ANOTHER INSTALLMENT IN THE *GEORGE THE BARTENDER* SERIES

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RE: GEORGE THE BARTENDER RAISES THE BAR ON IMPAIRMENT RATINGS

FROM THE LOBBY BAR THE HYATT:

Tonight was a working night for me at the lobby bar as I studied the Guides to the Evaluation of Permanent Impairment, Fifth Edition, more commonly referred to as the AMA Guides or simply The Guides.

In contemplating the Table of Contents, Chapters 1 through 18, and the list of Tables and Figures, I was somewhat astonished that our reporting medical-legal physicians on both sides have suddenly become "*experts*" on translating impairment from the Guides into their medical reports.

The truth is that most medical-legal physicians (panel Qualified Medical Examiners, Agreed Medical Examiners, treating physicians) misapply the Guides, which can work to the detriment of either the applicant or the defendant.

When SB 899 was signed into law by the Governor in April, 2004, our system of rating permanent disability was drastically changed.

Under the old system medical-legal physicians were only required to identify factors of permanent disability (both subjective and objective), and apply work restrictions where appropriate. More importantly these physicians were not required to assign a permanent disability standard rating to their reports.

With the advent of the Guides, physicians are now not only required to identify objective factors of impairment but also to apply these factors to the appropriate chapters and diagrams contained in the Guides and then translate this into an impairment standard rating in their reports.

The Division of Workers' Compensation (DWC) gives its annual seminar in Los Angeles every February and at its initial meeting after passage of SB 899 Blair McGowan, Manager of the Disability Evaluation Unit, led a panel discussion on the AMA Guides.

Mr. McGowan made the point that a majority of the states now follow the AMA Guides in rating permanent disabilities and based on information received, impairment ratings by physicians have been misapplied over 70% of the time.[1]

[1]My reference to Blair McGowan and the seminar on the AMA Guides is from my imperfect memory. Any errors that I make are mine and mine alone with apologies to Mr. McGowan for any inaccuracies.

Mr. McGowan announced that the rating specialists of the Disability Evaluation Unit would become experts on the Guides. Any report in which a physician misapplied the Guides would be returned for correction.

In other words, the final expert opinion on the precise impairment of a specific disability as compared to the mandate of the AMA Guides would be made by the Disability Evaluation Specialists employed with the Disability Evaluation Unit and not the physicians themselves.

Fortunately, at this moment my contemplation of the charts and diagrams as contained in the Guides was interrupted by Kim, the Hyatt's breathtakingly beautiful cocktail waitress, approaching me with my favorite cocktail, a Beefeater's Martini straight up with two olives.

As I took my first sip I became aware of a rather loud conversation between George the Bartender's Workers' Compensation Attorney, Ron Summers, and George's treating doctor, Dr. Nickelsberg.

Ron was expounding on the AMA Guides to Dr. Nickelsberg and told him in no uncertain terms that pursuant to the Guides Dr. Nickelsberg was the final decision maker with regards to establishing an impairment rating for injured workers.

At this point I joined the conversation and told Ron that I disagreed. I told him that Workers' Compensation Judges (WCJ) have the sole responsibility of selecting factors of impairment and/or disability from the evidentiary record, which includes physician's reports, and after hearing the evidence in a case to instruct the Disability Evaluation Unit (DEU) to apply a rating formula to these factors pursuant to the 2005 Schedule for Rating Permanent Disabilities.

Ron replied that he was confident that judges would simply send the reports of physicians, such as Dr. Nickelsberg, to the DEU, who would then accept the rating impairment standard arrived at by Dr. Nickelsberg or the Agreed Medical Examiners on Ron's list.

I told Ron that his contemplation of having a WCJ simply forward a physician's report to the DEU to be rated was in conflict with the Court of Appeals decision in *Universal City Studios, Inc. v. Workers' Compensation Appeals Board in the State of California and Bernice Lewis ( )* , 99 Cal App 3rd 647; 44 California Compensation Cases 1133.

I argued to Ron that even though the *Universal City Studios* case dealt with the old permanent disability rating schedule, the principles of law remain the same.

In *Universal City Studios*, the WCJ neglected to make a decision as to the factors of permanent disability on the basis of the entire record and simply sent the report of the Agreed Medical Examiner to the rating specialist for rating.

