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 MEETS THE PANEL QME

FROM THE LOBBY BAR AT THE HYATT:

Upon arriving at the lobby bar after a hard day of denying benefits I stopped in my tracks:

Where was George?

George the Bartender was not in his usual place behind the bar. In his place was a replacement bartender who introduced himself as Rusty.

While making my Beefeater's martini, straight up with two olives, Rusty explained that George had taken a personal day off but would be back tomorrow.

I then heard a familiar voice from the other side of the bar belonging to George's attorney, Ron Summers, who advised that George has taken the day off in order to attend a panel QME examination with none other than Dr. Nickelsberg, in connection with George's most recent case where George alleges epicondylitis or tennis elbow from repetitive serving and mixing of cocktails at the Hyatt lobby bar.

Since Dr. Nickelsberg was Ron's exclusive orthopedic workers' compensation doctor, who doubled as a primary treating physician, I told Ron I was surprised that the Medical Unit of the Division of Workers' Compensation would issue George a panel including Dr. Nickelsberg as he was obviously George's primary treating physician.

Ron glumly explained that the glory days of referring all his applicants to Dr. Nickelsberg were over. The Hyatt's insurance carrier had its own Medical Provider Network and in George's comp case, Dr. Nickelsberg was precluded as a matter of law from being George's treating doctor. I told Ron that he should be celebrating as the selected panel QME has been Ron's in house PTP for year.

A very depressed Ron told me that the panel QME system when combined with Medial Provider Networks **(MPNs)** had been structured by Senate Bill 899 to promote honesty, objectivity and fairness in medical reporting.

Ron explained that he had been advised by Dr. Nickelsberg that the new law was cutting down on his referrals and if he still wanted to be a player in our system, he was either going to have to join an MPN, the panel QME system, or both.

Ron told me that as far as Dr. Nickelsberg was concerned the days in which attorneys were able to freely select their own primary treating physicians or QMEs were coming to an end.

I commented to Ron that Dr. Nickelsberg would certainly bend over backwards on behalf of George as Ron had given Dr. Nickelsberg volumes of business over the years.

Ron groaned and indicated that Dr. Nickelsberg and other applicant physicians were now in a system that was controlled by the Medical Unit of the Division of Workers' Compensation and one thing was for sure no matter how Dr. Nickelsberg slanted his report this was not the "good old days" and a doctor could not look forward to getting more referrals from the attorney that benefitted monetarily from his report.

While ostensibly commiserating with Ron and buying him another cocktail I thought to myself: "It's about time."

Shortly after Senate Bill 899 became law on April 19, 2004, I attended the annual seminar of the California Workers' Compensation Defense Attorneys' Association and we were addressed by members of the governor's staff that crafted the reform provisions of SB 899 and specifically the Medical Provider Network and state panel QME provisions.

We were told that the concept of the state panel QME was created so that the selected doctor did not feel that he and/or she was "hired by one of the parties."

The DWC QME panels contain the names of three physicians in the selected specialty selected at random by the DWC Medical Unit with no input from the parties.

THE AME FALLACY:

Immediately after the creation of the DWC QME panel pursuant to Labor Code §4662.2 the applicant attorneys intentionally set out to try and convince defendants that going to an established Agreed Medical Examiner was far more preferable than going to the QME panel and playing Russian roulette as you would never know who you were going to get.

Unfortunately the Agreed Medical Examiner system, while theoretically sound, has a built-in conflict.

All insurance carriers and self-insured employers are fully aware that workers' compensation is a social system and expect that AMEs will issue compensable reports finding disability.

However, if an AME issues a report finding that an employee with little or no objective findings and minimal subjective complaints has no disability whatsoever then the applicant's attorney, who agreed to the AME in the first place, will get shut out with respect to attorney's fees.

Usually that particular applicant's attorney will never again utilize the expertise of that AME even though the report was fair, objective, thorough and persuasive.

Unfortunately, Agreed Medical Examiners depend on being included on the proposed panels of AMEs which are sent out by applicant attorneys to insurance carriers, employers and defense attorneys.

The California Workers' Compensation Defense Attorneys' Association has an annual convention as does the California Applicant Attorneys' Association. It is no coincidence that a majority of AMEs attend the CAAA convention as opposed to the defense attorneys' annual convention.

In my personal opinion the AME system is broken and the option of going to a panel QME is much more appealing for the following reasons:

1. A so-called **"popular AME"**[1] will not give you an examination date until anywhere from six months to a year and a half out. **A panel QME must give you an examination date within 60 days from the assignment.**[2]

2. Popular AMEs will not give you a report until anywhere from 90 days to two years from the date of the examination. **By law a panel QME must report within 30 days.**

3. A popular AME will not give you a deposition date until anywhere up to a year and a half. **A panel QME will give you a deposition date by proposed rule within 120 days.**

WHY NOT ENACT RULES FOR AGREED MEDICAL EXAMINERS SIMILAR TO PANEL QMEs?:

I attended a seminar in Huntington Beach last year that touched on the AME/QME system and one of the panel members, a representative from a large self-insured employer, complained about the lack of administrative rules governing the conduct of Agreed Medical Examiners and that these AMEs should have to abide by the same rules as panel QMEs.

The employer's representative complained rather bitterly that AMEs were taking up to a year to get the reports out and her cases were languishing in perpetuity.

The answer here is simple!

Do not go to AMEs and instead rely on the expertise of state panels issued by the Medical Unit of the DWC.

My thought after hearing the complaint from the panelist about the late reporting of AMEs was that maybe we should have an organization similar to Alcoholics' Anonymous called Agreed

[1]A popular AME is one who is used by a majority of applicant's attorneys.

[2]The administrative director Carrie Nevins, has promulgated proposed rules mandating an exam within 60 days of the request and although these rules have not been approved they are being enforced by the medical unit.

Medical Examiner Anonymous (AMEA) and the first step to recovery requires admission as to an uncontrollable addiction for going to AMEs.

Our firm's motto is I.E.T. or, Investigate, Evaluate and Terminate.

The panel QME system allows us to go through the system as contemplated and to speedily bring a litigated case to conclusion by way of settlement or Findings and Award without stopping the case in its tracks by waiting two years for the completion of the AME procedure.

APPLICANT'S ATTORNEY'S WAR CRY:

If they have no panel QME within 15 days we can select our own QME.

Some applicant attorneys, wanting to go to their own selected QMEs, rely on the old QME request form (still in effect) which provides that unless a panel is issued within 15 days then the applicant can select his own QME.

However, this old form only applies to cases in which the injured employee is not represented as Labor Code §139.2(h)(1) specifically provides that the 15-day limitation **only** applies when a panel is obtained under Labor Code §4062.1 (which applies to unrepresented employees) and not Labor Code §4062.2 (which applies to represented applicants).

DISCLAIMER:

The views expressed above are those of the author and were carefully analyzed and contemplated in the lobby bar. Make mine a double George.

- Joe Truce