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 ANALYZES THE CONCEPT OF DUELING DOCS ELIMINATED BY SB 899 . . . *OR WAS IT?*[1]

FROM THE LOBBY BAR AT THE HYATT

After a hard day of denying benefits I hastened to the Lobby Bar seeking some peace and quiet, and of course to look upon Kim, the Hyatt's breathtakingly beautiful cocktail waitress, bringing my Beefeater's martini straight up with two olives.[2]

I arrived at the bar, taking my customary seat. My aforementioned libation of choice arrived shortly after. After taking a few sips and sneaking one last fleeting glance at Kim as she walked away, I noticed Frank Falls, noted workers' compensation defense attorney, and his primary client, Pat Pennipincher, claims manager for Integrity Insurance Company, at the other end of the bar. The pair was noticeably in distress. I decided to order them a round of drinks and see if I couldn't cheer them up.

After joining them and exchanging greetings Frank began to explain to me their current state of despair. He said they had a case coming up for trial the following week with none other than our nemesis, Ron Summers, George the Bartender's workers' compensation attorney. The case was simple enough, as the matter involved an admitted industrial injury to the applicant's right ankle for which the Panel Qualified Medical Evaluator (QME) in orthopedics had given a reasonable Whole Person Impairment (WPI). Frank had tried to settle the case on the basis of the Panel QME report.

Pat chimed in, adding that in this case they were looking forward to not having to deal with Ron's favorite "go-to" primary treating physician (PTP) and fellow duke of duplicity, Dr. Nickelsberg. As it turned out, Dr. Nickelsberg was supposed to be excluded from this case as he was not within the Integrity Insurance Company's Medical Provider Network (MPN).

I said to the downtrodden duo then what could possibly have them so blue?

As (bad) luck would have it, Dr. Nickelsberg had found his way onto the case. Frank pointed out to me that California Labor Code §4064(d) contained a loophole that Ron was trying to drive an 18 wheeler through, filing a motion under Labor Code §4064(d) to have Dr. Nickelsberg's report made admissible.

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[1] For those new patrons to the Lobby Bar, George the Bartender's workers' compensation case involves an injury to his elbow, epicondylitis (tennis elbow), sustained from the repetitive serving of martinis to me. If there ever was an admitted industrial injury, this is it!

[2] A Beefeater's martini, straight up, is best served at 38˚ Fahrenheit.

Although §4064(d) provides that an employer (carrier) is not liable for the cost of any comprehensive medical evaluation obtained by the employee other than those authorized pursuant to Labor Code §4060, §4061 and §4062, these sections still provide that the injured worker can obtain said comprehensive medical evaluations at their own expense. Frank said this was how Ron hoped to get Dr. Nickelsberg's report made admissible, though Integrity Insurance Company would have no liability to pay for the expense of the exam done by Dr. Nickelsberg or for the report.

Frank and Pat were convinced that the Workers' Compensation judge (WCJ) in their upcoming trial would hold that the report of Dr. Nickelsberg was admissible. Dr. Nickelsberg had given the applicant a Whole Person Impairment (WPI) of over 90% and was of the opinion that based on the ankle injury the applicant would be unable to compete in the open labor market.

At this point, Ron strode into the bar and walked over to us, looking rather smug. He knew Frank and Pat were quite worried about this pending case. Ron pretended to be sympathetic to their concerns but this sentiment was belied by the grin on his face.

Never one to overlook an opportunity to rain on Ron's parade, I reached into my trusty briefcase and pulled out the Court Appeal of California published decision *Margaret Batten v. Workers' Comp. Appeals Bd.*, 241 Cal. App. 4th 1009 (Cal. App. 2d Dist. 2015)[3] issued on October 28, 2015. In *Batten*, the Court of Appeal addressed the various issues raised by Ron as follows:

> Section 4061, subdivision (i) does not nullify section 4064, subdivision (d), but it does prohibit the admissibility of reports by privately retained experts. Had the Legislature intended to permit the admission of additional comprehensive medical reports, obtained at a parties' own expense for the sole purpose of rebutting the opinion of the qualified medical expert, it would have said so. The plain and unambiguous language of section 4061, subdivision (i) precludes such an interpretation. We presume the Legislature intended every phrase and provision to have meaning and to perform a useful function. (*Garcia v. McCutchen* (1997) 16 Cal.4th 469, 476.)

Ron broke in to argue that this decision was in conflict with the California Supreme Court decision in *Valdez*. With a mischievous grin I handed a copy of *Batten* to Ron and referred him to footnote number two on page five of the Decision as follows:

> In a recent case, the California Supreme Court noted: "Currently, none of the statutes referenced in section 4064, subdivision (d) include any specific restriction on the admissibility of medical evaluations." (Valdez v. Workers' Comp. Appeals Bd. (2013) 57 Cal.4th 1231, 1234 fn. 2.) This dicta is not necessary to the

[3] Much like Mary Poppins's seemingly bottomless carpetbag (of Disney fame) and Hermione Granger's bottomless handbag (of Harry Potter fame), my briefcase possesses magical powers, granting me the ability to pull out any decision at a moment's notice. A copy of the Court of Appeal decision in *Batten* can be obtained by email request.

> decision in Valdez and does not address the restriction set forth in section 4061, subdivision (i).

The Court of Appeal in *Batten* adopted the Board's opinion authored by Chairwoman of the Appeals Board, Ronnie Caplane, which was a death blow to Ron's case. His swagger was now depleted as he realized Dr. Nickelsberg's report would be inadmissible.

WAS THE CONCEPT OF "DUELING DOCS" REALLY ELIMINATED BY SENATE BILL 899?

Before the passage of California Senate Bill 899 the Labor Code provided that all parties could obtain their own QMEs and that the defendant would be liable for the expense of applicant's QME.

