ANOTHER INSTALLMENT IN THE *GEORGE THE BARTENDER* SERIES

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RE: GEORGE THE BARTENDER AND "THE WAY WE WERE"[1]

FROM THE LOBBY BAR AT THE HYATT:

As I made my way to the lobby bar, I recalled with irritation today's case with Attorney Ron Summers, George the Bartender's workers' compensation attorney, and my frustrations encountered in our rush to "develop the record."

Even the sight of Kim, the Hyatt's breathtakingly beautiful cocktail waitress, approaching me with my Beefeater martini, straight up with two olives, could not get me out of my doldrums.

Well, maybe just a little!

Today's case with Ron involved a bank employee who was injured in a trip and fall injury in 2005.

The injury was admitted and through the bank's salary continuation plan the applicant received full salary for the two months she was off work.

The applicant then returned to work and was promoted to personal banker, then later to branch manager.[2]

In order to dispose of this rather minor case in an expeditious manner and without going through the expense of retaining defense counsel, our client agreed with the applicant's attorney (Ron) to send this case to an Agreed Medical Examiner by the name of Dr. David Mechman, MD, who is frequently utilized as an AME by the applicants' bar in Southern California.[3]

Dr. Mechman issued a Permanent and Stationary Report in early 2007 finding that the applicant's low back injury and resulting disability qualified for a Diagnosis Related Estimate (DRE) rating of 8%. Dr. Mechman felt that the applicant's disc disease qualified her for DRE II.

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[1] In the film version of this memo I should be played by Robert Redford, however Kim is a lot prettier than Barbara Streisand, though I can't speak to her singing ability.

[2] In these days of economic turmoil, promotions would appear to be all too common in the banking industry.

[3] As far as I am concerned any doctor that is recommended by the California Applicants' Attorneys Association is on their list for one reason and one reason only- they won the *Almaraz/Guzman* contest as to who can give the higher rating.

Although our client tried mightily through letters and phone calls to Ron to settle the case based on Dr. Mechman's report, there was no response and the case simply sat gathering dust.

In early 2009, the case was referred to me to move it to hearing and/or final disposition.

It is important to note at this point that, after more than two years, there had been no request by Ron to cross-examine or obtain a supplemental report from the AME.

I filed a Declaration of Readiness to Proceed and there was no objection.

The case then came up for a Mandatory Settlement Conference in February 2009.

In reviewing the report of Dr. Mechman, I noted that although the applicant had degenerative disc disease, there was no impact by the protruding discs shown on the MRI on the applicant's nerve roots or thecal sac. Dr. Mechman himself admitted in the report that there was no radiculopathy or radicular pain.

As Dr. Mechman's physical examination also was negative for muscle spasm in the applicant's low back or guarding of movement, it was clear that this case qualified for a DRE I or a 0% impairment rating

At the MSC Ron pointed out to me that on page 14 of Dr. Mechman's report the applicant had complained to Dr. Mechman of **"**sexual dysfunction**"** and the record should be developed on this point.

At this point in my reminiscing about the day, Kim was in the process of bringing my second Beefeater martini. I asked her how many people would go to their doctors and complain of "sexual dysfunction" using that precise term, which is a phrase taken right out of the AMA Guides.

Sexual dysfunction is highlighted on page 342 of the Guides and is defined as follows: " Sexual System Neurologic Impairment: Awareness and capability of having an orgasm are the criteria for evaluating permanent impairment of sexual functioning that may result from spinal cord or other neurologic system disorders."

Certainly, sexual dysfunction can constitute a serious impairment but it must have a neurologic cause. I pointed out to Ron that in our case the alleged "sexual dysfunction" was a claim that sexual intercourse was made more difficult because of the back pain, which certainly does not qualify as sexual dysfunction pursuant to the Guides.

The case was then set for trial in March 2009 and was tried and submitted to the Workers Compensation Judge (WCJ) for decision.

Rating instructions were then issued by the WCJ and the Disability Evaluation Rating Specialist gave Dr. Mechman's report a 0% rating.

Today was the cross-examination of the Rating Specialist by Ron. The Rating Specialist testified that, consistent with the AMA Guides, the applicant did not qualify for a DRE II rating as there was no bilateral radiculopathy, muscle spasm or guarding of movements.

At the conclusion of today's cross-examination, Ron made a motion to reopen proceedings to cross-examine the AME, Dr. Mechman, to find out why his opinion differed from the expert testimony of the Rating Specialist at the Disability Evaluation Unit. Ron also wanted to develop the record with regard to the issue of "sexual dysfunction."

