ANOTHER INSTALLMENT IN THE *GEORGE THE BARTENDER* SERIES

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RE: GEORGE THE BARTENDER AND THE DILEMMA OF THE APPEALS BOARD IN STEPPING BACK FROM ITS *EN BANC* DECISIONS IN *ALMARAZ, GUZMAN* AND *OGILVIE*

FROM THE LOBBY BAR AT THE HYATT

I settled in on my bar stool at the lobby bar and ordered my cocktail of choice, a Beefeater's martini straight up with two olives, from Kim, the Hyatt's breathtakingly beautiful cocktail waitress. I then informed her that as of April 6, 2009, the world may have become a safer place for California employers as the Appeals Board granted Reconsideration from their *en banc* decisions in *Mario Almaraz*, *Joyce Guzman* and *Wanda Ogilvie*.

Previously, on February 3, 2009, the Board, without any advance warning, fired a bow shot across the workers' compensation community with its *en banc* and consolidated decisions in *Almaraz*, *Guzman* and *Ogilvie.* The Board held that both the Future Earning Capacity (FEC) component of the 2005 Schedule for Rating Permanent Disabilities and the *AMA Guides* themselves were rebuttable, inferring that the litmus test for determining the percentage of permanent disability or impairment was fairness to the applicant.

My thought process and martini enjoyment were interrupted by an ongoing argument between Ron Summers, George the Bartender's workers' compensation attorney, and Ron's primary referral source for business, Dr. Nickelsberg.

This rather heated dialogue had been going on for weeks.

After the initial euphoria of the *Almaraz*, *Guzman* and *Ogilvie* decisions wore off, both Ron and Dr. Nickelsberg were at a loss to figure out how to use these decisions to their advantage.

Ron would yell at Dr. Nickelsberg that it was his job to write a report increasing the rating á la *Almaraz* and *Guzman*. The good doctor would then fire back something like "They don't pay me enough!" and remind Ron that he was the attorney and to do his job.

To say I was enjoying this interplay is an understatement.

If the Board wanted to get our attention they certainly did. Ever since these *en banc* decisions issued, employers and insurance companies have been collectively wringing their hands. The California Applicants' Attorneys' Association (**CAAA**) broke out the champagne and quickly organized a series of seminars on how best to raise permanent disability ratings. Workers' Compensation Judges throughout the state have taken trials off calendar to "develop the record" in order to ensure that medical reports complied with the mandates of *Almaraz*, *Guzman* and *Ogilvie*, whatever that mandate happens to be, which is open to debate.

Even Work Comp Central has gotten into the act, as they quickly reprogrammed their computer for the 2005 schedule for rating permanent disabilities by adding *Almaraz* and *Ogilvie* boxes for input.

Recognizing that the entire workers' compensation community badly wanted to get their two cents into the discussion on how L.C. §4660 deals with permanent disability, the Board, in its decisions granting reconsideration in *Almaraz, Guzman* and *Ogilvie*, seemed to invite the entire industry to submit Friend of the Court briefs, known as an *amicus curie brief*. In its Decisions Granting Reconsideration in these three consolidated cases the Board not only set out a briefing schedule for the parties and those wanting to file *amicus briefs* but also issued guidelines as to the length and content of the additional written arguments. In reading the Board's Decision after Reconsideration it is clear that the Board wants guidance as to the intent of the legislature in crafting and amending L.C. §4660.

Traditionally *en banc* decisions from the Board serve a dual purpose:

1. To advise the parties as to the law of the land.

2. To give guidance to the workers' compensation community as to how to comply with the en banc decision.

THE *OGILVIE* DECISION

In its decision in this case the Board basically obtained its two goals, i.e., (1) advised the workers' compensation community that the future earning capacity formula (FEC) as adopted by the Administrative Director can be rebutted and (2) set forth a formula that could be used in rebuttal to the FEC guidelines.

As applicant's attorneys are now finding out, the FEC component does not change in most cases, even when using the formula as recommended by the Board. The formula involves using data from the Employment Development Department.

Even in those cases in which the FEC component is rebutted the new FEC only increases the rating by 1% or 2%.

Therefore, in terms of uniformity and consistency the decision in *Ogilvie* has not really missed its mark by much.

THE *ALMARAZ* AND *GUZMAN* DECISIONS

Although in the reaction to these decisions there has been both a chorus of praise by **CAAA** and dismay by employers over the apparent demise of the objective standards of the *AMA Guides*, the reality is that most applicant attorneys and their doctors have no idea whatsoever as to how to rebut a rating pursuant to the *AMA Guides* under *Almaraz* and *Guzman*.

In the past month I have observed an ongoing dialogue between Ron and Dr. Nickelsberg on how to apply *Almaraz* and *Guzman* to Ron's pending caseload.

