ANOTHER INSTALLMENT IN THE *GEORGE THE BARTENDER* SERIES

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RE: GEORGE THE BARTENDER AND HOW TO CIRCUMVENT THE AMA GUIDES OR WHO HAS THE FINAL WORD ON PERMAMENT DISABILITY?[1]

FROM THE LOBBY BAR AT THE HYATT:

After a hard day of denying benefits, I arrived at the Lobby Bar looking forward to Kim, the Hyatt's breathtakingly beautiful cocktail waitress, approaching me with a smile and my Beefeater's martini, straight up with two olives.[2]

As I sipped my martini I thought to myself that nothing could ruin this night.

Boy was I wrong. Down at the other end of the bar I observed a smiling Ron Summers, George the Bartender workers' compensation attorney, and George's primary treating physician, Dr. Nickelsberg.

The dukes of duplicity were in high spirits, exchanging some laughs over a couple of drinks. At one point they executed a high five which ended with Dr. Nickelsberg striking the Heisman Trophy pose.

Ultimately curiosity got the better of me and after buying a round of cocktails for the unholy duo I soon learned the source of their delight.

Ron had just received a 100% permanent disability award in one of his cases that completely bypassed the American Medical Association (AMA) Guides to the Evaluation of Permanent Impairment (Fifth Edition).

Ron's designated treating doctor in the case was of course none other than Dr. Nickelsberg so I knew that the injured worker went straight downhill from a health standpoint once he started his treatment program with the "eminent" doctor.

Dr. Nickelsberg could not wait to tell me about the case. Apparently, through the auspices of Dr. Nickelsberg, the applicant enjoyed three failed back surgeries and as the applicant claimed at

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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 Beefeaters martini up is best served at 38˚ Fahrenheit.

trial he could not ever work again the Workers' Compensation Judge (WCJ) issued a 100% award.

At this point Ron broke in to tell me that the WCJ's Opinion on Decision in his case stated that although Ron's client only qualified under the AMA Guides for a DRE (Diagnosis Related Estimate) lumbar category five (25% to 28% impairment of whole person), the WCJ found that as the applicant had a complete loss of earning power he was 100% disabled.[3]

Ron had a copy of the decision with him and I asked if I could have a look at it. After examining it for a few moments I found that the WCJ held that in a case as serious as this he was entitled to bypass the AMA Guides and rely on Labor Code §4662.

Ron could see that I was a bit puzzled at this point so he explained that although Labor Code §4662 is the Labor Code section outlining disabilities that are presumptively total in nature (100%), such as loss of both hands, loss of sight, etc., the tagline of Labor Code §4662 allows the trier of fact to bypass the AMA Guides completely.

The last sentence of Labor Code §4662 reads as follows:

> "In all other cases, permanent total disability shall be determined in accordance with the fact."

Although Ron and Dr. Nickelsberg went on to act like Ron's case was a case of first impression I knew it was not.

On October 25, 2011, the Board issued a similar decision in the case *of Jesus Cordova v. Garaventa Enterprises; State Compensation Insurance Fund* (ADJ3684884, ADJ553885).

In denying the defendant's Petition for Reconsideration in *Cordova* the Board quoted from the schedule for rating permanent disability effective January 1, 2005.

The Board cited Section 1 of the schedule, entitled "Introduction and Instructions," as follows:

> "A permanent disability rating can range from 0% to 100%. Zero percent signifies no reduction of earning capacity, while 100% represents total disability."

The Board concluded that although Labor Code §4662 addresses permanent total disability (100%) then Labor Code §4660 (as amended by SB 899) must then only addresses permanent partial disability, i.e. apparently that disability from 1% to 99%.

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[3] The DRE table is on page 384 of the American Medical Association (AMA) Guides to the Evaluation of Permanent Impairment (Fifth Edition).

