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 OFTEN OVERLOOKED MANDATE OF LABOR CODE §4061.5 OR *THE BEST DEFENSE IS A GOOD DEFENSE . . . ATTORNEY*[1]

FROM THE LOBBY BAR AT THE HYATT:

After a hard day of denying benefits I arrived at the Lobby Bar seeking three things: peace and quiet, a Beefeater's martini straight up with two olives and, of course, a glimpse of Kim, the Hyatt's breathtakingly beautiful cocktail waitress. No sooner had I taken my usual seat at the bar than Kim appeared with my drink in hand. Settling in, all appeared right with world . . . or so I thought.[2]

Down at the other end of the bar there was a verbal altercation brewing between George the Bartender's workers' compensation attorney, Ron Summers, Ron's go-to primary treating physician (PTP), Dr. Nickelsberg, and noted defense attorney, Frank Falls. In the hopes of restoring tranquility to the Lobby Bar, I asked George to make a round of cocktails (on me) for the raucous trio.

My drink in tow I made my way to the other end of the bar to begin the arduous peace process. The kerfuffle grew more boisterous as I approached. Thankfully things died down as I was spotted by the trio. The three of them then all tried to speak to me at the same time. Luckily their drinks arrived, which allowed for a break and enough time for me to appoint Frank first to speak.

Frank explained that the argument involved a case filed by Ron at the Appeals Board where Frank was the defense attorney representing Integrity Insurance Company. He said that the case was quite simple, as it started out as an admitted low back injury sans radiculopathy.

However, Ron's Application for Adjudication not only alleged a low back injury but also injuries to the cervical spine, right shoulder, right wrist, gastroesophageal reflux disease, hypertension, diabetes, sleep disorder and headaches. Frank could not fathom how a simple back injury, which caused no lost time from work, could result in all of these injuries and claimed disabilities. [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, 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] Raise your hand if this sounds familiar.

Frank added that the PTP in this case was (who else) the eminent Dr. Nickelsberg. After examining the applicant, the doctor concluded that the applicant should be referred to two secondary physicians, one an internal medicine specialist and the other a sleep disorder specialist.[4]

Ron chimed in, saying that the mandatory settlement conference took place this morning and both he and Frank completed the Pretrial Conference Statement as required by California Labor Code §5502, listing stipulations, witnesses, exhibits and issues.

Frank then advised me that Ron had made a mistake on his statement. Although the reports of all of the secondary physicians were listed by Ron, the final report by Dr. Nickelsberg, incorporating the reports of the secondary physicians, was inadvertently omitted. Frank contended that since this report by the PTP was not listed by Ron, this was a fatal mistake and the applicant's allegation of these various injuries was not substantiated as the applicant's attorney had not carried their burden of proof.

This is the point where the argument had come to a head. Frank claimed that since Dr. Nickelsberg's report was not listed it was thereby inadmissible as evidence. Frank further argued that California Labor Code §4061.5 requires that the report of the PTP incorporating all secondary physician report(s) must be in evidence for the applicant to carry his burden of proof on disability.

California Labor Code §4061.5 provides as follows:

> The treating physician primarily responsible for managing the care of the injured worker or the physician designated by that treating physician shall, in accordance with rules promulgated by the administrative director, render opinions on all medical issues necessary to determine eligibility for compensation. In the event that there is more than one treating physician, a single report shall be prepared by the physician primarily responsible for managing the injured worker's care that incorporates the findings of the various treating physicians.

Ron of course vehemently disagreed with Frank's claim. He argued that even though Dr. Nickelsberg's report was not listed the Workers' Compensation Judge (WCJ) could still make a decision on the basis of the secondary physicians' reports as those had been listed on the Pretrial Conference Statement.

Having just finished taking all in I couldn't help but grin at Ron. It was a grin that Ron was very familiar with at this point in our relationship, one that conveyed the sentiment: "You poor, misguided fool." I reached into my trusty briefcase and pulled out copies of the Board's

[4] I suppose I have a sleep disorder myself as over the course of my long storied career I've never really been keen on sleep as I am of the opinion, "If crime never sleeps, then why should I?" Having never really trusted "sleep disorder specialists," I'll never truly know.

Panel decision in the case of *Maria Rodriguez v. Modern Development Company; Travelers Property & Casualty Company of America* (ADJ7469888) 2013 Cal. Wrk. Comp. P.D. LEXIS 393 filed July 9, 2013.[5]

I gleefully articulated to Ron that this very same issue was raised by the defense in *Rodriguez* on a Petition for Reconsideration. I told Ron that the facts in *Rodriguez* were essentially the same as in the case he and Frank were party to.

In *Rodriguez* the applicant attorney designated a Primary Treating Physician (PTP), Dr. John Larson, M.D. Dr. Larson referred the applicant out to a neurologist by the name of Natalia L. Ratiner, M.D., and also an internal specialist, Dr. Glenn Andrew Marshak, M.D.

