ANOTHER INSTALLMENT IN THE *GEORGE THE BARTENDER* SERIES

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RE: GEORGE THE BARTENDER AND THE EX PARTE DILEMMA II OR GIVING THE QME PROCESS ITS DUE[1]

FROM THE LOBBY BAR AT THE HYATT:

After a hard day denying benefits, I hurried to the Lobby Bar. My mouth was thirsty for my drink of choice, a Beefeater's martini, straight up with two olives, and my eyes hungered for the vision that is Kim, the Hyatt's breathtakingly beautiful cocktail waitress.[2]

Much to my chagrin Kim was nowhere to be found when I arrived. So, I placed an "ex parte" order with George. Although the term "ex parte" has been with the legal profession for years, it has just recently made a splash into the workers' compensation field with the creation of the Panel QME system, courtesy of Senate Bill 899. The term "Ex Parte" is from Latin meaning "from one party."

From the onset of the Agreed Medical Examiner system, the parties (defendant and applicant) have understood that it is frowned upon to have an ex parte communication with an AME.

In Southern California, letters to AMEs were traditionally boilerplate and vanilla in substance and would not be sent to the AME unless signed by both parties.

It is my understanding that in Northern California the AME procedure was slightly different as either party would send their own letter to the AME and this came to be known as the "advocacy letter."

This traditional landscape changed dramatically with the creation of Panel QMEs who are not agreed to by either party but are appointed to a three member QME Panel by the Administrative Director.[3]

Given this background and the Board's recent 2-1 panel decision in *Manuel Ferniza v. Rent A Center, Inc.; Specialty Risk Services*(ADJ1644999) filed on December 27, 2010, I knew that tonight would be viewed as a triumph by Ron Summers, George the Bartender's workers'

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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, lateral epicondylitis (tennis elbow), sustained from the repetitive serving of martinis to me. If there ever was an admitted industrial injury, this is it!

[2] For those of you that keep track of such statistics, a Beefeater's martini straight up is best served chilled, at 38° Fahrenheit.

[3] This system is somewhat similar to the old Independent Medical Examiner system (IME) which existed before 1990 in which the IME was placed on the IME list by the Medical Director and/or the Administrative Director.

compensation attorney, and Ron's sidekick, Dr. Nickelsberg, the ever devoted primary treating physician employed by Ron.[4]

Oh, how I wish I was wrong.

The absence of the breathtakingly beautiful Kim was noticeably filled by a boisterous conversation down at the end of the bar between George, Ron and Dr. Nickelsberg. George had rejoined them after preparing my drink.

As it turns out the dynamic duo were in fact celebrating over the Board panel decision in *Ferniza*.

In essence, this decision prohibits a defendant from sending an "advocacy letter" to a Panel QME setting forth the defendant's position unless agreed to by the applicant attorney.

In *Ferniza*, the Board analyzed Appeals Board Rule 35 (Cal. Code Regs., tit. 8, §35) entitled "Exchange of Information and Ex Parte Communications" and concluded as follows:

> Thus, pursuant to section 4062.3, both medical and nonmedical records are considered "information." We also construe "medical and nonmedical records" to encompass letters from attorneys that discuss medical and nonmedical information, particularly where the letter engages in advocacy.

The so-called "advocacy letter" in *Ferniza* was inflammatory as the Board summarized the defense attorney's position statements as follows:

> Both of these position statements were at least somewhat adversarial, e.g., complaining about internal, sleep, and psych complaints that "this Applicant has created out of a simple back injury" and stating that "the community is aware that the only way for many of the claims to be worth any money now is if the attorneys add on internal, psych and sleep claims."

After going over the history of the "advocacy letter" in my mind, I turned my attention back to the rather animated conversation going on between Ron, George and Dr. Nickelsberg.

George was apparently trying to memorize something that Ron had written down on a piece of paper equivalent to a "script."

Curiosity got the better of me and after buying the Dukes of Duplicity a couple rounds of cocktails I began to understand why Ron considered the Board's decision in *Ferniza* such a triumph.

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[4] A copy of the *Ferniza* case may be requested by e-mail.

Ron explained to me that his law practice was affected in a big way when the Panel QMEs actually heard "both sides" of the story.

He went on to tell me that George was memorizing a script of psychiatric and orthopedic complaints and his contentions as to how his employer "had done him wrong." George would recount this "script" to the Panel QMEs in internal medicine, orthopedics and psychiatry disguised as a "history."

Ron also said that this bit of theater would be taking place in the privacy of the examining room without fear of contradiction by George's employer.

Ron added that he planned to write up similar "scripts" for his other clients.

At this, I thought to myself that even though the defense counsel in *Ferniza* crossed the line in his zealous advocacy letter to the Panel QME, what is to prevent the injured worker, or those claiming to be injured, as similarly "crossing the line" in giving a history of the employer's misdeeds in the privacy of the examining room of the Panel QME?

