

## **ANOTHER INSTALLMENT IN THE *GEORGE THE BARTENDER* SERIES**

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### **RE: GEORGE THE BARTENDER MEETS THE GAF BOYS**

#### **FROM THE LOBBY BAR AT THE HYATT:**

After a hard day denying benefits I found myself at the lobby bar, relaxing with my favorite cocktail, a Beefeater's martini straight up with two olives, and gazing longingly at Kim, the Hyatt's breathtakingly beautiful cocktail waitress.

Unfortunately, my moment of bliss was interrupted by the GAF boys and their drum and bugle corp. The initials "GAF," of course, stand for the phrase: "Global Assessment of Functioning Scale," brought to us courtesy of the 2005 Schedule for Rating Permanent Disabilities. In my opinion, this is subjective rating at its best.

The moniker "GAF boys" is actually my own description that I apply to two young forensic psychologists, Mike and Mike, who recently started coming to the lobby bar after work.

Mike and Mike are the sons of Ron Summers, George the Bartender's workers' compensation attorney, and Dr. Nickelsberg, George's primary treating physician.

Therefore, it is not surprising that Ron and Dr. Nickelsberg were with Mike and Mike when they entered the bar.

George had told me some time ago that these young psychologists had recently graduated from college and, after advanced educational training, had become licensed as clinical psychologists in California.

Mike and Mike were partners in a psychological clinic called "Psychologists R Us," which conveniently was in a building owned jointly by Ron and Dr. Nickelsberg. George's secondary physician, Dr. Ratbar, is a silent partner in this endeavor.

Having taken many depositions in Ron's office I knew that Ron occupied suite 101 on the first floor of his high-rise building, suite 102 was the office of Dr. Nickelsberg, Dr. Ratbar's office was suite 103 and right next door was the office of Mike and Mike, suite 104. Talk about one stop shopping.

Ron had told me on prior occasions that most applicants that came to his office would do so more than 30 days from notice of their injuries to the employer and therefore, absent a Medical Provider Network, the applicant was able to select his own primary treating physician. This, of course, is a real irony in our system as the applicant almost never selects his own primary treating physician, as the PTP is selected by the applicant's attorney.

At any rate, Ron told me that once he interviews his client they are sent next door to see Dr. Nickelsberg, who becomes the applicant's PTP for their orthopedic injuries, and then to Dr. Ratbar for internal medical issues.

Of course now that Mike and Mike had become licensed as clinical psychologists Dr. Nickelsberg would also refer the applicant to them as secondary physicians pursuant to Administrative Rule 9785.<sup>1</sup>

Since Mike and Mike had begun coming to the lobby bar we have had ongoing dialogues over workers' compensation issues. At our last meeting this grew into an argument over the fact that Mike and Mike invariably found that all injured employees also had a sleep disorder which required a sleep disorder evaluation (overnight) at a cost of between \$7,500.00 and \$15,000.00.

I never cease to get hot under the collar over the abuse of our system. I called out Mike and Mike on their errant claim about sleep disorder diagnosis, wanting to know how everyone they evaluated could have a sleep disorder.

It was explained to me that the answer is simple, i.e., all psychological exams were set at 5:00 a.m. so no one could really say that they got a good night's sleep.

Mike and Mike also proudly told me that they had mastered the technique of obtaining high ratings in psychiatric cases by simply ordering customized wallpaper for the room in which their patients took their psychological tests. At my look of puzzlement the GAF boys explained.

Whenever a new patient comes into the office of a psychologist or psychiatrist in a litigated workers' compensation case they are administered a battery of psychological tests. These tests are self-administered and when the patient comes into the office he will be handed these tests by a receptionist who points the applicant to the "testing room" to answer these multiple choice questions.

When completed the patient then hands them back to the receptionist who then scores the tests by way of a grid. Mike and Mike chuckled that this process results in a \$1,200 bill for the carrier and that's before the patient ever sees the doctor.

When I asked Mike and Mike as to whether these tests were instrumental in their diagnosis and what this had to do with the wallpaper in the "testing room," Mike and Mike smirked at my naïveté. They asked me if I had ever seen a copy of the Beck Depression Inventory test or the

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<sup>1</sup> Administrative Rule 9785 defines the role of the primary treating physician in workers' compensation. The primary treating physician or PTP is designated by Administrative Rule 9785 as sort of a gatekeeper with the power to make referrals of the injured employee to other physicians in different specialties should he deem this to be warranted. This is referred to as a referral to a secondary treating physician.

Mood/Depression Assessment Questionnaires and before I could reply they showed me blank copies of the tests. The following sample questions are from the Beck Depression test:

- 0: I do not feel sad.
- 1: I feel sad much of the time.
- 2: I am sad all of the time.
- 3: I am so sad or unhappy I can't stand it.

- 0: I am not discouraged about my future.
- 1: I feel more discouraged about my future than I used to be.
- 2: I do not expect things to work out for me.
- 3: I feel my future is hopeless and will only get worse.

