ANOTHER INSTALLMENT IN THE *GEORGE THE BARTENDER* SERIES

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RE: GEORGE THE BARTENDER AND THE GOVERNMENT BAILOUT OR THE UNCAPPING OF THE *AMA GUIDES*

FROM THE LOBBY BAR AT THE HYATT

In light of the Board's recent *en banc* decisions, *Ogilvie*; *Almaraz* and *Guzman*, I dreaded going to the Lobby Bar at the Hyatt as I knew that a loud celebration would be in full swing.

However, I was not quite prepared for the sight of George the Bartender's workers' compensation attorney, Ron Summers, and his treating physicians, Dr. Ratbar and Dr. Nickelsberg, dancing with locked arms, which apparently was their version of a chorus line, singing: "We're in the money . . . ."

No wonder!

On February 3, 2009, the Board issued its *en banc* decision in *Ogilvie*, slightly loosening the cap on rebutting the Diminished Future Earning Capacity (DFEC) Modifier portion of the current Schedule for Rating Permanent Disability. Then in its consolidated decisions in *Almaraz* and *Guzman* it potentially blew the cap all the way off in the determination of permanent impairment on the basis of a strict application of the *AMA Guides, 5th Edition*.

In a lengthy decisional process which apparently opens the floodgates to an avalanche of litigation, the Board has ruled that Workers' Compensation Judges (WCJs) are legally bound to utilize the *AMA Guides* in determining an injured worker's permanent impairment, **unless the ultimate result is "not a fair and accurate measure of the employee's permanent disability. . ."**

Of course, ever since the implementation of the 2005 Schedule for Rating Disabilities we have heard a never ending chorus of how unfair the *AMA Guides* are in determining permanent disability from the applicants' bar.

These decisions certainly may be the death knell for the concept that all disability must be measured by objective standards and that reporting on permanent impairment by evaluating and/or treating physicians must be uniform and consistent.

Under the category of "Thank God for small favors," the Board did prohibit the utilization of any and all permanent disability schedules that existed prior to January 1, 2005. Left open, however, was the possibility that prophylactic work restrictions, as well as subjective complaints of pain and/or disability, could escape from Pandora's Box under the guise of **"activities of daily living."**

More importantly, the Board's decisions specifically state that if an evaluating doctor feels that the result of confining their evaluation of permanent disability to the *AMA Guides* is unjust or unfair, then the QME or AME as the case might be is at liberty to utilize their own judgment as to what is a **"just"** result.

My musings were then interrupted by a loud conference and clinking of champagne glasses by Ron, Dr. Ratbar, Dr. Nickelsberg and another individual I did not recognize.

After Ron made the introductions, I realized that Dr. Nickelsberg had brought his word processing and/or computer expert to the Lobby Bar. After everyone exchanged high fives, Ron told me that in light of the Board's *en banc* decisions, Dr. Nickelsberg was instructing his computer expert to update his template.

For those of you who are novices to the inner workings of our system, a medical report template is a fill-in-the-blanks word processor guide for most defense and applicant QMEs and AMEs, to assist them in their report writing.

As a result, every medical-legal report contains stock phrases and the doctor (or his assistants) has only to fill in the blanks for each new applicant.

Ron told me that Dr. Nickelsberg had instructed his computer expert to update his medical report template with the following stock phrase:

> "Although a strict application of the *AMA Guides, 5th Edition* results in a permanent impairment rating of (fill in the blank), this strict application of the *Guides* does not reflect this applicant's (fill in name) actual permanent impairment and/or disability."

The template would then go on as follows:

> "Pursuant to the Court's *en banc* decision in *Mario Almaraz* and *Joyce Guzman*, the following rating best describes the impairment and/or disability of (fill in name of applicant)."

Ron explained that a blank would then be left in the template in which Dr. Nickelsberg would justify a departure from the *AMA Guides* and a higher rating.

At this point, Randy Rehab and his Band of Renown-- Renowned rehab counselors that is–crashed the party at the Lobby Bar holding balloons proclaiming that "LeBoeuf is Back!"

The *Almaraz* and *Guzman* decisions probably brought back the ability to obtain a 100% rating per the Supreme Court decision in *LeBoeuf* by establishing that an injured worker was not able to compete in the labor market. Knowing this I put up a brave front by telling Randy that in its decision in *Wanda Ogilivie* the Board held that the testimony of rehabilitation counselors was not necessary to rebut the DFEC, as this could be accomplished by gathering statistics from the EDD and applying these statistics to a numeric formula.

Randy paused for a minute and then grinned broadly and responded that I was right but the testimony of rehabilitation counselors was then made relevant again by the Board's companion decisions in *Almaraz* and *Guzman*.

Unfortunately, Randy is right. On page 14 of its decision, the Board noted that the *AMA Guides*, in discussing the activities of daily living, specifically excluded work activities and on page 17 observed:

> "Further, with respect to the broader job market, other evidence may be appropriate–specifically including the expert opinion of vocational expert."

Therefore we have the reverse of the phrase: "The Board giveth and the Board taketh away."

The celebration continued for some time and finally all of the partygoers, Ron, Dr. Ratbar, Dr. Nickelsberg and their entourage, left.

However, the way they left the bar was significant in itself as far as I was concerned.

Before the Board's bombshell in *Ogilvie*, Ron and his docs, after having too much to drink, left the bar in cabs or called relatives to pick them up. Now they were back to renting Presidential stretch limousines.

WHAT IS THE ANSWER FOR THE DEFENSE?

Outside of drinking heavily I'll be damned if I know! – At least in the short term.

After the first barrage of appeals, supplemental medical reports, etc., the dust will start to settle and on a case by case basis the Board will start issuing decisions as to what type of evidence is needed to rebut the *AMA Guides*.

Although the Board's decisional process holding that the *AMA Guides* are rebuttable is certainly articulate and legally logical, it would appear that the Board has opened a hole through which the California Applicants' Attorneys Association (**CAAA**) is going to drive a Mack truck. I am also not sure whether the Board is prepared either on the trial level or the appellate level for the avalanche of litigation, including multiple Petitions for Reconsideration and Petitions for Removal, which will commence immediately.

One of the common reasons for taking the trial off calendar by Workers' Compensation Judges is to "develop the record." We may be looking at a new disposition: "Off calendar to determine whether the AMA rating is fair."

As fairness in any advocacy/litigation system is in the eye of the beholder, it would appear that the concepts of **"objectivity and consistency"** may have received a premature burial.

I assume that the call to arms by the applicants' bar is going to be similar to the start of the Indy 500:
"Gentlemen, start your litigation engines!"

DISCLAIMER:

While the above characters at the Lobby Bar and their stories are fictional, the threat of all-consuming litigation is not.

Given our economic crisis and our concurrent attempt to comply with the paperless mandate of EAMS, WCJs, the DWC staff and the Appeals Board District Offices are nearing a breaking point (if they aren't there already). The Board staff is devoting substantial work hours to simply scanning in documents, and at the same time all Board offices and their already voluminous workload are going to be compressed and stressed more by reason of the recently announced furloughs.

I looked at George and told him that he was going to have to expand the seating facilities at the Lobby Bar as we are going to have a lot of company.

Make mine a double, George

– Joe Truce

WJT/jrh