I objected, of course, and pointed out to the Court that Ron had at least two to two and a half years to decide whether or not he wanted to cross-examine Dr. Mechman and that it was inappropriate to reopen the record and start discovery subsequent to trial.

In reply Ron jumped in the air, clicked his heels and shouted *Almaraz/Guzman* three times. When I recovered from my shock I couldn't help but hope that Ron did find himself back in Kansas, with Toto too. Much to my chagrin he did not.

Instead the Judge ignored my objection and ordered that the record would be reopened and that Ron could set Dr. Mechman's cross-examination.

Tonight, as I started writing my Petition for Removal on cocktail napkins at the lobby bar, I reflected on the procedural changes in the system which brought us to this point.

Granted, in the early 1970's when I started practicing workers' compensation law there were fewer issues, as well as fewer litigated injuries.

In my opinion, the "develop the record" phrase is a direct result of not only the uncertainty of the present law on permanent disability and/or impairment, but also due to the fact that we do not have time limits (which are enforceable) as to the cross examination of physicians.

In the early 1970's, the term "Agreed Medical Examiner" did not exist in our industry.[4]

In litigated cases, if either side wanted a medical evaluation, they simply set one without going through the AME/QME procedures as outlined by the 1989 *Margolin* reform law or the Panel QME system brought to us courtesy of SB 899 and Labor Code §4662.2.

[4] Believe it or not the initials "AME" did not make it into our vocabulary until sometime into the late 1970's. But when it did it changed our industry in a big way which was not, in my opinion, to the benefit of the employer. In 1989, the term "Agreed Medical Examiner" even made its way into the *Margolin Reform Act* and became law for injuries after January 1, 1990.

Similar to the phrase "Agreed Medical Examiner" there was no form such as a Declaration of Readiness to Proceed. When one wanted a hearing (conference, rating conference, trial, etc.), the requesting party would simply write a letter to the presiding judge who would then review the file and the letter and set whatever hearing appeared to be appropriate.

There was no discovery cutoff such as we have now at the Mandatory Settlement Conference and on the conclusion of taking testimony the referee (yes, there were called referees not judges in those days) had the authority to either refer the applicant to what was then known as an Independent Medical Examiner (IME) or to the Medical Bureau.

However, "development of the record" occurred only after trial and after the establishment of the evidentiary record which included the summary of testimony of all witnesses testifying, a summary of the stipulations and issues, and those exhibits which were entered into evidence on behalf of the parties.[5]

Therefore, when the "referee" decided to develop the record by referring the applicant to either the Medical Bureau or to an Independent Medical Examiner, the legal file or evidentiary record (in both instances) would be referred to to the Medical Bureau.

If the referral was to the Medical Bureau for examination then the Board, not the parties, would send out notice to the applicant of an appointment with one of the Medical Bureau doctors on the premises of the Los Angeles office of the Appeals Board (when it was located at 107 South Broadway in Los Angeles).

The Medical Bureau doctor would have the benefit of reviewing the legal file and, after examining the applicant, would then issue his report directly to the referee (not the parties). The referee would then serve the medical report on the parties by way of a formal notice advising that the report of the Medical Bureau doctor would be received into evidence as a Board exhibit and submitted for decision unless good cause were shown to the contrary within seven days.

"Good cause to the contrary" did not mean obtaining a rebuttal report but meant that the party that was dissatisfied with the medical report would have only seven days (not forever) to request cross-examination of the doctor by filing a letter with the trial referee requesting such cross-examination.

The Board, after receiving this request, would then set the case for cross-examination of the Medical Bureau doctor and the notice would specify that the party requesting cross-examination

[5] For those of you who do not stay up Saturday nights and read the Board rules and instead have a life, the "record" is defined by Board Rule 10566 in which the Workers' Compensation Judge is mandated to prepare a trial record which includes the Minutes of Hearing and Summary of Evidence. **Has anyone noticed a subtle change in the California Code of Regulations though? The Rules of Court, previously referred to as the Rules and Regulations of the Appeals Board, have now been changed, without fanfare, to the Rules of the Court Administrator. Oh well, what's in a name, right?**

must serve a subpoena on the Medical Bureau doctor for his appearance at the Board, not the doctor's office.

The cross-examination would then take place before the referee who tried the case. Subsequent to the cross examination the case would be submitted for decision.

