ANOTHER INSTALLMENT IN THE *GEORGE THE BARTENDER* SERIES

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RE: GEORGE THE BARTENDER AND THE DREADED RULE 30

FROM THE LOBBY BAR AT THE HYATT:

The lobby bar was crowded tonight as both George the Bartender and Kim, the Hyatt's breathtakingly beautiful cocktail waitress, were busy serving customers.

However, I managed to catch Kim's eye and she proceeded to bring me my favorite cocktail, a Beefeater martini straight up with two olives.

At this point I heard sounds of merriment (alright, outright laugher) coming from a corner of the bar. I immediately recognized it as coming from Ron, George the Bartender's workers' compensation attorney, and his sidekick, Dr. Nickelsberg.

Whenever this pair was happy I knew that it was bad news for the defense. Therefore, I asked Kim to take Ron and the good doctor cocktails on my behalf and had her request that they join me at my table.

The duo headed over my way and I found out that Ron was positively giddy over the results of today's trial, as was Dr. Nickelsberg.

Ron explained that in today's denied back injury case the defense attorney arrived without a medical report in opposition to that of the applicant's Primary Treating Physician, which just happened to be Dr. Nickelsberg.

Dr. Nickelsberg chimed in that he had strayed from the AMA Guides "as was his right" under the Board's decision in *Almaraz/Guzman* and had given the applicant a 40% Whole Person Impairment in a continuing trauma low back injury, which had been denied by the defendant.

Even though the applicant was a receptionist that simply answered telephone calls all day Dr. Nickelsberg proudly told me that he had somewhat taken liberties with the applicant's history and found that the applicant had sustained a compensable continuing trauma injury.

When I asked Ron why the defendant had not obtained either a QME or AME report on this disputed injury he smiled and told me that the DWC Medical Unit had refused to issue a QME panel, despite the request of the defendant, on the sole basis that this denied case was on the Labor Code §4060 track. Once a case has been denied the DWC will not issue a QME panel pursuant to Administrative Rule 30, effective February 17, 2009.

Ron happily told me that he had put his "client on the stand after he read his client the script" as

recorded by Dr. Nickelsberg in his PTP medical report and the case was submitted. The only medical evidence that will be considered by the Workers' Compensation Judge (WCJ) will be the permanent and stationary report of Dr. Nickelsberg. Ron was confident that the WCJ will have to find that the applicant's continuing trauma injury is compensable, thereby awarding the applicant 40% Whole Person Impairment.

After hearing Ron's story of the events of that day I grimaced as I was all too familiar with the defendant's dilemma with respect to Administrative Rule 30.

Administrative Rule 30 was promulgated by the Administrative Director and advises all parties as to how to request QME panels. More importantly it specifies when QME panels will be granted and when they will not.

In cases in which the defendant is dealing with an admitted injury to a body part and has provided benefits there is little question that the defendant retains an absolute legal right to a panel QME should the defendant not be able to agree with the applicant's attorney to refer the applicant to an Agreed Medical Examiner.

The problem, of course, is with injuries that have been denied pursuant to L.C. §5402.

These injuries are in the Labor Code §4060 track and Administrative Rule 30 specifies as follows:

> **"(d)(1) After a claim form has been filed, the claims administrator, or if none the employer, may request a panel of Qualified Medical Evaluators only as provided in Labor Code section 4060, to determine whether to accept or reject a claim within the ninety (90) day period for rejecting liability in Labor Code §5402(b), and only after providing evidence of compliance with Labor Code Section 4061.1 or 4062.2."**

The meaning of the above quoted rule is clearly what has made Ron and Dr. Nickelsberg very happy. The DWC Medical Unit will not give a defendant a QME panel once the claim has been denied for any reason.

The DWC reasons that Labor Code §4060 mandates that a QME is **only appropriate** if the QME opinion is necessary to decide whether or not a claim is compensable.

Therefore, in those claims where a claims administrator has denied a claim pursuant to Labor Code §5402 for non-compliance with discovery, a post-termination claim or other reason the defendant will not be able to thereafter obtain a medical report and is at the mercy of the applicant's Primary Treating Physician, such as Dr. Nickelsberg.

Although Administrative Rule 30 was officially promulgated on February 17, 2009, this has

basically been the position of the DWC Medical Unit since January 1, 2005, long before the official birth of Rule 30.