Tonight the argument escalated to a point where Dr. Nickelsberg was yelling at Ron about a letter that Ron had sent requesting that Dr. Nickelsberg issue an opinion as to the applicant's permanent disability taking into account the Board's decisions in *Almaraz* and *Guzman*.[1]

In response to Ron's letter, Dr. Nickelsberg told Ron in no uncertain terms that he did not have the time or inclination to sit down and read and digest the *Almaraz* and *Guzman* decisions by the Board. Dr. Nickelsberg added that if Ron wanted an opinion on permanent disability, he was going to have to spell out his theory of it in his letter.

Ah, ***therein lies the rub***, as Shakespeare would say!

Although the Board certainly held that the *AMA Guides* could be rebutted by competent evidence, they did not specify or give an example with clarity as to the type of evidence that would rebut the *AMA Guides* in a specific case.

After the initial celebration some applicant attorneys are now saying that *Almaraz* and *Guzman* may only apply to 5% of cases involving permanent disability.

At this point in my musings I heard a loud noise and saw Dr. Nickelsberg forcefully slam his cocktail glass down on the bar, ending his argument with Ron, and then head for the door. As I was interested in how Ron planned to obtain higher impairment ratings courtesy of the initial decisions in *Almaraz* and *Guzman* I bought Ron a cocktail.

As Ron had just lost his drinking partner he was only too glad to share his strategy.

Ron explained that he now sends out letters to the defense attorneys on his cases inviting them to sign an enclosed interrogatory to the reporting panel QME or AME requesting that the reporting doctor issue a supplemental report per *Almaraz* and *Guzman*.

I told Ron that no defense attorney would sign such an interrogatory as this would be akin to issuing an invitation to your own execution. Regrettably Ron grinned and told me over 50% had already signed.

Ron then went on to boast that several of his "list of Agreed Medical Examiners" had already sent him letters with examples of how permanent impairment ratings could be "doubled" using the Board's language in *Almaraz* and *Guzman*.

Ron told me that he has a list of some 20 docs he uses as AMEs and they have all assured him that they can now get higher ratings as a result of the Board's decision.

Ron told me that later this month these AMEs would host a dinner at the Italian Restaurant and there would be a competition amongst AMEs of who could guarantee the highest ratings. As far as I am concerned this is reason 283 why never to use an AME.

[1] I have actually received half a dozen letters from applicant attorneys to Panel QMEs requesting that they assess the applicant's disability pursuant to the Board's decisions in *Guzman* and *Almaraz* with no further guidance.

THE ODYSSEY OF PERMANENT DISABILITY IN CALIFORNIA

I have been practicing workers' compensation law since November of 1973 and during this time I have learned two truisms: Applicant attorneys constantly argue that permanent disability benefits are inadequate and the employer/insurance community argues that permanent disability benefits are too high.

Prior to April 15, 1972, there was no graduated scale for permanent disability. When I started with this firm, each week of permanent disability had a maximum benefit of $52.50 and each percent of permanent disability was four weeks or $210.00. This was true for every applicant no matter if the rating was 1% or 100%. Therefore, there was no need for a permanent disability table as we could simply do the math.

However, in the early 1970's Warren Hanna of Hanna & Brophy, along with a few like-minded representatives of labor, pioneered and persuaded the Legislature to adopt a graduated permanent disability schedule whereby injured workers with serious disabilities would obtain higher benefits. Therefore, the payout of permanent disability went up with the corresponding percentage assigned to a specific factor permanent disability.

In the 1970's (believe it or not) most orthopedic permanent disabilities were decided on the basis of objective factors of disability. Ratings were based on range of motion measurements and objective factors of disability noted in the physical examination, such as atrophy.

Although we have long since forgotten this, the permanent disability schedule for injuries, prior to January 1, 2005, was based in large part on a handbook entitled *The Evaluation of Industrial Disability*, 2nd Edition, by Packard Thurber.

The Packard Thurber handbook was carried by all defense attorneys and most applicant attorneys as this handbook contained stringent guidelines on how to measure loss of motion, atrophy, etc. Sound familiar?

In the early 1970's doctors (on both sides) gave few work restrictions and most cases received permanent disability ratings based on objective factors of disability as measured by the applicant and defense medical-legal physicians at examination.

In my opinion this basic user-friendly system was ultimately destroyed by the "**prophylactic work restriction."**

In the early 1970's the Court of Appeal issued published decisions in the cases of *Dale Adams v. Workers' Compensation Appeals Board*, 22 Cal.App.3rd 214 and *Pacific Telephone and Telegraph Company v. Workers' Compensation Appeals Board*, 47 Cal.Comp.Cases 1416.[2] In these decisions the Court conceded that a rating could be based on a prophylactic work restriction. This prophylactic work restriction could not be based on pain and discomfort alone and could only be applied to prevent further injury and/or impairment.

