

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 TELEPHONE MEDICAL EXAMINATION OR WHY PHONING IT IN JUST WON'T CUT IT*¹

FROM THE LOBBY BAR AT THE HYATT:

After a hard day denying benefits I arrived at the Lobby Bar looking forward to my cocktail of choice, a Beefeater's martini served straight up with two olives, brought to me by none other than Kim, the Hyatt's breathtakingly beautiful cocktail waitress.

After taking a sip from my aforementioned martini and with a last fleeting glance at Kim, I turned my attention to an argument in progress at the other end of the bar.

The loud outcry of impassioned voices was emanating from my favorite Lobby Bar denizens, the dukes of duplicity- Ron Summers, George the Bartender's workers' compensation attorney, and George's primary treating physician, Dr. Nickelsberg.²

Sitting beside Dr. Nickelsberg was a person I had never seen before.

Noticing me gazing at the other end of the bar George told me that Ron had apparently just lost a case in which the Workers' Compensation Judge (WCJ) ruled against his client's claim of continuing temporary disability. The WCJ found that the report of the applicant's primary treating physician, Dr. Nickelsberg, did not constitute substantial evidence on which to base an award.

George also told me that the person sitting beside Dr. Nickelsberg, the one wearing glasses and staring at a ledger, was Dr. Nickelsberg's office manager and accountant, Paul Profit.

The hollering of accusations between Ron and Dr. Nickelsberg went on for what seemed like an eternity. The commotion ceased though after 15 minutes, punctuated by Dr. Nickelsberg slamming his cocktail on the bar, throwing down some money and leaving the bar in a huff, followed by Paul Profit.

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 With so much tumult going on at the Lobby Bar these days one might wonder why I haven't started frequenting another establishment. The simple answer is that George pours one hell of a martini, but I digress.

Doing my best to conceal my Schadenfreude over Ron's current pitiable state I decided the best way to get a complete explanation of the situation was to order a few rounds of drinks for Ron.

After a few cocktails and some light conversation in which Ron just sort of muttered "Dr. Nickelsberg, that ingrate" under his breath I determined that Ron was sufficiently "greased." Turning the conversation to more serious fare I asked him what caused this particular dust up with "that ingrate."

Ron explained to me that he had approximately 2,500 cases on his diary and in each case he nominated Dr. Nickelsberg as the applicant's primary treating physician to direct the applicant's treatment, recommending secondary physicians where appropriate. Ron paused here and laughed, indicating that in every orthopedic case, a psychiatric evaluation was obviously necessary. He went on, stating that more importantly Dr. Nickelsberg was tasked with issuing medical-legal reports giving the applicant the maximum benefit by way of temporary and permanent disability.³

Although I withheld my wry comment at this time, I always suspected that Ron told Dr. Nickelsberg that the definition of temporary total disability depended on whether or not the applicant liked his job and wanted to go back to work.

Thinking that Ron was probably three to four sheets to the wind at this point in our conversation, I suspected he might be embellishing his case load so I asked him again how many cases he was handling. Ron confirmed for me that he did in fact have 2,500 cases and that he named Dr. Nickelsberg the primary treating physician for all of them and sent all of the applicants to his office. I then asked Ron as to why both he and Dr. Nickelsberg were so upset.

Ron told me that in the case over which he and Dr. Nickelsberg had had words Dr. Nickelsberg found that the applicant was temporarily totally disabled. However, in order to reach that conclusion he had conducted a telephone interview with the applicant as opposed to an actual physical examination.⁴

When this fact came out at the trial the WCJ found that Dr. Nickelsberg's report could not constitute substantial evidence on which to base an award.

Ron explained that he had no idea that Dr. Nickelsberg did not actually examine his clients in person, although I thought to myself that Ron should in fact have known this since it is relatively impossible to balance 2,500 patients on the head of a pin much less conduct in-person exams on all of them.

³ And here I thought I was busy!

⁴ A minor oversight, I'm sure.

At any rate, Ron went on to indicate that the meeting that I observed which rapidly deteriorated into a heated exchange was over Ron's insistence that from now on Dr. Nickelsberg must personally examine each and every one of Ron's clients.