For years we have been dealing with three different tracks depending on the medical and/or compensable issues involved:

1. Labor Code §4060; this section deals with cases in which compensability is an issue.
2. Labor Code §4061; this section deals with permanent disability.
3. Labor Code §4062; this section traditionally deals with admitted injuries in which the applicant is temporarily totally disabled and is being monitored by his treating physician.

Ironically, the 1989 Margolin Reform Act (effective for injuries after January 1, 1990) only created two tracks, i.e. Labor Code §4061 and §4062.

Therefore for injuries that were disputed we simply set a medical/legal examination to determine compensability and also to make a determination as to the nature and extent of disability and need for medical treatment should we lose on the injury AOE-COE issue.

In other words we wanted all issues covered - not just compensability.

In 1993 the California state legislature again amended the labor code and Labor Code §4060 was created and we then had three tracks as we have today.

Pursuant to Labor Code §4060 we continue setting AOE/COE examinations with a physician of our selection and these reports were admissible as evidence.

After some 15 years we are now told by the DWC Medical Unit that Labor Code §4060 only authorizes us to obtain a medical report from a QME if we are doing so to assist us in determining compensability.

In other words, we are being told by the DWC Medical Unit that we have misinterpreted Labor Code §4060 for over 15 years.

You know something? It appears that they are right![1]

[1]This reminds me of a landmark California Supreme Court case that was decided years ago, bringing us the concept of comparative negligence in liability cases. The case was *Li v. Yellow Cab Co.* and while arguing the case before the Supreme Court plaintiff's attorney Joe Hall was asked by one of the Justices: "Mr. Hall, are you asking us to change the law on negligence after 100 years?" And Joe Hall replied: "No, your Honor, I am asking you to enforce the law."

Labor Code §4060 effective for injuries on or after January 1, 1994, provides in relevant part as follows:

> **"(a) This section shall apply to disputes over the compensability of any injury. This section shall not apply where injury to any part or parts of the body is accepted as compensable by the employer. (b) Neither the employer nor the employee shall be liable for any comprehensive medical-legal evaluation performed by other than the treating physician, except as provided in this section. <u>However, reports of treating physicians shall be admissible</u>." (emphasis added)**

In denying a request for a Labor Code §4060 QME panel the DWC Medical Unit, in implementing Administrative Rule 30, relies on Subsection C of Labor Code §4060 which now reads in relevant part as follows:

> **"If a medical evaluation <u>is required</u> to determine compensability at any time after the filing of the claim form, and the employee is represented by an attorney, a medical evaluation to determine compensability shall be obtained only by the procedure provided in Section 4062.2." (emphasis added)**

The meaning of Subsection C is clear and in hindsight the law has been clear for more than 15 years.

It would appear that we are very lucky that all of the AOE/COE evaluations that we have been obtaining since 1994 have not been ruled inadmissible.

On the other hand both the Margolin Reform Act and the law as amended by Senate Bill 899 probably contemplated that the Board would deal with one track at a time.

In dealing with the Labor Code §4060 track it was probably contemplated by the Legislature that injury AOE/COE would first be determined and, if determined against the defendant, we would then move to Labor Code §4061 and/or §4062 and the defendant would then be allowed to obtain a QME panel.

Therefore, when a case is on delay we always want to ask ourselves whether or not we are comfortable in going to an AOE/COE Trial without a medical report. If not, we should immediately go through the Labor Code §4060 and/or §4062.2 procedures and request a Labor Code §4060 QME.

Most of you have already noticed that the new forms for requesting a Labor Code §4060 QME ask point blank whether or not the case has been denied.

DISCLAIMER:

The above reflections and legal interpretations are my opinions and my opinions only. The story line and characters at the lobby bar, with the exception of George, Kim and myself, are creations of my imagination.

However the presence of Rule 30 and its draconian effect on a denied case is real.

It is my understanding that there are several cases pending before the WCAB by defendants who are not able to obtain a medical report pursuant to Rule 30. The Board may be issuing either a significant panel decision or an en banc decision on this very dilemma within the next couple of weeks, so stay tuned.

On behalf of George, Kim and I we would like to wish everyone a Merry Christmas, Happy Hanukkah, and happy holidays.

Make mine a double George.

-Joe Truce