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 ONGOING SAGA OF INTERPRETING THE AMA GUIDES OR *COMING TO GRIPS WITH THE TRUTH* [1]

FROM THE LOBBY BAR AT THE HYATT:

After a hard day denying benefits I arrived at the Lobby Bar hoping for a reprieve and to catch a glimpse of Kim, the Hyatt's breathtakingly beautiful cocktail waitress. A feeling of serenity washed over me as I knew I was only seconds away from holding my cocktail of choice, a Beefeater's martini, straight up with two olives.[2]

Alas, while I did receive my martini from Kim my dream of peace and solitude was crushed by raised voices down at the other end of the bar. From the sound of it a heated conversation was taking place and looking down at the other end of the bar I saw that this ruckus was emanating from none other than the dukes of duplicity themselves -- Ron Summers, George the Bartender's workers' compensation attorney, and Dr. Nicklesberg, George's primary treating physician.

I quickly assessed the situation and decided that the argument between these two gentlemen probably meant a victory for the defense.

Both Dr. Nicklesberg and Ron were in an enraged state so I knew I would not get any information from them as to the basis for their argument.

Thankfully George filled me in. George told me something I already knew, i.e., that Ron utilized Dr. Nicklesberg as the primary treating physician on all of his cases not for the purpose of giving the applicant maximum medical benefits but rather to draft a permanent and stationary report which would give the applicant the highest possible permanent disability rating.

This of course is not a new concept to defense attorneys as an applicant attorney's choice of primary treating physician owes their business to this very same applicant attorney. Primary treating physicians generally regard the applicant attorney as their *"client"* even though this isn't the actual person receiving the treatment.[3]

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[1] 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!

[2] A Beefeater's martini, straight up, is best served at 38° Fahrenheit.

[3] A minor oversight, I'm sure.

The *"partnership"* between Ron and Dr. Nicklesberg had worked out well for Ron as many workers' compensation judges in selecting between Dr. Nicklesberg and the panel QME would often rely on Dr. Nicklesberg as he was the treating physician.

This concept of WCJs relying on the opinion of primary treating physicians has always puzzled me. As I just alluded to, doctors who are selected by applicant attorneys to be treating physicians for the applicant invariably want to stay on the good side of their *"client."* As such their permanent and stationary report tends to be an extremely liberal analysis of the AMA Guides.

A panel QME on the other hand has many of the attributes of an Agreed Medical Examiner. Unlike the applicant attorney's choice as a treating physician there is a prohibition against ex parte contact by letter, phone call, etc. More importantly, panel doctors are not selected by either side but by the Administrative Director.

In other words, there is no incentive for panel QMEs to advocate for one side or the other as their report or opinion will not mean increased business for them.

I have always felt that panel QMEs should have the same presumption of correctness as Agreed Medical Examiners but that is another story.

George interrupted my musings to tell me that today Ron received a Findings and Award on one of his cases in which the workers' compensation judge found that the report of Dr. Nicklesberg was not substantial evidence. Dr. Nicklesberg, who was dealing with an upper extremity case, did not comply with the AMA Guides in his grip loss test for the applicant, nor did he discuss how the applicant's disability affected his activities of daily living.

George concluded that the argument between Ron and Dr. Nicklesberg was over the fact that Ron felt that it definitely was the fault of Dr. Nicklesberg that the WCJ did not rely on his report.

I smiled to myself as the decision in Ron's case was similar to a panel decision of the Board in the case of *Ofelia Salcedo v. P. F. Chang's China Bistro* (ADJ6528393) filed on May 18, 2012.[4]

In *Salcedo* the applicant attorney nominated Dr. John Larsen, M.D., as the applicant's primary treating physician. In issuing his decision the workers' compensation judge relied on the report of Dr. Larsen in issuing an Award of 19%.

The defendant filed a Petition for Reconsideration claiming the following:

1. Dr. Larsen's report should have been excluded from evidence "pursuant to his failure to comply with Labor Code section 4628."

2. The report of Dr. Larsen dated March 20, 2011 was not served on defendant until September 14, 2011, which was the day of the trial.

[4] Anyone interested in obtaining a copy of the *Salcedo* decision should submit their request via email.

The Board granted defendant's Petition for Reconsideration and in its panel decision noted as follows:

> . . .the WCJ found Dr. Larsen's August 10, 2009 report more persuasive than Dr. Baldwin's January 17, 2011 panel qualified medical examination (QME) report because Dr. Larsen measured applicant's grip strength and Dr. Baldwin did not.

In rescinding the decision of the WCJ the Board observed as follows:

> However, Dr. Larsen has not examined applicant since August 10, 2009 and, according to Dr. Baldwin, applicant reported an improvement of her hand function over time . . . In addition, we note that, in providing grip strength measurements, Dr. Larsen did not indicate whether the measurements were taken in accordance with the protocols set forth in the American Medical Association (AMA) Guides and why those measurements should be a factor of disability as opposed to other possible objective impairment measurements. (See AMA Guides, 5th ed., §16.8a, at p. 508.) Lastly, Dr. Larsen did not address applicant's activities of daily living which should form the basis for calculating impairment under the AMA Guides.

In comparing the evaluation of impairment and/or permanent disability to the AMA Guides we tend to forget that the Guides are also a primer on how to evaluate and perform the physical examination and testing (such as grip loss test) in the first place.

In every panel decision there is a lead commissioner. Since Commissioner Ronnie Caplane was selected in December 2011 by Governor Jerry Brown to be the Chair of the Workers' Compensation Appeals Board she has, in addition to her management duties, continued to participate in panel decisions.

In fact, Chairwoman Caplane was the lead commissioner in *Salcedo,* which basically sends the message that the Board intends to continue to enforce Labor Code §4660 as amended by Senate Bill 899 and rely upon a strict interpretation of the AMA Guides.

DISCLAIMER:

All characters at the Lobby Bar aside from Kim, George and I are a product of my warped imagination, as is the storyline.

The excellent and articulate decision in *Salcedo* is another reminder to the workers' compensation community that physicians (whether treating physicians, panel QMEs or AMEs) must comply with both the spirit and intent of the AMA Guides in determining permanent impairment.

Make mine a double, George.

-Joe Truce