Talk about an ex parte violation! What about the applicant's unfettered and unchecked ability to give any type of history, one-sided as it may be, to the evaluating Panel QME or AME?

I offer you, the loyal Lobby Bar patron, this "what if?" Let's say that the defense counsel in *Ferniza* after the objection by the applicant attorney *did not* send an advocacy letter to the Panel QME. Instead, he filed a Declaration of Readiness to Proceed to obtain an Order from the Workers' Compensation Judge allowing him to then send an advocacy letter to the Panel QME.

In this scenario the Workers' Compensation Judge would more than likely be guided by Workers' Compensation Appeals Board Rule 35(e)(Cal. Code Regs., tit. 8, §35(e)) which provides in relevant part as follows:

> In no event shall any party forward to the evaluator: (1) any medical/legal report which has been rejected by a party as untimely pursuant to Labor Code section 4062.5; (2) any evaluation or consulting report written by any physician other than a treating physician, the primary treating physician or secondary physician, or an evaluator through the medical-legal process under Labor Code sections 4060 through 4062, that addresses permanent impairment, permanent disability or apportionment under California workers' compensation laws, unless that physician's report has first been ruled admissible by a Workers' Compensation Administrative Law Judge; or (3) any medical report or record or <u>other information</u> or thing which has been stricken, or found inadequate or inadmissible by a Workers' Compensation Administrative Law Judge, or which otherwise has been deemed inadmissible to the evaluator as a matter of law. (emphasis added)

Therefore, nonmedical information can certainly be sent to the Panel QME and/or AME and a Workers' Compensation Judge would then be obliged to rule in accordance with Workers'

Compensation Appeals Board Rule 35(e)(Cal. Code Regs., tit. 8, §35(e)). Unless of course the reports and/or information "has been stricken, or found inadequate or inadmissible by a Workers' Compensation Administrative Law Judge, or which otherwise has been deemed inadmissible…as a matter of law."

Workers' Compensation Appeals Board Rule 35(f)(Cal. Code Regs., tit. 8, §35(f)) also deals with the situation in which the defendant wishes to send surveillance films to the Panel QME.

If the applicant's objection is based on authenticity, Workers' Compensation Appeals Board Rule 35(f)(Cal. Code Regs., tit. 8, §35(f)) puts the burden on the applicant and/or the applicant's attorney as follows: "Either party may use discovery to establish the accuracy or authenticity of non-medical records or information prior to the evaluation."

The so-called advocacy letters in the *Ferniza* case were inflammatory to be sure and in the long run may well prejudice the Panel QME against the defendant, not the applicant.

ONE PROPOSED SOLUTION:

As just hypothesized it would seem that Workers' Compensation Appeals Board Rule 35(e)(Cal. Code Regs., tit. 8, §35(e)) makes it clear that a Workers' Compensation Judge will approve sending nonmedical information, including an advocacy letter (even one as inflammatory as in the *Ferniza* case) should either side request a hearing on this specific issue.

However, the only thing accomplished by requesting a hearing at our overworked and understaffed Workers' Compensation Appeals Board offices would be a lengthy delay in resolution of the case. Of course, this flies in the face of the constitutional mandate of a system in which expeditious and unencumbered proceedings are favored.

We must recognize that for years the most glaring ex parte statement to an examining and/or treating physician has been the history given by the applicant in the privacy of the physician's office without the possibility of rebuttal from the employer.

The majority in *Ferniza* recognized that Labor Code §4062.3 "is somewhat ambiguous, and the law interpreting it is unsettled." The dissenting commissioner saw no problem in allowing the defendant to send its advocacy letter to the Panel QME advising as to defendant's position in advance of the examination.

Both sides should be able to send their advocacy letters to the panel QME setting forth the position of their respective clients and all factual disputes should be resolved by a WCJ. That's what due process and procedural justice is all about.

DISCLAIMER:

All characters at the Lobby Bar except for George, Kim and I are imaginary and a product of my warped imagination.

However, the longstanding issue of giving the applicant an unchecked opportunity to tell his and/or her "side of the story" to the examining doctor is not. Certainly the employer is not in the actual examining room at the time of exam offering a rebuttal, as the rebuttal can only come by a letter, in advance of the examination, by the employer's representative setting forth the position statement of the defendant.

Through the years credible evaluators, acting as QMEs or AMEs, when faced with an issue of fact, advise that the resolution of the factual issues is a job for the Trier of Fact (in this instance a Workers' Compensation Judge), not a doctor.

A system in which only the applicant can make an ex parte statement to the Panel QME is not fair and it certainly isn't right.

Though I can't say I count this amongst my worries as 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 Tais 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