I quickly saw that these tests waved a red flag to applicants to choose answer 3 if they wanted a high permanent disability rating based on their GAF score.

Before I could comment, the GAF boys told me that for those applicants that still do not get it this is where the custom made wallpaper comes into play.

The wallpaper shows an applicant walking out of a door marked number 3 with a wheelbarrow full of cash bearing the caption: "Number 3 is your path to cash."

On this night the Mikes proudly announced to me that they had written a marching song in tribute to their business. Before I could mention that the Hyatt did not have a cabaret license Mike and Mike filled the air with their theme song to the tune of "When Johnny Comes Marching Home:"

### **THE GAF SONG<sup>2</sup>**

**"We're drinking at the Hyatt bar hurrah hurrah.**

**And Truce will have a legal spar hurrah hurrah,**

**He'll argue loud and argue tough but applicants don't get enough**

**And they will all raise the reserves when Ratbar comes marching home."**

Thankfully, the singing abruptly ended once my round of cocktails arrived.

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<sup>2</sup> Not trusting myself to compose a truly representative song about the global assessment functioning scale, I persuaded my long time and now retired partner, Bob Wills, to compose the lyrics of the GAF song. Bob's poetic masterpiece is above.

Ron had been enjoying the spectacle and my obvious discomfort but did explain to me that he was somewhat uncomfortable with a recent panel decision by the Board in *Quintella Eutsey v. City and County of San Francisco* issued on March 24, 2010.<sup>3</sup>

Ron confided in me that much of his clientele had had history of emotional problems and, if discovered, this could impact their claims of psychiatric disability and/or injury.

Ron went on to tell me that he had been successful in limiting discovery at depositions by instructing his clients not to answer defense counsel's questions concerning incidents, claims, etcetera that occurred over ten years ago.

Ron told me that he had been extremely successful in limiting questions at depositions by relying on the Court of Appeal decision in *Allison v. Workers' Compensation Appeals Board* (1999) 72 Cal. App. 4<sup>th</sup> 654; 64 Cal. Comp. Cases 624, in which the Board limited questioning of an applicant about remote events. In *Allison* the Court of Appeal stated the standard as follows:

‘The scope of the inquiry permitted depends on the nature of the injuries, which the claimant has brought before the tribunal. The scope of the methods used must be tailored to avoid disclosure of protected records.’

Ron went on to tell me that he had been using *Allison* quite effectively in persuading defense attorneys to limit their questioning of the applicant.

However, in *Eutsey* the Board noted that the applicant was claiming psychiatric disability and observed as follows:

By raising a claim of injury to her psyche arising out of her injury to her right lower extremity, applicant placed her mental condition in issue. Defendant, by inquiring into applicant's history, was engaged in reasonable and relevant questioning regarding the basis for the applicant's claim. The scope of questioning is not limited to asking questions that would elicit admissible answers. Defendant is entitled to ask questions that may reasonably lead to the discovery of admissible evidence.

The Board went on to note that they reversed the Workers' Compensation Judge (WCJ) in *Eutsey*, as the judge's ruling appeared “to be based upon their relevancy if asked in his courtroom.”

The Board's decision in *Eutsey* is a lesson to us all, i.e., not to be deterred in limiting our questions on depositions when the applicant's attorney screams *Allison*.

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<sup>3</sup> Anyone wishing a copy of the *Eutsey* panel decision should request same by email.

## **HOW DO WE DEFEND AGAINST A CLAIM OF PSYCHIATRIC DISABILITY**

For years employers and carriers begged the legislature to create a system of evaluating the nature and extent of permanent disability based on objective standards of disability so that reports of evaluating and/or treating physicians would be uniform.

Although there has been a great “rending of garments” by the California Applicants’ Attorneys Association (CAAA) over increasing permanent disability ratings of impairment by utilization of the Board’s decisions in *Almaraz/Guzman* and *Ogilvie*, I have not really come across a Board decision in which this has been successful, with the exception of a few unique cases.

With SB 899 the legislature has accomplished the aims of defendants in establishing a uniform method of calculating permanent disability and/or impairment for physical injuries but has left one glaring loophole, i.e., psychiatric injuries and the calculation of psychiatric disability.

Unfortunately, the AMA Guides do not give us a chapter in which impairment ratings are based on objective and measurable factors of disability as the realm of psychiatry and/or psychology is subjective.

The only guide we have is the 2005 rating manual commencing on page 1-12(4) captioned: “Rating Psychiatric Impairment.”

The rating manual mandates, “Psychiatric impairment shall be evaluated by the physician using the Global Assessment Function (GAF) scale shown below. The resultant GAF score shall then be converted to a Whole Person Impairment (WPI) using the GAF conversion table.”

On the following pages we have what is referred to as a GAF code and if you have a high score (91 to 100) you are well-adjusted and have no psychiatric disability, but if you have a low score (21 to 30), then you are not well-adjusted. The GAF score is then converted into a whole person impairment rating.