To demonstrate the impracticality of this demand Dr. Nickelsberg brought to the bar his accountant, Paul Profit, to demonstrate to Ron as to why this was not practical.

According to Paul, Dr. Nickelsberg received cases from a majority of the attorneys in southern California. At present he had a patient caseload of 8,300 applicants and that Dr. Nickelsberg, pursuant to Administrative Rule 9785, was required to examine and treat these patients approximately every 45 days and prepare their corresponding reports.

Paul tried to point out to Ron that this was a physical impossibility for Dr. Nickelsberg. Ron responded that Dr. Nickelsberg could conduct telephone interviews on cases that were sent to him by other attorneys but Ron insisted that on his clients Dr. Nickelsberg perform the examinations in person and make the necessary recommendations.

LABOR CODE §4600 AND THE RIGHT OF THE INJURED WORKER TO SELECT THEIR OWN PRIMARY TREATING PHYSICIAN

Theoretically Labor Code §4600, which allows the injured worker to select his/her physician after 30 days from notice to the employer of their injury, would enable the injured worker to seek out the most competent physician available in any particular specialty.

Also theoretically, this is the best medical delivery system in the country because there is no deductible payment or co-payment by the injured worker.

Unfortunately, in litigated cases primarily, the injured worker's right to select his own primary treating physician is really smoke and mirrors as more often than not it's the applicant's attorney who selects the primary treating physician.

In southern California this usually results in the selection of a doctor such as Dr. Nickelsberg, who is familiar with inner workings, backdoors and loopholes of the workers' compensation field.⁵

When cases go to trial the WCJ gets to select between the applicant's primary treating physician and the panel QME. Usually this decision is made on the basis of not only substantial evidence but also on whose report is more credible.

⁵ Ironically, I have been told by lien claimant representatives that primary treating physicians nominated by applicant attorneys often regard the attorney as their true client.

As many of you might know, in southern California the primary treating physician is selected by the applicant's attorney and the selected physician then regards the applicant's attorney as their client as this physician wants to ensure that more referrals will keep coming their way.⁶

A panel QME is appointed by the Administrative Director and not either party and therefore there is no pressure to report for the benefit of either side.

I ask you, loyal Lobby Bar patron, who is more credible?

TELEPHONE EXAMINATION GONE AWRY

Similar to the WCJ's decision in the case involving Dr. Nickelsberg and Ron's client, the board has issued a decision on this issue in the case of *Feliciano Espinoza v. Intergem, Argonaut Insurance Company* (ADJ7946529) 2012 Cal. Wrk. Comp. P.D. LEXIS 236 filed on May 15, 2012.⁷

In this case the applicant attorney selected Dr. Komberg as the applicant's primary treating physician.⁸

Dr. Komberg found that the applicant was temporarily totally disabled and the Workers' Compensation Judge relied on his report in issuing an Award of temporary total disability from March 31, 2011 through July 21, 2011.

The defendant filed a Petition for Reconsideration and pointed out to the Board that Dr. Komberg's total temporary disability report was the result of a telephone examination and not an actual physical examination.

The applicant apparently had testified that Dr. Komberg had spoken to him by telephone while the applicant was at Dr. Komberg's clinic and that Dr. Komberg had never actually examined him.

The Board reversed the WCJ and ordered that the record be developed.

⁶ As I discussed at some length in the last edition of *George the Bartender -- George the Bartender and the Ongoing Saga of Interpreting the AMA Guides or Coming to Grips with the Truth*

⁷ *Espinoza* is a panel decision and is admissible pursuant to Labor Code §5703(g) which states that decisions of the Board on similar issues can be received into evidence. Anyone interested in obtaining a copy of the *Espinoza* decision should submit their request via email.

⁸ Dr. Komberg is a chiropractor and is utilized by many applicant attorneys as the primary treating physician responsible for not only the applicant's orthopedic care but also responsible for referring the applicant out to secondary physicians when needed.

DISCLAIMER:

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

Unfortunately, the flawed application of Labor Code §4600 is not. The right of an injured worker to select his own physician was envisioned to allow them to select the best physician available in a particular specialty. Regrettably, in practice this is far from the case.

Make mine a double, George.

-Joe Truce