The rules would be basically the same if the referee opted to send the applicant out to an Independent Medical Examiner. Again, the legal file would be sent to the Medical Bureau and the Medical Bureau Director (not the referee or the parties) would read the legal file and decide the appropriate specialty called for, be it neurology, orthopedics, psychiatry, etc.

Once the Medical Bureau Director decided as to the appropriate specialty, they would then review the list of Independent Medical Examiners (which was complied by the Administrative Director) and the next doctor up in the specialty chosen would be selected as the IME.

The Medical Bureau Director (not the parties) would then send out notice of the examination with a caveat that the defendant was to send the applicant transportation expense. The legal file would then be sent to the selected IME along with a form letter advising them as to their duties and responsibilities in examining and preparing their IME report.[6]

Once the examination was concluded, the IME would then direct his report to the Workers' Compensation Referee (not the parties) and basically the same procedures would be followed as noted above with the Medical Bureau doctor.

The important thing for us to note from the above procedure is that the parties would have only seven days (plus five for mailing) to decide whether or not they wanted to cross-examine the IME or the Medical Bureau doctor–not forever plus six days, as is quite common in today's AME/QME environment.

To be fair, there were some problems with our industry long ago such as the absence of the Mandatory Settlement Conference, uncertainty as to the type of hearing that would be set, etc., but what made the system efficient was the fact that the parties would lose their right to cross-examine the IME and/or Medical Bureau doctor unless they acted within seven days.

We still have that seven-day requirement with respect to requesting cross-examination of the DEU Rating Specialist, but in order to ensure that our system functions expeditiously, we need the same time limits with respect to requesting cross-examination of physicians, i.e., be they treating doctors, AMEs or QMEs.

The Administrative Director as of February 17, 2009, has issued new time guidelines for Panel

[6] Imagine that! We did nothing. The Board did everything.

QMEs with regard to setting examinations, sending out the reports and setting cross examinations by way of depositions.

However, we now need guidelines or hard and fast time limits with respect to requesting cross-examination of physicians.

We used to have a rule, WCAB Rule 10610, which addressed this very problem called Cross-Examination of Physicians.

This Rule provided in relevant part as follows:

> **"The right of cross-examination of a physician on the physician's report may be deemed waived where the report of the physician has been filed and served on the parties twenty (20) days or more before the hearing unless the physician is produced at the hearing, or unless good cause has been shown for not producing the physician."**

Over the years, I used Rule 10610 to my substantial advantage when applicant attorneys would attempt to set the cross-examination of a physician years after the report had been served. However, when I received my new "Workers' Compensation Laws of California" in the year 2003, I found that WCAB Rule 10610 had mysteriously been repealed.[7]

Similar to the discovery cutoff at the Mandatory Settlement Conference, the seven day limitation on cross-examining DEU Specialists on a formal rating and the limitations recently placed on Panel QMEs by the Administrative Director with respect to scheduling appointments, cross-examinations, etc., we need to revisit and amend WCAB Rule 10610 to provide mandatory language as to time limits for cross-examining physicians, including treating physicians, Agreed Medical Examiners and QMEs.

This will avoid delays such as in my case with Ron in which Dr. Mechman issued his AME report in early 2007, Ron first thoroughly read the report years later at the Mandatory Settlement Conference in early 2009 and after discovering the phrase "sexual dysfunction" only then started his rant about developing the record.

DISCLAIMER:

Although the characters at the lobby bar are mythical, the case between Ron and myself is partially based on fact. The Agreed Medical Examination designation, based on my imperfect memory, was created by Judge Harold Stearn, then a presiding judge in 1974 at the now defunct Inglewood Appeals Board office.

[7] If you refer to the 2009 Edition of Workers' Compensation Laws of California, you will see that WCAB Rule 10610 is still reprinted in full, but has the word "repealed" after it. It is also lined out on the WCAB website.

Judge Stearn attempted to persuade the applicant and defense bar practicing at his Board to agree on a doctor to resolve medical issues but that the utilization of an agreed doctor would only occur after the case went to trial and in lieu of the IME procedure.

Those of us in practice in those years at the Inglewood Board will recall that Judge Stearn would call his court reporter and go on the record and, after recording the stipulations and issues between the parties, would then declare for the record that upon the filing of the AME report with the Board the case would be submitted for decision absent the submission of “proper rebuttal evidence.” Those were definitely the days my friend.

In the early 1980's, the AME system took on a life of its own and cases going out to an AME (the phrase is “to the better AMEs”) would expand the life of a case by several years.

We need closure and we need time limits, except for the lobby bar, of course.

Make mine a double, George.

–Joe Truce