was not illuminated at the time of impact. This was an indication that the lead vehicle was not backing up when it was struck.

The right taillight lens and housing were also examined.

The right side outer bulb was heavily damaged. The lower filament (brake or turn filament) had broken off.

It could not be determined if the lower filament was illuminated at the time of impact. The upper filament was distorted and stretched, which indicated that it was illuminated at the time of impact. The filament stanchion (or base) was found broken and melted.

The right side middle bulb was missing, as was the right inner bulb (back-up light).

The Center High Mount Stop Light (CHMSL) bulbs were removed by an unknown party and were not available for inspection.

The headlight switch and wiring were inspected and appeared to be in working order. The switch, fuses, and wires were found in good condition with the wiring connected properly. A National Highway Traffic Safety Administration recall, related to the possibility of a problem within the headlight switch circuit breaker that could cause the headlights to flash on and off, did not cause or contribute to the incident. The manufacturer's website showed no open recalls on the vehicle related to the rear taillights.

In summary,
1) Some of the bulbs were removed prior to inspection.
2) Some of the bulbs were not illuminated at the time of the crash.
3) Some of the bulbs were illuminated at the time of the crash.

Therefore the lead vehicle taillights were on at the time of the impact and the lead vehicle driver did not contribute to the accident by driving in the dark without lights.

On the Lighter Side...

This is the easiest and one of the best recipe for your summer barbecues. The secret is in the boiling of the spareribs. They literally fall off of the bone and are so tender and flavorful.

Barbecued Spareribs
(adapted from McCall's Cook Book, 1963)

Ingredients:

4 lb. Spareribs (the meatiest you can find)

1 onion, quartered

2 teaspoon kosher salt

¼ teaspoon pepper

Bottle of your favorite BBQ sauce

Directions:

1. In a large pot, combine all ingredients (except BBQ sauce). Add water to cover, bring to boil. Reduce heat and simmer, covered, for 1-1/2 hours or until meat is very tender.
2. Drain ribs. Baste well with BBQ sauce.
3. BBQ, basting as necessary, until sauce starts to caramelize. Cut into serving- size pieces Enjoy!