In reversing the decision of the workers' compensation judge and the Board, the Court of Appeals found that the WCJ abrogated his function as a judge by simply instructing the rating bureau as follows: "Rate Dr. Ralston's report."[2]

The report of Dr. Ralston contained the magic word "*semi-sedentary,*" resulting in a rating of 61% which was in conflict with other evidence in the case.

In reversing the workers' compensation judge, the Court stated:

> **". . . any award, order or decision of the board must be supported by substantial evidence *in light of the entire record*" [and referred to the Supreme Court case of *Lamb v. Workers' Compensation Appeals Board* (1974) 11 Cal 3rd 274; 39 Cal Comp Case 310.]**

I pointed out to Ron that the *Universal City Studios* case can also be applied to Labor Code §4660 as amended by SB 899. Under this decision it would be improper for a workers' compensation judge to simply forward a physician's report to the DEU with the sole instructions: "Please rate the report of Dr. Nicklesburg" or even the report of an Agreed Medical Examiner.

In addressing this issue the Court in *Universal City Studios* declared in relevant part as follows:

> "**We believe it is significant at this point that initially when first directed to rate this injury, the workers' compensation trial judge did not make findings of fact and conclusions upon any evidence as to the nature and extent of Lewis' actual physical impairment. The trial judge simply referred the medical examiner's report to the rating specialist. The significance of this is that the decision of what ultimate facts and findings regarding the extent and type of disability were improperly made by the rater, using the report of the doctor rather than using the findings of the trial judge. Thus the record does not reflect the fact that the trial judge weighed and considered all of the evidence relative to the physical ability and the impairment to the employee."**

When I first started practicing workers' compensation with this firm in the early 1970s, most cases were rated on the basis of objective factors of disability including atrophy, loss of motion and measurements.

Therefore, rating instructions usually contain the stock phrase: "Please consider the objective factors of disability contained in the report of (INSERT NAME OF DOCTOR)."

As time went on we became lazy, as all members of the workers' compensation community began to rely on prophylactic work restrictions rather than objective factors of permanent disability.

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[2]Dr. Ralston was the Agreed Medical Examiner.

Ironically, in some cases the objective factors actually rated higher than the prophylactic work restriction.

Under the mandate of Labor Code §4660 and the AMA Guides, the burden placed on physicians and especially workers' compensation judges has become more difficult. Both are required to not only pick out factors of impairment but also to apply these factors to the specific chapter contained in the Guides.

Under the mandate of *Universal City Studios*, a workers' compensation judge must identify the impairment to be rated and also the effect of the impairment on the applicant's activities of daily living.

While it is impermissible under *Universal City Studios* to simply issue instructions requesting that a particular report be rated, it certainly is permissible to request the DEU to rate the objective factors of impairment and/or disability of specific reports *in addition to* the judges finding as to how said impairment affects the activities of daily living of an injured worker.

My guess is that in many cases the final opinion of the Disability Evaluating Unit rating specialist in applying the AMA Guides to a specific impairment and/or disability will be different than the opinion of the particular physician relied upon by the workers' compensation judge.

One of the most common mistakes involves injuries to the spine and the concept of radiating pain versus radiculopathy.

From a medical standpoint, radiating pain has nothing to do with radiculopathy or radicular pain. The diagnosis of radiculopathy must be combined with an imaging scan (MRI) showing impingement on a nerve root, which is then correlated by physical examination demonstrating a legitimate loss of reflex, atrophy or muscle loss.

Therefore, we need verification that the disc protrusion is so large that it becomes a herniation which impacts on the nerve root or the thecal sac, thereby resulting in true radicular pain, not just radiating pain.

A medical determination as to whether an injured worker has radiculopathy versus radiating pain is important for determining whether or not the range of motion (ROM) or DRE method is appropriate for rating a low back injury. More often than not the rating specialist of the DEU, reviewing the objective factors of disability of a physician's report, may also dispute the physician's assessment of the impairment by finding that true radiculopathy or radicular pain has not been demonstrated.

DISCLAIMER:

Everyone in our community is still trying to adjust to the new rating schedule and the AMA Guides. The above view as to how the AMA Guides should be applied is mine and mine alone. I think there is no question that Labor Code §4660 as amended by Senate Bill 899 has provided not only an extra burden and a responsibility to our physicians but also has placed more responsibilities on workers' compensation judges.

My eyes have now grown glossy after reading multiple diagrams as contained in the Guides. Must be that time again.

Make mine a double, George.

-Joe Truce