ANOTHER INSTALLMENT IN THE *GEORGE THE BARTENDER* SERIES

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RE: GEORGE THE BARTENDER CONTEMPLATES THE *MESSELE* DECISION OR ON YOUR MARK, GET SET, REQUEST![1]

FROM THE LOBBY BAR AT THE HYATT:

After a hard day denying benefits I arrived at the Lobby Bar at the Hyatt contemplating a new year filled with endless possibilities and of course lots of great Beefeater's martinis.

Speaking of which, Kim, the Hyatt's breathtakingly beautiful cocktail waitress, approached me now with my cocktail of choice in tow, the aforementioned Beefeater's martini, straight up with two olives.[2]

At the other end of the bar I spotted Ron Summers, George the Bartender's workers' compensation attorney and a long time thorn in my side. He was in a heated argument with George's primary treating physician and fellow duke of duplicity, Dr. Nickelsberg.

As this was an ongoing argument which started back in the end of 2011 I was privy to all of the specifics.

With the passage of SB899 on April 19, 2004, and the change in the law brought about by Labor Code §4062, changing the method in which AMEs or Panel QMEs are selected, Ron and Dr. Nickelsberg had hashed together the following strategy.

Pursuant to the mandate of Labor Code §4062 and/or §4062.2, Ron would send a letter to the defense attorney recommending the utilization of Dr. Nickelsberg as an Agreed Medical Examiner.

Failing agreement to Dr. Nickelsberg, Ron would then request a Panel QME. Ron would make sure that he was the first to request a Panel QME, as first in line gets to choose the specialty. Ron would always request a QME Panel of three chiropractors as he had used chiropractors for years (on a referral by Dr. Nickelsberg the PTP) and figured out he would get the best treatment from such a Panel.

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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 Beefeater's martini is best served at 38˚ Fahrenheit.

However, the Board's en banc decision on September 26, 2011, in *Tsegay Messele v. Pitco Foods, Inc.* Case No. ADJ7232076 spoiled Ron's master plan and was the current source of his ire.

In *Messele,* the Board followed the mandate of Labor Code §4062.2, enforcing its time-lines to the letter.

Specifically, the Board held that Labor Code §4062.2 (b) mandated that a Panel QME could not be requested until 10 days after the AME offer and since the Panel was served by mail, there would be an additional five-day waiting period pursuant to the Code of Civil Procedure. (Who said there was no honor among thieves?)

Therefore, the first date that a QME Panel could be requested would be on the sixteenth day after the AME letter.

It was Ron's lament that the 15-day waiting period and even a 10-day waiting period was ridiculous, as no one really paid attention to these limits.

I thought to myself that Ron's real problem was that both parties would know that a Panel QME could not be requested until the 16th day meaning the person that had their request to the Medical Unit first (on the 16th day) could choose the specialty.

Ron had confided in me that he would usually request the Panel on the tenth day and sometimes sooner but under *Messele* these requests would not be legally effective.

Although I did not normally agree with Ron (as a matter of fact this was the first time) I am convinced that the original time-line/time limits embodied in Labor Code §4062.2 have outlived their usefulness in our current system.

Labor Code §4062 not only has a time limit for agreement to an Agreed Medical Examiner but other time limits as well.

If there is no agreement the parties move to Labor Code §4062.2 (c), which, as many of you are familiar with, has the following additional time-limits after request of a QME panel:

1. Once a QME Panel has been requested, the parties have 10 days from the issuance of the QME Panel to agree to one of the three doctors on the Panel as an Agreed Medical Examiner. *(In practice the parties almost never communicate with each other about utilizing one of the three doctors as an AME. Pursuant to Messele, this presumably would be extended for five days by virtue of the fact that the QME Panel was mailed.)*

2. Parties will then have three days to strike one doctor from the Panel. *(As the "strikes" are accomplished by mail, loyal Lobby Bar patron I ask you doesn't this extend the time limit another five days?)*

In my opinion these time limits are impractical and only delay resolution of workers' compensation cases.

Actually, the Commissioners who issued *Messele* may have thought the same thing but it is the duty of the Board to uphold the current law. In adhering to the rule of law, the Board really had no choice but to issue its decision in *Messele*.

At this point in my musings I went over to buy a round of cocktails for Dr. Nickelsberg and Ron.

After their drinks arrived Ron told me that in his cases almost no one adheres strictly to all of the time-lines as mandated by Labor Code §4062.2, something which I too have discovered while traversing the wonderful world of workers' compensation.

For example, Ron told me that last week he told his secretary to wait 10 days after the issuance of the QME Panel and during the next three days strike a certain doctor from the Panel. His secretary then came in the next day and asked Ron why wait as the other side had just stricken a doctor and so why couldn't they strike one also?

Ron smiled and indicated that he was going to wait his 10 days, strike the doctor that he wanted to strike and then claim that the defense attorney's strike was premature. I told Ron that this might be an effective strategy, perhaps even resulting in *Messele II*.

With a sheepish grin Ron told me that he would probably win the war but lose the battle as his aim was the same as mine, i.e., getting a resolution as soon as possible and that the time limits currently in effect pursuant to Labor Code §4062.2 only cause delay and further litigation.

We both agreed (again extremely rare) that a change in Labor Code §4062.2 was probably necessary and after wishing Ron and Dr. Nickelsberg a Happy New Year, I started to write down my wish list for the year 2012.

