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 ATTACK ON RULE 30 OR WE CAN NOW GET PANEL QME'S ON DENIED CASES

FROM THE LOBBY BAR AT THE HYATT:

After a hard day denying benefits I could hardly wait to get to the lobby bar to deliver the good news to my friend and long-time defense attorney, Mr. Frank Falls.[1]

The Board has just issued two decisions in succession which I knew would bring a smile to Frank's face: A panel decision in the case of *Beverly Washington v County of Los Angeles* and an *en banc* decision entitled *Amelia Mendoza v Huntington Hospital*.

For some weeks now Frank had been down in the dumps over a pending case with Ron Summers, George the Bartender's workers' compensation attorney.

Having had many cocktails with Frank in the past few days I was familiar with his dilemma. The case involved a long-time client of Frank's, a major insurance company, who had been relying on Frank's counsel for years.

With the passage of the Margolin Reform Act in 1989, which brought us Labor Code §5402 and the mandate that all claims must be denied within 90 days or presumed compensable, Frank advised all of his clients that a case could be easily denied for lack of cooperation by the applicant in discovery.

This strategy worked fine for years until February 17, 2009, a date that will live in infamy as far as Frank is concerned.

On that date the Administrative Director issued what has become known by defendants everywhere as the "dreaded" Rule 30.

Rule 30 mandates that a QME can only be obtained pursuant to Labor Code §4060 on the issue of compensability before and not after a claim has been denied.

The basis for the rule was the ambiguous wording of Labor Code §4060, which implies that a QME can be obtained on the issue of compensability pursuant to Labor Code §4060 and that once a claim has been denied there is no reason to obtain a QME.

---

[1] Aside from me all attorneys appearing at the lobby bar will have a last name equivalent to one of the four seasons. This is in memory of the old television program The Howdy Doody Show and one of its main characters (at least as far as I am concerned) Princess Summerfall Winterspring.

The implementation of this rule has resulted in many defense attorneys going into trial without a medical report, which has certainly improved the business of the lobby bar.

In Frank's case his client had relied on Frank's original advice given years ago that a claim could be denied for the applicant's failure to cooperate in discovery. Sure enough the case that Frank was worried about was denied when the applicant missed his initial deposition date.

However, when Frank wrote to the DWC medical unit and attempted to obtain a QME panel his request was denied on the basis of Rule 30.

Ron, on the other hand, had sent the applicant out to his good friend, Dr. Nickelsberg, who became the applicant's primary treating physician. After a prolonged period of temporary disability Dr. Nickelsberg had declared the applicant to be permanent and stationary with an impairment rating in the life pension category.

On previous nights, after several cocktails, Frank had lamented that not only was he going to lose this case to Ron but also his client's business.

However, on this night I came bearing good news, namely the Board's panel decision in *Beverly Washington v. County of Los Angeles*[2] and the Board's *en banc* decision in *Mendoza*.

In *Washington* the Board addressed defendant's Petition for Reconsideration in which the defendant, County of Los Angeles, claimed as follows:

1. Despite the wording of Rule 30, Labor Code §4060 allows a party to obtain medical evidence on compensability at any time after the filing of the claim form.

2. Rule 30 denies the defendant due process of law.

In its Decision After Reconsideration, the Board expressed its concerns over Rule 30 but did not directly address this issue, finding that the defendant in *Washington* was not bound by Rule 30 as the defendant requested a QME panel on February 13, 2009, or before Rule 30 was enacted by the Administrative Director.

However, the Board also observed, without further comment, as follows: "Even if the defendant did not issue its denial until March, 2009, defendant is entitled to a panel QME." To me this one sentence paved the way for the Board's en banc decision in *Mendoza*, issued a few days later, which did away with Rule 30 entirely. While not addressing the due process argument directly the Board in *Mendoza* declared that there is "nothing in section 4060" that declares that only the

[2] A copy of the *Washington* case of can be obtained by an email request.

applicant can obtain a QME evaluation after the claim has been denied and that L.C. §4062.2 allows either party to obtain a QME

By the time I arrived at the lobby bar with the *Washington* and *Mendoza* cases in hand Frank was just finishing his first cocktail.