This system proved to be unsatisfactory as the QME reports obtained by applicants and defendants often differed markedly in the analysis of permanent disability. For example, it would not be unusual for the applicant's report to rate 50% and the defendant's report to rate 10%, causing an increase in litigation over the issue of permanent disability.

Senate Bill 863 created the Panel QME system whereby parties were allowed to select a QME from a Panel of three physicians, with each party having the right to strike one of the QMEs to reach a consensus choice.

I discussed this system with the framers of SB 899 immediately following the passage of the bill. The apparent intent was to have the issue of permanent disability decided by the selected Panel QME or a medical examiner. In other words, in creating the Panel QME system it was our understanding that the framers of SB 899 wanted to create a system in which this evaluator would not feel like they were hired by either party.

It was envisioned that the PTP would treat[4] and that medical-legal evaluators would decide the ultimate issues of permanent disability and/or impairment.

SB 899 eliminated the problem of "dueling docs," or at least we thought it did, loyal Lobby Bar patron.

THE CONCEPT OF DUELING DOCS IS NOT DEAD

One of the ironies in our litigation system is the concept under Labor Code §4600 that the applicant or injured worker has the ability to select their own treating physician.

This, of course, is a euphemism as the PTP is not selected by the applicant but by the applicant's attorney. The motivation of the applicant's attorney is to obtain a report with a high Whole

[4] A novel concept, I know.

Person Impairment (WPI). Ultimately, it is hoped that this high WPI will prevail against a more fair and balanced report by a Panel QME or Agreed Medical Evaluator (AME).

For example, Ron utilizes Dr. Nickelsberg as the PTP in all of his cases, so Ron as opposed to the injured worker is really the client of Dr. Nickelsberg. It is because of this relationship that money may become a driver as Dr. Nickelsberg would not want to displease Ron with reports that could be detrimental to the outcome of his cases, not to mention to his attorney fees.

What SB 899 really replaced was the evil of medical-legal reports promulgated by two adversarial QMEs with the evil of two medical-legal reports, one prepared by the Panel QME and one by the applicant's primary treating physician.[5]

The concept of the dueling docs is back in full bloom.

THE PLUNGE OF THE PROLIFIC PRIMARY TREATING PHYSICIAN

For years, one of the main players in Southern California, as far as PTPs are concerned, has been an orthopedist whom we will refer to as "The Doctor."

The Doctor may have had as much as 25% of the PTP business in Southern California. On November 20, 2015, a bombshell was dropped on our wonderful world of workers' compensation by way of a written 28-page plea agreement between The Doctor and the United States Attorney's Office (USAO) in which The Doctor waived indictment by a federal grand jury and agreed to plead guilty[6] to two federal felony counts, each with a maximum prison sentence of five years.

The Doctor admitted to engaging in a scheme with the owner of Pacific Hospital of Long Beach to refer patients to this hospital for spinal surgeries and other procedures in return for fees (kickbacks) which apparently totaled the sum of $5.2 million. The Doctor also admitted to referring patients to other doctors on the condition that they utilize the goods and services of Pacific Hospital of Long Beach.

The actual sentencing has been put off at least until November 2016 at the earliest, as stated in the plea agreement:

> Defendant further agrees to cooperate fully with the USAO, the Federal Bureau of Investigation, the United States Postal Inspection Service - Office of the Inspector General, the Internal Revenue Service, and, as directed by the USAO, any other federal, state, local, or foreign prosecuting, enforcement, administrative, or regulatory authority. This cooperation requires defendant to:

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[5] Ironically this report is referred to as the treating report and is admissible as evidence.

[6] The plea was entered into the record at a hearing on January 22, 2016. A copy of the transcript of this hearing (case number SACR NO. 15-00148-JLS) can be obtained from the court reporter at http://www.deborahdparker.com/

> a. Respond truthfully and completely to all questions that may be put to defendant, whether in interviews, before a grand jury, or at any trial or other court proceeding.
> b. Attend all meetings, grand jury sessions, trials or other proceedings at which defendant's presence is requested by the USAO or compelled by subpoena or court order.

The above is "prosecutor speak" to the fact that The Doctor may receive a reduced sentence by cooperating with authorities in their prosecution of other players in the scheme. While The Doctor is certainly a "big fish" in the workers' compensation system, the federal law enforcement agencies involved with the case are attempting to obtain evidence against other physicians and possibly non-physicians involved in workers' compensation fraud.

This may only be the tip of the iceberg as far as workers' comp prosecutions are concerned.

DISCLAIMER:

Aside from Kim, George and I, all characters of the Lobby Bar are fictitious, as is the storyline, and are products of my vivid and warped imagination.

The guilty pleas by The Doctor and other physicians, in my opinion, demonstrate that the freedom of the injured worker to select their own Primary Treating Physician for "treatment" is illusory and has not worked out as contemplated by the California legislature.

It may be time to go back and revisit this principle as the present system utilized to address the ultimate issue of permanent disability or impairment has not worked out as planned. A system in which the applicant's Primary Treating Physician only provides medical care to an injured worker and recommends temporary disability but doesn't make recommendation as to permanent disability may be the solution.

Now, if you'll excuse me loyal Lobby Bar Patron, I have to get back to my vacation on the sandy beaches of Kauai, a place where every cocktail waitress is breathtakingly beautiful. Picture me sipping Mai Tais at the Grand Hyatt, with Georgia on my mind. Georgia, George's cousin, tends bar at the Grand Hyatt in Kauai. Hard days of denying benefits aren't too far away, so you know I'll be enjoying the reprieve while it lasts.

Make mine a double, Georgia.

Aloha.

-Joe Truce