

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 AND THE REPLACEMENT QME CONUNDRUM OR *LETS REMEMBER TO PLAY BY THE RULES*¹

FROM THE LOBBY BAR AT THE HYATT:

Another long day of denying benefits behind me I hastened to the Lobby Bar looking forward to the cold embrace of a Beefeater's martini straight up with two olives², as well as catching a glimpse of Kim, the Hyatt's breathtakingly beautiful cocktail waitress. However, what I was really looking forward to this night was the opportunity to burst the bubble of my ever present adversary, Ron Summers, George the Bartender's infamous workers' compensation attorney.

My issue with Ron involved an ongoing case we were litigating. The applicant in our case sustained an admitted industrial injury to his low back. The only real issue was the nature and extent of the applicant's permanent disability and/or impairment.

After objecting to the report of the applicant's treating physician (PTP), I requested a QME panel in the field of orthopedics. Ron did me the honor of offering to utilize his "esteemed" colleague, Dr. Nickelsberg, as an Agreed Medical Examiner. Knowing better of course I politely refused. Much to my delight, Ron, after both our strikes, was stuck with the most conservative orthopedic specialist on the panel.

Unfortunately, the conservative orthopedist issued a report more than 30 days from the date of the examination. Ron gleefully sent me a letter objecting to the QME report as it was late. There was no question that the report was late, but Ron (for whatever reason) did not request a new QME panel until after the panel report was received few days later.

It used to be an industry-wide sentiment that once you objected to a report that was untimely, that was it and you could simply request a new QME panel at any time. The initial rule was you had to object before (not after) you received the report. Ron had filed a Declaration of Readiness to Proceed to obtain a new QME panel as a result of his timely objection and the hearing the following week.

After receiving my martini I surveyed the bar for Ron. I spied him down at the other end of the bar. With the news I was about to deliver I opted to buy him a round of drinks. Making my way over to him I could see he was grinning from ear to ear, probably relishing the fact that he had me and he could get rid of the conservative QME whose report derailed his case.

¹ For those new patrons to the Lobby Bar, located in the Hyatt Regency Long Beach on South Pine Avenue, George the Bartender's workers' compensation case involves an injury to his elbow, 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, straight up, is best served at 38° Fahrenheit

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He was surprised to see me in such good spirits. Offering to explain to him the reason for my glee, I reached into my trusty briefcase and pulled out the Board's panel decision in *Douglas Feutz v. County of Sacramento* filed on September 4, 2014 and handed it to Ron.³

I told Ron that just like him, in *Feutz* the applicant's attorney objected to a late supplemental report by the panel QME, Dr. D'Amico, but did not request a new QME panel until after the doctor had served their supplemental report on both the applicant's attorney and the defense attorney. The Workers' Compensation Judge (WCJ) ruled in favor of the defense and the applicant appealed.

The Board held in favor of the defense, affirming the decision of the WCJ. The Board stated in relevant parts as follows:

The WCAB has consistently held that a party may not contest a procedural violation in the preparation of a QME report after having had the opportunity to review it, if the violation could have been raised prior to the date the report was served.

However, the Board also held:

Here, applicant's attorney raised the late report violation before seeing Dr. D'Amico's supplemental report, but he did not perfect his objection by making a new QME panel request to the Medical Unit until after he had received Dr. D'Amico's supplemental report and had the opportunity to review it.

Ron's drink arrived upon the completion of my analysis of *Feutz*, and it was a good thing too. I could see Ron's grin quickly fading away, becoming a scowl. I knew I had done my job.

DISCLAIMER

All characters of the Lobby Bar aside from Kim, George and I are imaginary and the product of my vivid imagination as is the storyline.

We should all remember on both sides that it is not enough to simply object to a late panel QME report but one must also contemporaneously request the new QME panel.

Make mine a double, George.

-Joe Truce

³ Much like Mary Poppins's seemingly bottomless carpetbag (of Disney fame) and Hermione Granger's bottomless handbag (of Harry Potter fame), my briefcase possesses magical powers, granting me the ability to pull out any decision at a moment's notice. A copy of *Feutz* can be obtained by email request.