Therefore, with great fanfare I ordered my cocktail of choice, a Beefeater's martini straight up with two olives, from Kim, the Hyatt's breathtakingly beautiful cocktail waitress, and handed the Board's decisions to Frank with a broad smile on my face.

After reading the cases Frank was ecstatic and my first drink was the last drink I had to pay for on this particular evening.

When the Margolin Reform Act became law for injuries after January 1, 1990, it was contemplated (in my opinion) that if injury AOE/COE was in issue there would be a trial on that issue and that issue only.

If compensable, the case would then move into the Labor Code §4062 track and the Primary Treating Physcian or PTP would issue medical determinations as to the applicant's entitlement to disability benefits. Defendants would then have the right to object to the medical determinations of the PTP within a specified time limit as set forth in Labor Code §4062 and obtain an AME or QME report to resolve the disputed medical issues.

As this matter of proceeding would lead to multiple hearings/trials the parties obtained not only QME reports on compensability but also the applicant's entitlement to disability benefits so that all issues might be resolved at a single hearing.

For injuries on or after January 1, 1990 thru December 31, 1993, we did not have Labor Code §4060 QME's but only Labor Code §4061 and §4062 QME's.

However, the legislature corrected this oversight in 1993 and for injuries on or after January 1, 1994, an additional ring or track was added, i.e., Labor Code §4060.

After the enactment of Labor Code §4060 defendants and applicants alike would obtain QME reports on compensability as well as on the applicant's entitlement to disability benefits and we all marched forward toward the January 1, 2005, panel QME system.

With the promulgation of Rule 30 the Administrative Director basically said that we had been misinterpreting Labor Code §4060 for 15 years and that once the case has been denied defendants were not entitled to a medical report on compensability.

The problems confronting the defense under Rule 30 are obvious.

A loss on the issue of compensability could well subject the defendant to payment of disability benefits as presumably the defendant would not be entitled to obtain a QME report on the issue of compensability, as well as the extent of disability. A Workers' Compensation Judge (WCJ) would then be compelled to rely on the reports of the applicant's selected treating doctor which is a euphemism for the applicant's attorney's favorite medical legal doctor.

Many defendants found themselves in this predicament, losing on the issue of AOE/COE, and thereby facing an award of disability as they were not able to obtain rebuttal medical reports. Appeals followed resulting eventually in the Board's decision in *Mendoza*.

Prior to *Mendoza* and to try and resolve the due process issue on disability in denied cases, the DWC Medical Unit announced that it will issue Labor Code §4062 and/or §4061 panels at the request of defendant – even if the case has been previously denied—thereby allowing the defendant to obtain a rebuttal report on disability.

In reviewing the report and recommendation on defendant's Petition for Reconsideration/ Removal in *Washington* by the WCJ, Judge Scott Seiden, addressed a pet peeve of mine quite correctly.

The defendant issued something called a "conditional denial" and Judge Seiden rather dryly observed: ". . . there is no such vehicle in workers' compensation vernacular as a 'conditional denial'."

The WCJ is absolutely correct. You either deny the case or you do not. A conditional denial is like being a little bit pregnant!

We have similar creations in utilization review as some utilization review denials are phrased: "Conditional Utilization Review Denial."

This was addressed best in the movie about the Watergate scandal, "All the President's Men," in which denials that really did not deny specific allegations were referred to as "a non-denial denial."

I am second to none in my admiration for the work of the DWC Medical Unit as I cannot even conceive of the tremendous volume of QME panel requests received in a single day, a task that has been handled quite efficiently when considering the obstacles put in their path by furlough Fridays and budget short falls.

Leading the charge is Sue Honor, Manager of the Medical Unit, who in the face of her daunting task still finds time to give our industry seminars at the annual DWC conferences with a dash of wit, a sprinkle of dry humor and a ton of information and wisdom that allow us to navigate successfully amid the Administrative Director's rules. For this George and I salute her.

DISCLAIMER:

The characters at the lobby bar aside from me, George and Kim are a product of my imagination but the story line is not. Even before the enactment of Rule 30 by the Administrative Director on February 17, 2009, the DWC Medical Unit would not issue a QME panel pursuant to Labor Code §4060 once a case had been denied.

By its decision in *Mendoza* the Board brought back the concept of fairness.

Make mine a double, George.

-Joe Truce