ANOTHER INSTALLMENT IN THE *GEORGE THE BARTENDER* SERIES

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RE: GEORGE THE BARTENDER AND THE "DEVELOP THE RECORD" FRENZY OR "FORGIVE US OUR TRESSPASSES"[1]

FROM THE LOBBY BAR AT THE HYATT:

After a hard day denying benefits I arrived at the lobby bar to find Frank Falls, noted workers' compensation defense attorney, in a deep funk.

I was puzzled but my curiosity did not deter me from ordering my cocktail of choice, a Beefeater's martini, straight up with two olives, from Kim, the Hyatt's breathtakingly beautiful cocktail waitress.

I knew Frank was doing quite well as his workers' compensation defense firm now had five offices throughout Southern California and he seemed to be adding another attorney every couple of months.

After buying Frank a cocktail he explained to me the reason for his despair.

Frank's primary client happens to be the largest insurance carrier in the world, the Integrity Insurance Company. According to Frank, he had just received a rather unsettling call from the vice president in charge of claims, Pat Pennipincher, wanting to know why Frank's cases were not closing.

I thought to myself that this concern was understandable as long as a workers' compensation case is open, especially a litigated case, the insurance company and/or employer is being billed by someone. Only closure can stop the bleeding.

Frank explained that Mr. Pennipincher had always been a great supporter of Frank and together they had devised a strategy that had worked well for years. The strategy commenced after discovery was complete. Frank's attorneys would file a Declaration of Readiness to Proceed and this would keep the applicant attorney's feet to the fire by moving the case through the system. If the matter did not settle at trial the case would be submitted to the Workers' Compensation Judge (WCJ) and a Findings and Award would be issued. If an appeal was not filed, then the case would close.

[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!

Frank wailed that Mr. Pennipincher was upset that most of his cases set for trial were taken off calendar at the request of the applicant's attorney and with concurrence of the WCJ to "develop the record."

He told Mr. Pennipincher that this was a fairly common occurrence since the Board's decision in *Almaraz/Guzman II*.

Frank further informed me that he was meeting with Mr. Pennipincher to discuss this dilemma and that Mr. Pennipincher wanted Frank to discuss his "plan of action."

In Frank's opinion, there was nothing he could do as the WCJ was certainly within his right to "develop the record."

He went on to explain that should he lose Integrity Insurance Company's business he would have to downsize his firm considerably.

Frank was at a loss as to what he could propose to Mr. Pennipincher as a suitable "plan of action."

During this tale of woe from Frank, I thought to myself that the phrase "develop the record" had become a concept that is certainly overused by all parties including WCJs. Also, hearing Frank mention this phrase "develop the record" stirred some memories within me of the not too distant past.

Let's leave Frank and his sob story at the lobby bar for a second. I feel that I must disclose to you and our entire industry that it was our law firm, Kegel, Tobin & Truce A.P.C., that was responsible for the very phrase that strikes fear in the heart of even the most talented defense attorney: "develop the record."

At the time I was employed with this firm in 1973, the Appeals Board had a procedure that allowed its judges to obtain comprehensive, objective and unbiased medical reports. (Oh, how I long for those days of yore)

At the conclusion of a hearing, judges had the discretion and authority to refer the applicant to an *Independent* Medical Examiner (IME).

Pursuant to the referral to the IME, the legal file would be sent to the Medical Bureau.[2] The Medical Director, after reviewing the medical report(s) in evidence, would decide as to the medical specialty required and would then make the referral pursuant to a closely guarded list known in the industry as the IME list.

The Board, believe it or not, would have the responsibility of sending out notice of the appointment to the applicant. The Board would also send the legal file containing the medical

[2] Believe it or not in those days(sigh) the Board actually had a medical bureau on site at the Board office staffed with doctors and a medical director.

reports admitted into evidence to the IME, as well as the balance of the legal file including but not limited to the Judge's summary of the testimony of the witnesses.

I know many of you, and especially our younger patrons, will find this difficult to believe but the parties and/or their attorney did nothing in this process. That's right, nothing. We were not required to send a joint letter or advocacy letter to the selected QME. The duties and responsibility of the IME were outlined in a form cover letter sent by the Board.

Subsequent to the examination the selected IME would serve his report on the specific Appeals Board District Office and his report would be attached to the file.[3]

After reviewing the IME report the judge would then serve the report on the parties with a form letter indicating that unless good cause to the contrary was shown the IME report would be admitted into evidence as a Board exhibit.

The parties had only seven days to show good cause as to why the case should not be submitted, which meant the parties had only seven days to request cross-examination of the IME.[4]

This was done by submitting a letter to the judge with a Declaration of Readiness to Proceed. The case would then be set for hearing at the Appeals Board for the cross-examination of the IME and the requesting party had the obligation to serve a subpoena on the IME.

Cross-examination then occurred at the Board before the WCJ and thereafter the matter was submitted for decision.

Applicant attorneys hated this system and devised endless strategies to do away with the IME system. Defense attorneys, however, saw nothing wrong in having an Independent Medical Examiner issue reports that were objective, unbiased and comprehensive.

In other words, the old IMEs, like the present panel QMEs, were not "hired" by either party.

With the passage of the Margolin Reform Act of 1989 the applicant attorneys got their wish and the IME system was abolished.

