ANOTHER INSTALLMENT IN THE *GEORGE THE BARTENDER* SERIES

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RE: GEORGE THE BARTENDER AND THE *ALMARAZ/GUZMAN II* EXCEPTION, OR "AND THE COVETED ALMARAZ TROPHY GOES TO"

FROM THE LOBBY BAR AT THE HYATT:

When I arrived at the lobby bar after a hard day denying benefits I was greeted by the sight of Dr. Nickelsberg, George the Bartender's primary treating physician, proudly displaying the award that he had won at the most recent meeting of the California Applicants' Attorney Association (CAAA).

Ron Summers, George's workers' compensation attorney, was smiling broadly and called me over to admire the distinctive award. Ron explained to me that this was now going to be an annual award appropriately designated as "The Almaraz."

Ron explained that Dr. Nickelsberg had been one of a dozen "Agreed Medical Examiners" (AME's) on the most popular panel at the recent CAAA meeting.

Ron had been the moderator and the topic addressed by the panel was "How to Increase Permanent Disability Ratings Pursuant to *Almaraz/Guzman II*."[1]

Ron went on to explain that each of the 12 "AME's" on the panel tried to outdo one another in claiming that they could substantially increase ratings over those specifically given in chapters of the AMA Guides.

The panel utilized a low back injury as a standard, as injuries to the lumbosacral spine are the most common in our workers' compensation system.

Ron told me that his friend and the primary treating physician that he uses on all of his cases, Dr. Nickelsberg, easily won this competition.

I must admit that Dr. Nickelsberg's trophy was a very powerful statement as to the multiple theories promulgated by the applicants' bar (misguided in my opinion). Subsequent to the

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[1] On September 3, 2009, the Board issued, or I should say re-issued, its en banc decision in *Almaraz/Guzman*. The Board rescinded its February 3, 2009, en banc decision in part in which it held that it was permissible to deviate from the AMA Guides if the impairment rating was unfair to the applicant. In its new and improved decision of September 3, 2009, the Board amended its decision and indicated that any impairment rating should be contained within the four corners of the Guides.

Almaraz/Guzman decisions, the trophy, which Dr. Nickelsberg was proudly displaying to the entire assemblage at the lobby bar, was a sculpture of the AMA Guides with a copy of the 1997 Permanent Disability Rating Schedule superimposed on top.

As I ordered my usual Beefeater martini with two olives from Kim, the Hyatt's breathtakingly beautiful cocktail waitress, I surmised that this rather grotesque trophy was sending a message that we were returning to the subjective and arbitrary work restrictions which were the hallmark of the 1997 rating schedule.

Since I could not contain my curiosity I asked Dr. Nickelsberg to tell me about his "winning entry."

Dr. Nickelsberg proudly explained that his idea of combining the work restrictions of the 1997 PDR's with Chapter 15 of the AMA Guides (the spine) was predicated on page 427 of the Guides, and more specifically Figure 15-9 entitled, "Side View of Spinal Column."

Dr. Nickelsberg turned his "trophy" around and Figure 15-19 was prominently displayed on the back of the award and clearly showed that a total impairment of the lumbar spine equaled 90%.

Dr. Nickelsberg literally wowed the crowd at the CAAA meeting by explaining that a sedentary work restriction for a low back injury equaled 70% under the old system and if we took 70% of the total loss of function of the lumbar spine, or 90%, then we would have an impairment rating of 63%, which was before adding in 3% for severe pain and a separate rating for a sleep disorder.

Although I did not notice Dr. Ratbar joining us at the lobby bar, suddenly I heard him tell Dr. Nickelsberg that from that point we would go into the field of sexual dysfunction and psychiatry.

By now I was on my third martini and I was determined to bring Dr. Ratbar, Dr. Nickelsberg and Ron Summers back to reality.

I explained that the Board in *Almaraz/Guzman II* had set a rather high burden for physicians to deviate from a specific chapter in the AMA Guides, which deals with the body part under consideration.

For example, I pointed out that Dr. Nickelsberg had incorrectly computed an applicant's impairment rating for his low back by analogizing the view of the spinal column contained on page 427 of the Guides with work restrictions, which are definitely outside of the four corners of the Guides as work restrictions go hand-in-hand with the 1997 Rating Manuel.

I further pointed out that the Board in *Almaraz/Guzman II* requires the physician to specify just why the appropriate chapter in the AMA Guides does not adequately describe the applicant's disability.

