ANOTHER INSTALLMENT IN THE *GEORGE THE BARTENDER* SERIES

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RE: GEORGE THE BARTENDER AND THE FUTURE EARNING CAPACITY GAMBIT, OR WHY "EXPERTS" ALWAYS SEEM TO PROSPER

FROM THE LOBBY BAR AT THE HYATT:

After a hard day denying benefits I was certainly looking forward to the sight of Kim, the Hyatt's breathtakingly beautiful cocktail waitress, approaching me with a Beefeater's martini, straight up with two olives.

However, Kim and George the Bartender were busy serving champagne to a group at the bar, and from the looks of things a celebration was in progress.

The group included George's workers' compensation attorney, Ron Summers, as well as George's PTP, Dr. Nickelsberg.

I then recognized the host of this party as none other than Ken Kopy, owner of Ron's exclusive photocopy and subpoena service, Med-Legal Reproduction Service or MLRS.

I decided I would buy the next round for the group so I could find out the cause for the celebration which I anticipated was bad news for the defense.

Ron gleefully accepted my offer to buy drinks for the group and told me that Ken, in addition to being the owner of MLRS, is also an acknowledged *Ogilvie* "expert" qualified to testify on behalf of Ron's client as to their diminished future earning capacity or the DFEC component of the rating formula.

Ron added that this was a "thank you" for his exclusive use of Ken's photocopy and subpoena services.

"Acknowledged by whom?" I asked. Both Ken and Ron ignored the question.

Ken added that his billings would still be sent to the carrier in a format identical to photocopy charges so Ken anticipated no problem in getting paid as the defense industry routinely pays charges on a billing that looks like a photocopy bill.

Ken confided to me that in another life he had been a vocational rehabilitation "expert" and was fully qualified to testify as to the future loss of earnings of Ron's clients and the DFEC of similarly situated employees. This results in increasing the rating by a minimum of tenfold.

Ron broke in and happily told me that a majority of his clients that went through Dr. Nickelsberg's endless treatment and multiple surgeries never worked again.

At this I reminded both Ken and Ron that California was not a wage loss state and Labor Code §4660 clearly indicated that the wage loss of a specific employee was irrelevant in determining DFEC.

Ken, after opening his Labor Code, told me that his testimony would be premised on Labor Code §4660(a) which stated in relevant part as follows:

> In determining the percentages of permanent disability, account shall be taken of the nature of the physical injury or disfigurement, the occupation of the injured employee, and his or her age at the time of injury, consideration being given to an employee's diminished future earning capacity. (emphasis added)

Ken looked at me and said that the wage loss of a specific applicant is certainly relevant under the statute.

I was ready for this argument and referred Ken to the next paragraph of Labor Code §4660(b)(2) as follows:

> For purposes of this section, an employee's diminished future earning capacity shall be a numeric formula based on empirical data and findings that aggregate the average percentage of long term loss of income resulting from each type of injury for similarly situated employees. The administrative director shall formulate the adjusted rating schedule based on empirical data and findings from the Evaluation of California's Permanent Disability Rating schedule, Interim Report (December 2003), prepared by the RAND Institute for Civil Justice, and upon data from additional empirical studies. (emphasis added)

In *Ogilvie* the Board reasoned that Labor Code §4660 not only allowed the diminished future earning capacity (DFEC) component of the rating formula to be rebutted but also set forth a formula that can be used by the parties to determine an injured worker's DFEC ratio. In setting forth this formula for rebutting the DFEC, the Board stated that a ratio of the future loss of earnings by similarly situated injured employees can be compared to the actual loss of earnings by the applicant.

While I agree with the Board that the DFEC component is prima facie evidence and is subject to rebuttal, I disagree with the Board's pronouncement that the loss of earnings of a specific applicant can be utilized as rebuttal evidence.

Labor Code §4660 refers to empirical data based on the comprehensive RAND study and it would not appear that this references, at all, a case of an individual applicant.

I told Ken that despite the Board's decision in *Ogilvie* the statute was crystal clear and that the wage loss of a specific employee is irrelevant. The only relevant information are statistics based on empirical studies as to similarly situated injured employees. I added that even if we accepted the Board's formula outlined in *Ogilvie*, comparing the wage loss suffered by an injured employee to "similarly situated employees," the Board still demanded empirical evidence as reliable as the RAND study.

Unfortunately, applicant attorneys see the *Ogilvie* decision as an invitation to mount an attack on the Administrator Director's calculation of the DFEC component. The attack utilizes many and varied so called experts to throw figures at the Board claiming that the DFEC component has been rebutted when compared with the loss of earnings by their clients.

At this point Ken smiled and indicated that during the time he had been a vocational expert he had compiled his own statistics as to the wage loss of "similarly situated employees."