This is how our firm became involved in the creation of the "develop the record" frenzy.

In 1997, D'Arcy Swartz, formerly a partner working out of our Long Beach office, tried a case before Judge Zimmerman at the Appeals Board District office in Santa Ana. The applicant,

[3] This is also hard to believe – in those days mail received in district offices would actually be attached to the Board files. What a concept!

[4] Comparing this with today's environment in which the parties have seven days plus forever to cross-examine doctors, I ask you, which case do you think closes more quickly?

Mr. Tyler, was diagnosed by an AME with schizophreniform disorder.[5] The allegation was that his condition was induced by stress related to his employment with our client, The Metropolitan Life Insurance Company. In issuing a "Take Nothing" finding, Judge Zimmerman bemoaned the fact that the IME list no longer existed. Had it still existed he would have certainly referred this case out to "develop the record."

The case made its way to the Court of Appeal, and again Mr. Swartz argued the case on behalf of our client. When D'Arcy came back to the office after the oral argument, he told me that we have a new doctor to deal with. Pursuant to Labor Code §5701 a physician can be appointed by a WCJ to "develop the record."[6]

Subsequent to the *Tyler* case we experienced a furor of "developing the record" which brought our industry to a standstill. Before a case was even tried, judges would request parties to "develop the record," or simply appoint a "regular physician" pursuant to Labor Code §5701.

Once more into the fray we went, entering another one of our partners, Ameneh Ernst.

Ameneh appeared for a hearing at the Appeals Board in Santa Monica on the case of *James McDuffie v. Los Angeles County Metropolitan Transit Authority.* Without trying the case, the WCJ ordered that the "record be developed" by the appointment of a "regular physician" who had not previously reported in this case.

Ameneh filed an appeal which resulted in an *en banc* decision by the Board. In *McDuffie* (WCAB No. MON 254928) 67 Cal. Comp. 138, the Board clarified when it was appropriate to "develop the record" by the appointment of another physician. The Board stated in relevant part as follows:

> We disagree, however, that the first and best option for further developing the medical record is the appointment of a new medical examiner unfamiliar with the case.

The Board went on to indicate that the best option is to seek supplemental reports from the QME's.

So, you see, the "develop the record" frenzy is really our fault.

Okay, let's get back to the issue at hand and Frank's dilemma.

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[5] Schizophreniform disorder is a mental disorder diagnosed when symptoms of schizophrenia are present for a significant portion of the time within a one-month period, but signs of disruption are not present for the full six months required for the diagnosis of schizophrenia.

[6] Labor Code §5701provides as follows: "The appeals board may also from time to time direct any employee claiming compensation to be examined by a regular physician." I see my physician regularly, but I have never figured out what a regular physician is. Is this the judge's personal physician? Who knows?

In *Almaraz/Guzman II* the Board did indicate that an examining panel QME or (perish the thought) AME, on a serious or complicated injury, might be justified in seeking a whole person impairment rating outside the specific chapter of the Guides in seeking a description of an appropriate rating to fit the disability.

However, the Board emphasized, and this has been affirmed by the Court of Appeal in its decision in *Guzman*, that searching through the four corners of the Guides for a higher disability rating is not appropriate for the run of the mill back strains and other common injuries.

If it were otherwise, chaos would ensue and the AMA Guides would become meaningless, as would as Labor Code §4660.

Therefore, the "develop the record" principle has been overused, misused and abused.

I explained to Frank that the Board did not contemplate that every case coming before a WCJ would be taken off calendar to "develop the record" as this was a remedy to develop evidence subsequent to trial.

I then told Frank about the Board's most recent decision on this issue in its panel decision on *Linda Pini v. County of Fresno* (ADJ2036926;ADJ1097945) filed on September 16, 2010.[7]

In *Pini* a three member panel of the Appeals Board emphasized, or I should say reemphasized, that one of the conditions precedent to "developing the record" is that the WCJ frame issues, take stipulations and enter exhibits into evidence and proceed to take testimony from witnesses.

After the case has been tried the WCJ can then make a determination as to whether or not the record needs to be developed further.

Once I told Frank about the *Pini* case those gray clouds of despair disappeared. He struggled to hide his elation and made me promise to send him a copy of the case by email in time for tomorrow's conference with Mr. Pennipincher.

Frank confided in me that the applicant attorney in most of his cases was Ron Summers, George the Bartender's workers' compensation attorney. It seemed that Ron and the WCJ at the Board that Ron appeared at exclusively would invariably take trials off calendar to "develop the record" and Frank intended to tell Mr. Pennipincher that from now on he was going to be very aggressive and at the first suggestion that his case be taken off calendar he would raise *Pini* immediately.

This time Frank happily ordered a new round of drinks.

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[7] A copy of the *Pini* case can be obtained by way of a request by email. *Pini* is a panel decision of the Appeals Board and can be entered into evidence and/or brought to the attention of the WCJ either at or subsequent to a hearing pursuant to the Labor Code §5703(g).

DISCLAIMER:

All characters appearing at the lobby bar are fictional aside from George, Kim and myself. However, the storyline is all too true as far too many cases are being taken off calendar to “develop the record” which contributes to a log jam in our system.

Even though we might long to go back to the way things were we must learn to make the most of our weapons at hand in the here and now.

Make mine a double, George.

-Joe Truce