

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 HOLDS THE LINE ON THE AMA GUIDES OR “HOW LIKELY ARE YOU TO DOZE OFF WHILE READING THIS?”

FROM THE LOBBY BAR AT THE HYATT:

After a hard day denying benefits, I arrived at the Lobby Bar bearing “gifts.”

My day was nearly made complete when Kim, the Hyatt’s breathtakingly beautiful cocktail waitress, approached me with my cocktail of choice, a Beefeater’s martini, straight up with two olives.¹

My “gifts” were not for Kim, but were for Frank Falls, noted defense attorney, who had been agonizing for weeks over a case he had with Ron Summers, George the Bartender’s workers’ compensation attorney.

Frank had confided in me over the past weeks that this case was for a new client recently brought into his law firm. As far as the client was concerned this was a “make or break” case for Frank’s firm.

According to Frank, the case had not been going well at all as Ron Summers had designated his favorite physician, Dr. Nickelsberg, as the applicant’s primary treating physician. From that point the case had gone downhill fast.

Dr. Nickelsberg had made a diagnosis of a low back injury and after a trial of conservative treatment had referred the applicant to one of Dr. Nickelsberg’s multiple outpatient surgery centers, where two back surgeries in successive years had been performed.

During the treatment, Dr. Nickelsberg had the applicant fill out what is lovingly referred to in our industry now as the “Epworth Sleepiness Scale,” which is a self-report scale (0-3) consisting of eight questions, worth up to three points each.²

If anyone selects three to any one of the eight questions that person is presumed to have a sleep problem.

¹ A Beefeater’s gin martini is best served in a chilled glass at 38 degrees Fahrenheit, for those that like to keep track of these types of statistics.

² For those of you who have never taken this test, the legend is as follows: 0: would never doze; 1: slight chance of dozing; 2: moderate chance of dozing; 3: high chance of dozing. For those of you who have no life and would actually like a copy of the test, please reply by email.

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Frank moaned that the applicant had chosen three on all eight questions, such as “sitting and reading, watching television, lying down to rest, seated talking to someone,” etcetera.

Frank went on to tell me that in addition to the applicant’s high score on the ‘Epworth Sleepiness Scale,’ Dr. Nickelsberg referred the applicant out for an overnight sleep study. The resulting rating was a Class 4, or 70%-90% impairment of the whole person.

As the applicant’s primary treating physician (PTP), Dr. Nickelsberg incorporated the report of the applicant’s secondary treating physician (sleep specialist) and advised that the applicant’s sleep disorder was directly attributable to his low back pain.

In addition to this Frank told me that Ron was alleging that the applicant was 100% disabled on the basis of the now infamous decision by the California Supreme Court in *LeBoeuf*, in which the court held that in determining the applicant’s permanent disability it was indeed relevant to have a vocational expert testify as to whether or not the applicant can compete in the open labor market.

Frank advised that Ron had designated a vocational rehabilitation expert that would testify that the applicant, by virtue of his injury and resulting disabilities, was precluded from the entire labor market. Therefore, the applicant qualified for a 100% permanent disability award.

However, this is where my gifts came into play as I presented Frank with two Panel decisions by the Appeals Board.

In a significant Panel decision designated as *Manuela Pena v. Alvarado Hospital* filed on March 28, 2008, the Board directly addressed the concept of a sleep disorder pursuant to the AMA Guides.

In noting that the applicant’s sleep disorder was caused by pain, the Board stated in relevant part as follows:

To rate a sleep disorder under Table 13-4 at page 317 of the *Guides*, the cause of the sleep disorder cannot be pain from the underlying injury because pain, and its effects on the worker, is included in the rating of the impairment of the injured body part. (emphasis added)

I pointed out to a relieved Frank that although most applicant attorneys allege a sleep disorder, the sleep disorder is most often caused by pain due to the underlying orthopedic injury and therefore cannot be rated separately.³

³ Anyone wishing a copy of the Board’s significant Panel decision in *Manuela Pena* should reply by email.