After ordering another martini from Kim, I told Ron and Ken that Ken's so-called "empirical studies" would not suffice given the clear wording of Labor Code §4660(b)(2)

I also told Ken and Ron that the Board in it's en banc decision in *Joey M. Costa v. Hardy Diagnostic and State Fund Compensation Insurance Fund (2007)* 72CalComp cases 1492(en banc) had set the bar high as to the type of evidence that would be considered in rebutting the DFEC component of the rating formula and further held that in order for a so called expert to be reimbursed the expert must submit evidence capable of consideration in rebutting the DFEC.

I added that it is questionable as to whether or not Ken, acting as an *Ogilvie* expert, would even be reimbursed for his report and/or testimony.

The Board in panel decision after panel decision has rebuffed so called experts such as Ken Kopy. In a recent panel decision, *Jon Shini v. Pacific Coast Auto Body & Truck; Famers Santa Ana* (ADJ2079252)[1], the Board once again confirmed that the bar in providing rebuttal evidence to the DFEC of a specific applicant has been set high by *Ogilivie.*

In *Shini* the Board questioned the determination of an applicant's loss of earnings on the applicant's testimony alone and observed as follows:

> "[T]here may be instances where it is not proper to use the injured employee's actual post-injury earnings in determining his or her proportional earnings loss. In establishing their average proportional earnings loss figures, the 2003 and 2004 RAND Studies followed three years of post-injury earnings for 241,685 employees who had sustained industrial injuries over more than a six-year period."

[1] Anyone wishing a copy of *Shini* should request one via e-mail.

Therefore, the Board went on to note that "when a proportional earnings loss calculation is made for a particular employee in a DFEC rebuttal case, the employee's post-injury earnings portion of that calculation may not accurately reflect his or her true earning capacity."

WHO IS JOHN GALT?:

This is the opening sentence in Ayn Rand's novel, Atlas Shrugged, in which John Galt is acknowledged to be a creator and inventor who symbolizes the power of the individual capitalist.

However, in workers' compensation, in *Ogilvie* terms, the phrase should be: "Who is Albert Rivas?"

Albert Rivas is an alleged expert witness who testified in the case of *Brandon Coe v San Luis Auto & Smog; Employers Compensation* (ADJ136281).[2] In this case Mr. Rivas's reported testimony was offered by the applicant's attorney to rebut the Administrative Director's calculation of the DFEC component.

Albert Rivas pops up quite frequently as an expert witness on the DFEC in many of my cases.

In *Coe* the trial judge found that the "expenses of witness Albert Rivas were unreasonable and unnecessary."

On applicant's Petition for Reconsideration the Board granted reconsideration and issued its opinion and decision after reconsideration, finding in relevant part as follows:

> Also, like the WCJ, we are not persuaded that the DFEC factor has been rebutted, based on the report and testimony of vocational expert Albert Rivas. Although Mr. Rivas purports to do the calculations specific in *Ogilvie*, the data underlying the calculations are lacking. Using the individualized DFEC adjustment factor he develops, Mr. Rivas arrives at a rating at 29 percent. He also concludes that applicant has a "50% loss of diminished earning capacity." Mr. Rivas's report does not satisfy the requirements of *Ogilvie* and does not rebut the DFEC portion of the 2005 schedule . . . As to the costs of obtaining Mr. Rivas's report and testimony, we explained in *Costa v Hardy Diagnostic (2007)* 72 Cal.Comp.Cases 1492 . . . with regard to DFEC rebuttal evidence for vocational rehabilitation counselors:
>
> > "as with medical-legal costs, reimbursement will not be allowed if the report and/or testimony is premised on facts of assumptions so false as to render it worthless . . . Furthermore, as medical-legal

[2] Anyone wishing a copy of *Coe* should request one via e-mail.

> costs are not recoverable with respect to reports, for example, that are incapable of providing or disproving a disputed fact or whose conclusions are totally lacking in credibility . . . reports and testimony of a vocational rehabilitation expert must at least have the potential to affect a permanent disability rating in order for the costs to be recoverable."

The Board concluded on their decision after reconsideration as follows:

> "We agree with the WCJ that Mr. Rivas's report and testimony were so deficient as to be incapable of affecting the rating in this case. Accordingly, we affirm her denial of costs."

DISCLAIMER:

With the exception of George, Ken and myself the characters and story line above are fictional and a product of my imagination.

However, the relentless attacks on the plain meaning of Labor Code §4660 as amended by SB 899 are not.

Fortunately, the Board in both *Almaraz/Guzman* and *Ogilvie* was clear on what it considered to be proper rebuttal evidence to rebut the AMA Guides and/or the Future Earning Component and we must be ever vigilant in analyzing such evidence and the accompanying charges of the so called experts.

Make mine a double, George.

-Joe Truce