A prophylactic restriction is not a work restriction at all but is simply a preventive measure. It was very easy for a physician to report that although an applicant had no subjective complaints or objective findings the applicant should still be precluded from heavy lifting to prevent further injury or pain or a 20% standard rating.

[2] Anyone wanting a copy of the *Dale Adams v. Workers' Compensation Appeals Board* or *Pacific Telephone and Telegraph Company v. Workers' Compensation Appeals Board* cases should send an email to info@kttlaw.us

To say this system of measuring disability was ripe for abuse is an understatement.

The mandate of the Court of Appeal in the *Adams* and *Pacific Telephone and Telegraph Company* cases was universally ignored as applicant attorneys began to obtain medical-legal reports in which every applicant, no matter how minor the injury, was given some sort of prophylactic work restriction.

It was the abuse of the prophylactic work restriction combined with never-ending treatment programs that led to the passage of SB 899.

During the excesses of the late 1980's, and then the 1990's and right up to the passage of SB 899, I began to consistently see a diagnosis that I had never seen before: "failed back syndrome."

WHERE DO WE GO FROM HERE?

Work Comp Central is relatively new in my work life and if there is one thing I have learned from Work Comp Central it is that the issues in workers' compensation in California, which I felt were exclusive to our fair state, are issues that are addressed in states across the Union. The combatants are the groups that receive the benefits and the groups that pay the benefits, as well as the cottage industries that serve both parties.

In granting reconsideration in the *Almaraz, Guzman* and *Ogilvie* cases, the Board has set out a briefing schedule for the parties wishing to submit an *amicus curiae brief*, thereby ensuring that we will not have a definitive decision until the end of this year, if then.

My predictions:

1. I cannot really see a viable argument to counteract the Board's decision in *Ogilvie* that the FEC component can be rebutted.

   However, I do see an argument that information taken from the Employment Development Department is not sufficient or comprehensive enough to rebut the FEC component which is based on the Rand formula and is certainly more extensive than the information as developed by the EDD.

   Remember, L.C. §4660 calls for empirical data as a basis for the FEC component of the Guides. Therefore, I do not see any substantial change in liability to the employer community under *Ogilvie* as it would appear that the $20,000,000+ Rand study is the only game in town.

2. As far as I am concerned the greatest impact of *Almaraz* and *Guzman* was to delay the resolution of disputes involving permanent disability. A great number of cases statewide have been taken off calendar so that the record can be developed and in most instances the parties do not have the slightest idea on how to develop the record.

3. The employer/insurance community has long argued that the real cost in the system were those cases that rated under 20%, even when these employees went back to work at the same job. *Almaraz* and *Guzman* will still mandate that applicants with minor disabilities will still be rated per the objective standards of the *AMA Guides*, while allowing more seriously injured applicants to occasionally go outside the constraints of the Guides.

4. Some applicant attorneys advance the theory that *Almaraz* and *Guzman* give doctors free reign to ignore the *AMA Guides*. However the language in L.C. §4660 is clear and mandates a "schedule" that "shall promote consistency, uniformity, and objectivity" and this language should guarantee that few ratings will deviate from those found in the Guides.

We must remember that the driving force behind the announced 24% increase in insurance premiums is still the medical benefit and not permanent disability. In my experience permanent disability and medical treatment go hand in hand, as the longer the treatment program (and I am talking about ineffective treatment programs resulting in numerous surgeries), the greater the permanent disability exposure.

Even though Utilization Review is more than five years old our industry still has not grasped how to use this important tool.

Most claims administrators have created a separate Utilization Review Department which does not have input from the claims examiner and/or claims administrator, recognized by the Labor Code as the most important person in our system.

After all, it is the claims administrator that makes all decisions in terms of medical treatment and disability and therefore it is mandatory that there be a partnership between the Utilization Review Department and the claims adjustor with one common purpose, i.e., to deliver the most cost effective and **appropriate** medical treatment to the injured worker with the goal of returning the worker to the labor market.

Although our industry has finally grasped the concept of prospective utilization review we still have not been able to completely get our hands around the concept of retrospective utilization review. Until we do so we will simply not have control of our system.

An effective utilization review program with respect to both prospective and **retrospective** utilization review can cure all ills.

DISCLAIMER:

The only real people at the lobby bar are Kim, George and me. All other characters are fictional and a product of my imagination.

However, the argument between Ron and Dr. Nickelsberg is an argument (maybe I should use the word "dialogue") that is going on statewide.

This is hard to believe but in the 1970's our legislature did not even know how to spell workers' compensation (actually then it was "work**man's** compensation") and comp was not yet a political football.

This allowed statesmen such as Warren Hanna and some of the likeminded members representing labor to make legislative changes to our system without a roll out of interest groups on both sides.

Those days are certainly gone.

Maybe we should go back to our user friendly system of the 1970's. After all, I still have my Packer Thurber handbook.

Make mine a double, George.

-Joe Truce