Doctors Ratiner and Marshak did their jobs, providing reports substantiating the applicant's claims of a sleep disorder, gastroesophageal reflux disease, hypertension, diabetes and headaches. These reports were presumably transmitted to Dr. Larson, who incorporated them into his own report pursuant to Labor Code §4061.5.

However, the applicant attorney in *Rodriguez* inadvertently omitted the report of Dr. Larson as an exhibit in the Pretrial Conference Statement. As a result the WCJ did exclude the report of Dr. Larson as we might expect, but nonetheless found the applicant to be permanently disabled on the reports of the secondary physicians.

The defendant filed a Petition for Reconsideration claiming that since there was not a Primary Treating Physician report incorporating the reports of the secondary physicians, the WCJ could not now rely on the secondary physicians' reports in their ruling and, therefore, the applicant had not proved their case.

In granting reconsideration the Board noted as follows:

> However, defendant is correct that section 4061.5 and Rule 9785 require a report by the PTP incorporating the reports of the secondary physicians, and it follows that the report by the PTP must be in evidence in order for the WCJ to consider whether those requirements have been met.

At this point any hope remaining in Ron had been crushed. However, attempting a Hail Mary, he commented that *Rodriguez* was simply a Panel decision and could not be brought to the attention of either the Board or a WCJ.

[5] Much like Mary Poppins's seemingly bottomless carpetbag (of Disney fame) and Hermione Granger's bottomless handbag (of Harry Potter fame), my briefcase possesses magical powers, granting me the ability to pull out any decision at a moment's notice. A copy of *Rodriguez* can be obtained by an email request.

At this I again reached into my trusty briefcase and pulled out a copy of the Workers' Compensation Laws of California (aka Labor Code) which I always carry with me. I referred Ron to Labor Code §5703, entitled "Specified additional evidence allowed" which reads in relevant part as follows:

> The appeals board may receive as evidence either at or subsequent to a hearing, and use as proof of any fact in dispute, the following matters, in addition to sworn testimony presented in open hearing:
>
> (g) Excerpts from expert testimony received by the appeals board upon similar issues of scientific fact in other cases and the prior decisions of the appeals board upon similar issues.

Therefore, Labor Code §5703 mandates (as it has for years) that not only can a Panel decision be brought to the attention of the Board or a WCJ (either at or subsequent to a hearing) but that Labor Code §5703 specifically indicates that a Panel decision might actually be entered as evidence.

MORAL OF STORY

Ever since the *Margolin-Bill Greene Reform Act of 1989* the California Labor Code has specified that the only admissible medical reports are reports by treating physicians or reports of Panel QMEs for injuries on or after January 1, 1990.

Let's not fool ourselves. Treating physician reports in a litigation environment have really nothing to do with treatment. Rather, they are medical-legal reports disguised as reports of treating physicians and these reports are admissible simply because they are captioned "reports of the Primary Treating Physician" or "secondary physician."

The prohibition of ex parte communication does not apply to treating physician reports as it does for the reports of Panel QMEs and I have never understood why. Panel QME reports should be legally regarded as more reliable than the reports of treating physicians. It is difficult for me to differentiate between the requirements of an AME as opposed to those of a Panel QME. As is the case with AMEs, the parties cannot communicate with Panel QMEs. If they do communicate a copy of the correspondence must be copied to all parties. In other words if it walks like a duck, quacks like a duck, it is a duck!

However, I digress. The moral of the story, as well as other decisions of the Board addressing the discovery cutoff date as mandated in Labor Code §5502, is that the most important legal document in the life of a litigated file is the Pretrial Conference Statement.

Best practices dictate that the Pretrial Conference Statement should start to be prepared when the file is received or initiated by the parties. Page two of this six-page document is a critical page as this is the *Stipulations* page. Once we have signed this page the stipulations that we have entered into are binding on us and may not be set aside with the exception of fraud, duress or mutual mistake.

In the case of an admitted industrial injury to the low back we want to admit injury to the low back, not the back as this could include the thoracic spine or even cervical spine. Any additional body parts that are not considered a part of the admitted injury constitute an issue and must be raised on page three (*Issues*) under the section for "PARTS OF BODY INJURED".[6]

One of the most important questions asked of the parties on page two of the Pretrial Conference Statement is the identity of the Primary Treating Physician. This does not mean the physician designated by the applicant attorney is the Primary Treating Physician though. To find out if the Primary Treating Physician is really a Primary Treating Physician we must go to Title 8, California Code of Regulations, Chapter 4.5, Subchapter 1, Administrative Director – Administrative Rules, Article 5, §9785 to see if the designated Primary Treating Physician has complied with the mandates of this rule and has not only reported timely but has incorporated the reports of all secondary physicians.

There is no reason to confer the mantle of Primary Treating Physician on a physician who has not complied with Administrative Rule §9785. Our best option to counter this procedural overreach is to claim non-compliance with Labor Code §4061.5 and Administrative Rule §9785 on the *Issues* page under "OTHER ISSUES".

DISCLAIMER:

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

Make mine a double, George.

-Joe Truce

[6] Note to the defense community: It is the applicant attorney's job to fill this out, not us. No need to be helpful in this instance.