

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 GETS A GRIP ON THE AMA GUIDELINES OR SORRY, NO CHERRY PICKING ALLOWED*¹

FROM THE LOBBY BAR AT THE HYATT:

After a hard day of denying benefits I arrived at the Lobby Bar just in time to see George and Ron Summers, George the bartender's workers' compensation attorney, engaging in an arm wrestling match on the bar. I was flabbergasted at the spectacle playing out before my eyes.

When Ron saw me approaching, he offered a quick explanation that they'd be done in just a few more seconds. Just at that moment, George's arm apparently gave out and his arm banged down on the bar. Ron grinned victoriously.

Dr. Nickelsberg, George's primary treating physician and Ron's fellow duke of duplicity, applauded in the background. After collecting himself, George prepared my cocktail of choice, a Beefeater's martini, straight up with two olives. I was curious to know whether this was just boys being boys at a bar or if something more complex lay beyond this simple test of strength.

Ron explained that he was testing out George's "grip strength" for George's latest workers' compensation case. Ron exclaimed, with much elation, that he was in the process of reopening George's epicondylitis case alleging new and further disability.

At this time, Dr. Nickelsberg broke in and indicated that although he had not yet examined George he was sure that George's "tennis elbow" had now lead to a substantial loss of grip strength which was just demonstrated by George's loss at the hands of Ron.

Before I could point out to both Ron and Dr. Nickelsberg that George perhaps lost his grip not because of loss of strength but because there was water on the bar and George's elbow simply slipped, Ron explained to me that there was big money in grip loss cases.

At this point, Dr. Nickelsberg held up his ever present Jamar hand dynamometer and indicated that he could foresee at least a 60% to 70% loss of George's pre-injury capacity to grip.²

I was dumbfounded. I explained to Ron that under the old permanent disability rating system it was quite common to rate out grip loss as an indication of loss of strength in the upper extremities.

When I started with this firm in the early 1970's a good part of my diary involved upper extremity cases in which grip loss was alleged.

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 Jamar hand dynamometer is a device that purports to measure hand grip strength.

Competent hand surgeons or orthopedic specialists would then be called upon to express an opinion as to whether or not the injured worker was making an “honest effort” on the grip loss test.

I explained to Ron that the subjectivity of the prior permanent disability system, including ratings for grip loss based on lack of strength, ended with the amendment to Labor Code §4660 mandating the utilization of the American Medical Association (AMA) Guides to the Evaluation of Permanent Impairment (5th Edition) to determine permanent disability.

Dr. Nickelsberg smiled and indicated that he had read the AMA Guides and he would be allowed to utilize grip loss as a factor of disability under the Board’s en banc decision in *Almaraz/Guzman II*.

Ron added that under this case, Dr. Nickelsberg could pick and choose whatever factors of disability he wanted as long as these factors were within the four corners of the Guides.

As I almost never miss an opportunity to rain on Ron’s parade, I reached into my briefcase (which I always have with me, along with my trusty copy of the Labor Code) and presented the dukes of duplicity with a copy of the Board’s panel decision from the spring in the case of *Gurdev Malhotra v. State of California, Department of Developmental Services; SCIF* (ADJ360205) 2010 Cal. Wrk. Comp PD LEXIS 366 filed on March 20, 2012.³

In *Malhotra* the applicant was evaluated by QME, Dr. John Colias, for an upper extremity injury. Dr. Colias found that the applicant had decreased grip strength. Upon questioning by the applicant’s counsel he indicated that in his opinion the applicant had made an honest effort on the grip strength test.

However, Dr. Colias did not include the applicant’s loss of grip in his overall permanent disability rating.

Despite the medical opinion of Dr. Colias, the Workers’ Compensation Judge felt that the applicant’s grip loss was ratable and issued a 20% permanent disability rating based on the applicant’s loss of grip.

On cross-examination, the rating specialist of the Disability Evaluation Unit testified “that his rating was ‘simply based on the rating instructions given’ and that he would not use a grip loss rating for a laceration and numbness of a finger that has a WPI of 1%.”

Notwithstanding, the WCJ issued a 20% permanent disability Award.

In reversing the decision of the WCJ, the Board stated as follows:

³ Anyone interested in obtaining a copy of the *Malhotra* case should submit their request via email.

The WCJ is again usurping the role of the physician in determining that applicant's impairment should be based upon grip loss, rather than the factors he identified that comport with the AMA Guides. Dr. Colias responded in the affirmative to applicant's attorney's query: "does the grip loss indicated in your report reflect an honest effort by the applicant?" However, Dr. Colias chose not to rate applicant's grip loss, fully cognizant of the limitations on impairment ratings in Section 16.8a of the Guides, and used applicant's loss of range of motion to determine his WPI. The fact that he recognized that applicant gave an honest effort in his grip testing does not necessarily establish the factors in Section 16.8a for use of such measurements as an alternative basis for rating applicant's impairment.

The Board went on to note:

Had Dr. Colias chosen to exercise the "latitude" noted by the WCJ to use grip loss measurements to rate applicant's WPI, with an explanation consistent with the requirements of Section 16.8a as to how applicant's condition fit within the "rare case" exception, there would be a justifiable basis for the WCJ's rating instructions and permanent disability rating. In the absence of a physician's WPI rating based on grip loss measurements, it is beyond the WCJ's authority to interpose this rating method.

On April 19, 2004, the California State legislature passed Senate Bill 899, which was then approved and signed into law by the governor.

The amendment to Labor Code §4660 taking us from a "subjective system" to a system based on objective measurements and diagnostic testing emphasized the intent of the legislature to implement an impartial rating system.

The Board has recognized this in *Malhotra* and in discussing rating upper extremity impairments has drawn our attention to page 508 Section 16.8a of the AMA Guides, which stipulates that grip loss readings should only be utilized in rare cases.

After I finished my analysis, the devastated look on the faces of Ron and Dr. Nickelsberg said it all. The dollar signs fading from their eyes, their dream of the reopening of George's case on the basis of grip loss was now a distant memory.

DISCLAIMER:

Aside from myself, George and Kim, all characters at the lobby bar are fictional, as well as the story line. However, the continuing challenges to the AMA Guides and efforts to bring subjectivity back into the permanent disability system are most assuredly not.

The Board has been uniformly consistent in its evaluation of the American Medical Association

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(AMA) Guides to the Evaluation of Permanent Impairment (5th Edition) and its decisions certainly implement and define Labor Code §4660 as amended by SB899.

Make mine a double, George.

-Joe Truce