The Board went on to explain as follows:

> Support for interpreting these sections separately is found in section 4658(d), which establishes the benefit owed for permanent disability occurring as a result of an injury occurring after the effective date of the 2005 Schedule: "If the injury causes permanent disability, *the percentage of disability* to total disability should be determined, and the basic disability payment computed as follows . . ." (Emphasis added.) The table that follows covers disability up to 99.75 percent.

The Board further stated:

> That there are separate sections for computing disability payments in cases involving partial and total disability confirms that there is a meaningful difference between disabilities that are *a percentage* of total disability and those that are *total*.

Therefore, the Board in *Cordova* essentially concluded that Labor Code §4662 does not only apply to those catastrophic injuries that are presumed to be total in character but can be used with other disabilities as "Section 4662's language that 'permanent and total disability shall be determined in accordance with the fact' was not changed by Senate Bill 899."

At this point I thought to myself that the sentence structure of Labor Code §4662 does not even make sense as it concludes "in accordance with the fact" as opposed to "in accordance with the facts."[4]

The Board went on to observe as follows:

> Moreover, the rules of statutory construction militate against our interpreting these statutes in such a way as to negate the language of section 4662 or to render it superfluous.

After my musings the celebration between Ron and Dr. Nickelsberg was still going on and I thought that after a Dr. Nickelsberg treatment regimen with a series of unsuccessful surgeries no one was likely to have a future earning capacity.

As usual the Board has articulated a very good argument, taking serious injuries with a total loss of earning capacity away from the AMA Guides and Labor Code §4660.

However, in reading Labor Code §4660 again, subsection b(1) provides as follows:

[4] I happened to be an English teacher in another life.

> For purposes of this section, the "nature of the physical injury or disfigurement" shall incorporate the descriptions and measurements of physical impairments and the corresponding percentages of impairments published in the American Medical Association (AMA) Guides to the Evaluation of Permanent Impairment (5th Edition).

An argument certainly can be made that this mandatory language when read in conjunction with the full text of Labor Code §4660 mandates that all injuries shall be given a rating pursuant to the American Medical Association (AMA) Guides to the Evaluation of Permanent Impairment (Fifth Edition).

The Board in *Cordova* correctly noted that in amending Labor Code §4060 by way of SB 899 Labor Code §4662 was not amended and the language that "in all other cases, permanent and total disability shall be determined in accordance with the fact" was not deleted or changed.

However, statutory interpretation also mandates that the most recent statute enacted by the legislature is to be given effect over prior statutes when inconsistent. Support for this argument can be found in a published decision of the Court of Appeal entitled *Rebecca James v. WCAB, Pasa Robles Convalescent Hospital*, 55 Cal. App. 4th 1053, 60 Cal. Comp. Cases 757.

The dispute in *James* was between a prior law (Labor Code §5402) and a subsequent law (Labor Code §3208.3) as to which law applied.

Applicant claimed that since the case was not denied within 90 days the case was presumed compensable.

Defendant claimed that the six month provision as enacted by the legislature and a subsequent statute (Labor Code §3208.3) prevailed.

In this case the court concluded as follows:

> Because both *sections 5402* and *3208.3* are part of division 4 of the Labor Code, and the Legislature is presumed to be aware of how its existing laws will affect new laws it enacts, the WCJ reasoned that *section 3208.3, subdivision (d),* created an exception to *section 5402*. The Board agreed with the WCJ's reasoning. It concluded that the Legislature made *section 5402* subordinate to the provisions of *section 3208.3, subdivision (d)*.

The same reasoning might be argued to make Labor Code §4660 as amended by SB 899 on April 19, 2004, an exception to Labor Code §4662.

DISCLAIMER:

All characters of the Lobby Bar are fictional aside from Kim, George and myself.

However, the ongoing dispute over the statutory construction of Labor Code §4060 and Labor Code §4662 is not.

The Board in *Cordova* has articulated a very well-reasoned decision in harmonizing Labor Code §4660 and §4662. It remains to be seen whether or not the appellate courts will participate in this dialog.

Make mine a double, George.

-Joe Truce