Each GAF category contains a description which is either vague or generalized and makes no sense. For example, a GAF score between 21 and 30 is described as follows:

“. . . inability to function in almost all areas (e.g., stays in bed all day, no job, home or friends) .”

It is not clear to me how someone could stay in bed all day if one has no home.

Another problem comes with GAF scores of 51 to 60 as again the corresponding descriptions are extremely vague and subjective as they refer to depressed mood, mild insomnia, difficulty in social and occupational areas.

These GAF scores all convert to a WPI rating. According to the conversion form (page 1-16 of the rating manual) the cutoff line is 70. If your GAF score is above 70 you receive no WPI rating and for scores below 70 you are assigned WPI from 2% all the way up to 90%. Since psychiatric disability is at the top of the Future Earnings Capacity (FEC scale) there is a major adjustment upward.

Actually most of us have no problems on the high or low side as the descriptions are objective.

In *Almaraz/Guzman II* the Board pointed out that psychiatric disability and impairment ratings are not controlled by the AMA Guides, such as physical disability, as the AMA Guides do not contain WPI ratings for psychiatric injuries.

How do we as defendants attack a completely subjective GAF rating assigned to an applicant by either a panel QME or (perish the thought) an Agreed Medical Examiner?<sup>4</sup>

In analyzing a claim of psychiatric injury/disability we want to use the tools that the legislature has given us.

For years we were at the mercy of a psychiatrist and/or a psychologist in diagnosing a psychiatric injury as we could not check his opinion against objective standards.

However, the legislature has long held in Labor Code §3208.3 that a psychiatric injury can only be compensable if the following criteria is met:

. . .if it is a mental disorder . . . it is diagnosed using the terminology and criteria of the American Psychiatric Association's Diagnostic and Statistical Manual of Mental Disorders, Third Edition - Revised, or the terminology and diagnostic criteria of other psychiatric diagnostic manuals generally approved and accepted nationally by practitioners in the field of psychiatric medicine.

We do not want to accept a doctor's diagnosis of a major depression without first comparing the doctor's report with the criteria required for a major depression as set forth in the American Psychiatric Association's Diagnostic and Statistical Manual of Mental Disorders.

I have actually had a panel QME on one hand making a diagnosis of a major depression and under clinical findings making a statement that the applicant was not clinically depressed. DSM-III-R and DSM-IV require in order for someone to have a major depression that they at least be depressed.

Although the Board in *Almaraz/Guzman* indicates that we cannot use the AMA Guides for the calculation of the applicant's permanent disability we can refer to the guides in terms of

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<sup>4</sup> In countless decisions the Board has denied defense attacks on the opinions of Agreed Medical Examiners with the comment: "Why would the parties agree on an AME if they did not trust their opinion and expertise?"

diagnosis. For example on page 357 and Chapter 14 entitled “Mental and Behavioral Disorders” the guides read as follows:

The importance of following the *Diagnostic and Statistical Manual of Mental Disorders, Fourth Edition (DSM-IV)* criteria for determining a mental impairment is emphasized.

The guides go on to state:

A clear diagnosis is required to assess permanent mental or behavioral impairment. This diagnosis needs to be established according to *DSM-IV* criteria. The diagnosis is among the factors to be considered in assessing the severity and possible duration of the impairment, but is not the sole criteria to be used. (emphasis added)

Chapter 14 goes on to indicate that motivation is a key factor in determining the severity and extent of the applicant’s impairment and whether the impairment is physical or mental. The following sentence appears on page 358 of the guides:

The examiner needs to assess changes in motivation and whether problems in motivation are due to the illness or to secondary gains . . . some individuals may be demoralized or in some way unmotivated to improve by external circumstances (such as fiscal incentives to stay ill and maintain health insurance).

In addition to Labor Code §3208.3 and Chapter 14 of the guides we should also refer to page 1-13 of the 2005 Schedule for Rating Permanent Disabilities.

This page is captioned: “Instructions for Determining a GAF score” and is almost never followed by either a panel QME, AME or a treating physician in determining an applicant’s psychiatric impairment.

Remember, the applicant, not defendant, has the burden of proof in establishing psychiatric impairment. Most psychiatric and/or psychological evaluators seem to pick a GAF rating out of thin air and the law provides that an applicant’s GAF score must be based on substantial evidence.

**Disclaimer:**

With the exception of George, Kim and myself all of my characters at the lobby bar are imaginary and the product of my warped imagination, as is the story line.

However, the problems facing our industry with respect to assigning impairment ratings on the subjective and often arbitrary assignment of a Global Assessment Functioning scale are not.

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Our best defense is to insist that a GAF rating be based on substantial evidence other than the evaluator's subjective belief. Under the old rating system and the 1997 Schedule for Rating Permanent Disabilities we often joked that everyone had a work restriction. This has now changed to everyone has a GAF impairment rating.

Make mine a double, George.

-Joe Truce