I told Ron and the good doctors that a Board panel in the case of *Marcos Matta v. Nummi/Gallagher Bassett Gold River* (ADJ1865813)[2] filed July 8, 2009 had addressed this very issue as follows:

> In this case, it appears that Dr. Newman's finding of 22% whole person impairment pursuant to Table 13-22 may not be supported by the facts of this case. Dr. Newman did not explain how he concluded the AMA Guides do not adequately describe applicant's disability and why rating by analogy is necessary. (emphasis added)

I told Ron and Messrs Nickelsberg and Ratbar that the same reasoning by the Board is incorporated in *Almaraz/Guzman II*.

REASON #399 NOT TO GO TO AN AGREED MEDICAL EXAMINER:

In a great majority of cases the AMA impairment rating will be determined either by an AME or a panel QME.

As "AME's are agreed to by the parties" the status of an AME doctor has been given added weight by the Court of Appeal, reasoning that there must be good cause demonstrated for the Board to disregard the medical report of a doctor agreed to by the parties.

The surest way to open up the AMA Guides to subjective interpretation is for the parties to agree to an AME. The Board in countless decisions has given the report of an AME great weight on all issues, including the issue of permanent disability and/or impairment.

In the panel decision of *Dana Large v. Klein Plastering; Redlands Insurance Company* 37 CWCR 227[3] the Board addressed a situation in which an AME rather liberally interpreted permanent impairment under the AMA Guides.

In essence the Board ruled in this case that the AME made a sufficient showing that strict adherence to the Guides would result in a PD rating that did not accurately reflect applicant's disability. However, the damning language of the Board's decision is as follows:

> We presume that the agreed medical evaluator has been chosen by the parties because of his expertise and neutrality. Therefore, an agreed medical evaluator's

[2] Anyone wishing a copy of the panel decision in *Marcos Matta* can request a copy by e-mail. A Board panel decision can be admissible into evidence pursuant to Labor Code §5703(g).

[3] Anyone wishing a copy of the panel decision in *Dana Large* can request a copy by e-mail. A Board panel decision can be admissible into evidence pursuant to Labor Code §5703(g).

> opinion should ordinarily be followed unless there is good reason to find it unpersuasive.

So there you go; if you go to an AME you live and die by the opinion of the AME because, as the Board said, why would you agree in the first place if you didn't want the AME to call the shots?

Would the Board have reached the same decision with a panel QME? No one really knows, but I think not as the panel QME would not be selected by the parties but by the Administrative Director.

PANEL QME'S SHOULD BE ELEVATED OVER ALL OTHER DOCTORS:

In all its decisions addressing the panel QME system the Board has taken great pains to point out that panel QME's are not entitled to any sort of presumption of correctness nor can a panel QME be elevated to the same status as an AME.

Why, you might ask?

It's because panel QME's are truly independent! They are not hired by anyone (the defense or applicant's side) and owe their place on the DWC QME panels to the rigorous requirements and appointment by the Administrative Director.

Any given panel can consist of an applicant's doctor, a defense doctor, and an "I don't know" doctor. However, these doctors know one thing, i.e., that no matter how they report they will not be receiving another case from one of the parties.

Not only do panel QME's have the independence of being selected, not by the parties, but by the Administrative Director, the same rules apply to the panel QME's as AME's.

There can be no ex parte communications with the panel QME's and any written correspondence by a party must be copied to the other side.

As I ordered another Beefeater martini with two olives from Kim, the Hyatt's breathtakingly beautiful cocktail waitress, I reasoned to myself, "If it walks like a duck and quacks like a duck, then it must be a duck, or in this case an AME!"

DISCLAIMER:

Except for myself, Kim, and George the characters of the lobby bar are imaginary, as is my story. The "coveted trophy" from the CAAA is also a product of my warped imagination.

However, the ongoing competition among some AME's to deviate from the plain language of the AMA Guides is not. In *Almaraz/Guzman II* the Board has ruled that the AMA Guides are

rebuttable but has set the bar at such a height that in my opinion a material deviation from the Guides will be the exception rather than the rule.

However, the litigation frenzy that is trying to turn the Guides into something they are not will be with us for years.

I am currently on vacation, enjoying the beautiful sandy beaches of Kauai, a place where every cocktail waitress is breathtakingly beautiful. I've been sipping on Mai Tai's at the Grand Hyatt, with Georgia on my mind. (Georgia, George's cousin, tends bar at the Grand Hyatt bar). Hard days of denying benefits aren't too far away, so I better enjoy the reprieve while it lasts.

Make mine a double, Georgia.

Aloha.

-Joe Truce