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However, Frank’s celebration over the *Pena* case was short-lived. What about the *LeBoeuf* allegation? he wondered.

I told Frank I had the answer in my second gift to him in the form of a Panel decision by the Board in the case of *Wayne Johnson v. Tennant Company* (ADJ1620559)⁴ filed May 21, 2009.

In the applicant’s Petition for Reconsideration, the “LeBoeuf” theory was raised in an injury on or after January 1, 2005, and the Board, in shooting down *LeBoeuf*, observed as follows:

The concept of finding applicant permanently totally disabled because he cannot compete in the open labor market, on the other hand, is inconsistent with the 2005 Schedule, since the 2005 Schedule contemplates the applicant’s ‘diminished future earning capacity’ rather than the applicant’s ability to compete in the open labor market, as was the case under the 1997 schedule.

THE BOARD’S EN BANC DECISIONS IN ALMARAZ/GUZMAN II AND OGIIVIE:

In the above landmark decisions interpreting the AMA Guides, 5th Edition, and the future earning capacity formula as established by the Administrative Director, the Board has given us guidance.

In so many words, the Board on one hand has told us that the AMA Guides and the future earning capacity formula (FEC) is not inflexible, but on the other hand it certainly does not open the door to a judicial repeal of Labor Code §4660 as amended by Senate Bill 899.

In *Almaraz/Guzman II*, the Board held that it is permissible to explore other chapters of the Guides should the chapter in question be incapable of adequately describing and rating the impairment and/or disability of an injured worker. However, *Almaraz/Guzman II* does not give wholesale license to jump from chapter to chapter simply to obtain a higher rating.

A reporting physician, based on substantial evidence, must set forth good cause to deviate from the specific chapter that deals with an injured worker’s disability.

The WCAB website only contains *en banc* and significant Panel decisions of the Board and does not include the volume of Panel decisions issued by the Board each month.

For about two years, I have been monitoring all of the Panel decisions issued by the Board each month and a fair number of these decisions usually pertain to an attack on the AMA Guides or the FEC component of the 2005 rating formula under the guise of *Almaraz/Guzman II* or *Ogilvie*.

⁴ Anyone wishing a copy of the *Wayne Johnson* Panel decision should reply by email.

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However, with very few exceptions, these attacks fail and end with the Board reemphasizing the mandate of Labor Code §4660 that permanent disability and/or impairment shall be measured pursuant to the AMA Guides, 5th Edition.

Likewise, the ongoing attacks on the Future Earning Capacity (FEC) component of the rating formula as promulgated by the Administrative Director, with extremely few exceptions, also fail with the Board again citing the clear mandate of Labor Code §4660 that the FEC component be based on substantial evidence.

In reviewing and reading the monthly voluminous work product of the Appeals Board, and there are some 30 to 40 Panel decisions issued each month, my respect for our hard-working commissioners has increased tenfold.⁵

DISCLAIMER:

Although the above storyline as well as the characters at the Lobby Bar, aside from Kim, George and I, are products of my imagination, the ongoing attacks on the AMA Guides and the Future Earning Capacity of the 2005 Schedule for Rating Permanent Disabilities are not.

As far as George and I are concerned, “it is what it is” with respect to the AMA Guides and the FEC until it is proved differently.

My recommendation: “Hold the line.”

Make mine a double, George.

-Joe Truce

⁵ For years, the Board did not keep copies of its Panel decisions and it is my understanding that some years ago this procedure was changed due to an agreement between the Board and Work Comp Central whereby Work Comp Central agreed to make copies of all Panel decisions available to our industry, for a very reasonable price. Of course the above is pure speculation on my part and though I’ve never been one to speculate, I believe it was a George the Bartender memo that got the ball rolling on this issue. The memo analyzed a panel decision that was sent to us by another lawyer that created a controversy when a Workers’ Compensation Judge called Work Comp Central for a clean copy of said decision. It was determined at that time that the Board did not keep copies of its panel decisions for public distribution, whereby the agreement between Work Comp Central and the Board for public distribution of its panel decisions was born. This, again, is pure speculation on my part.