THE "A" IN AME ACTUALLY MEANS AGREED:

When I started practicing workers' compensation law in 1973 the phrase "*Agreed Medical Examiner*" had not yet entered our vocabulary. Instead, the only means to "*develop the record*" was a referral to an IME (Independent Medical Examiner), which was a closely-guarded list of medical professionals kept by the Medical Director.[3]

A case could only be referred to an IME by a Workers' Compensation Judge (then known as referees). The referral went first to the Medical Director who would review the medical file and determine the appropriate specialty, make the assignment, set the examination date for the medical exam and issue the appointment letter. The parties had no obligation other than to request doctors send x-rays and diagnostic testing to the selected IME.

[3] Believe it or not, in the 1970's and 1980's when we wanted to set a medical exam we simply set it as there were no rules on time limits, AMEs or Panels.

The IME was similar to today's Panel QME as the IME was not "hired" by either party but rather truly independent.

In the 1980's parties started using Agreed Medical Examiners and by virtue of the Margolin Reform Act of 1989, the Agreed Medical Examiner officially made its way into the Labor Code.

Parties wanting to utilize the QME system (defense or applicant QMEs) had to inquire from the other side as to whether or not they wanted to utilize an AME. Neither party was required to propose an AME by name.

This changed with SB899 as the parties were now required to submit the name of at least one physician for utilization as an Agreed Medical Examiner and, if rejected, could then go to a QME Panel.

This change in the law mandated that one party must agree to use at least one AME.

I contend that the "A" in AME means "Agreed" so this denies the option to a party that does not want to go to an AME.

My New Year's wish list includes the deletion of the requirement that the parties name at least one AME.

THE AME SYSTEM IS BROKEN, SO WHATS THE FIX?

One of the complaints of employers and insurance carriers as to the permanent disability system prior to the implementation of SB899 was that the defendant and applicant QMEs were not consistent and would have vastly different permanent disability ratings.

This was commonly referred to as the dilemma of the "dueling docs."

SB899 tried to resolve this dilemma by coming up with the AME/Panel QME system in which there would only be one doctor that would resolve the issue as to the nature and extent of permanent disability.

This did away with the "dueling docs" system and curtailed litigation on the issue of permanent disability but posed a real dilemma to those QMEs that made their living performing evaluations for injured workers and employers/carriers.

These "refugee QMEs" had two choices to remain in the game, i.e., either become AMEs or Panel QMEs.

To become an AME means that you have to be agreed to by both the applicant and defense attorney which means you have to be "on the list." To be "on the list" the selected AME must please both parties or split the baby.

While Panel QMEs have strict guidelines, such as they have to provide an exam date within 60 days and must report within 30 days, AMEs on the other hand have no such time limits. In Southern California, we are getting AME appointments almost a year away and reports are usually issued six months after the examination.

The AME system is broken and there would appear to be no easy fix in sight.

On the other hand in my humble opinion the Panel QME system would appear to be achieving the goal of SB899 as the doctors on the three-member Panel (be they an applicant doctor, a defense doctor or a none-of-the-above doctor, i.e. they were not "hired" by either party) and their eventual Panel QME opinion will not be driven by a motivation to stay "on the list."

A quick fix for the AME system may be a mandatory requirement that exams be provided within the 60-day QME time limit, that reports be issued within 30 days, and that AMEs have the same time requirement as Panel QMEs.

TIME LIMITS FOR CROSS-EXAMINATION OF PHYSICIANS:

In today's system there is no time limit for a party on either side challenging the opinion of a QME or AME by way of cross-examination. Sometimes cross-examination is requested two or three years after the report has issued.

Under the old IME system, parties would have seven days upon service of the IME report to request cross-examination.

Under a former Board rule (now repealed), parties would have 20 days to request cross-examination of a physician or else cross-examination could be deemed waived.

George and I would suggest the dust be blown off this shelved Board rule and be given a second life. We're in favor of a time limit of 20 days from service of the report. If cross-examination is requested during this period the requesting party should be mandated to follow through and set the cross-examination thereby eliminating form letters, saying we reserve our rights to cross-examine the offending physician.

JUSTICE DELAYED IS JUSTICE DENIED:

The Board's *en banc* decision in *Messele* is a red flag that the time limits as set forth in Labor Code §4062.2 are simply not working and contribute to an unnecessary delay in adjudicating cases.

Although the Board was not able to change the law, the legislature can certainly amend Labor Code §4062.2 to eliminate time limits which are no longer practical nor desirable.

The goal of most carriers and/or employers can be summarized in the acronym "IET:" investigate, evaluate and terminate, which is the motto of the law firm at which I work.

SB899 has devised a model in which most cases can move through the system at warp speed with a delivery of appropriate benefits to the injured worker.

George and I contemplate a system in which the parties can simply make an initial decision as to whether or not an AME is desirable or request a QME Panel without the encumbrance of the current time limits as enumerated in Labor Code §4062.2.

The parties still should have the option of striking one of the QMEs from the Panel, but the goal should be to arrive at the selected Panel QME promptly and schedule a medical evaluation within a 60-day time limit.

DISCLAIMER:

The above characters and storyline are fictitious, with the exception of George, Kim and myself.

However, the delays caused by the time limits as set forth in Labor Code §4062.2 and the red flag by the Board's decision in *Messele* are not.

George and I hope that the legislature will tweak Labor Code 4062 and §4062.2 by eliminating the AME requirement and the delay in time-lines so as to permit the parties to expeditiously select a Panel QME.

Make mine a double, George.

-Joe Truce