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[1], THE "LIST" AND THE COURT OF APPEAL DECISION IN *GUZMAN* OR WILL YOU BE LEFT STANDING WHEN THE MUSIC STOPS?

FROM THE LOBBY BAR AT THE HYATT:

After a hard day denying benefits I arrived at the lobby bar only to be confronted by an ongoing celebration over the long awaited decision by the Court of Appeal in *Milpitas Unified School District v. Workers' Compensation Appeals Board and Joyce Guzman* (ADJJ3341185)[2] filed on August 19, 2010. A beaming Ron Summers, George the Bartender's workers' compensation attorney, followed by George's treating physicians, Dr. Nicklesberg and Dr. Ratbar, had created a conga line and were snaking their way around the bar, picking up patrons along the way.

To clear my nausea I quickly ordered my cocktail of choice, a Beefeater's martini, straight up with two olives, from Kim, the Hyatt's breathtakingly beautiful cocktail waitress.

Finally, when an out of breath Ron Summers joined me at the bar, I asked him to tell me why he thought the *Guzman* decision was such a victory for applicant attorneys and their doctors.

An elated Ron told me that it was quite clear that the Court in *Guzman* had given doctors free reign in determining permanent disability by using their "judgment" in place of the black letter mandate for permanent impairment as contained in the *AMA Guides, 5th Edition*.

After Ron bought me another round, I told him that the Court of Appeal in *Guzman* simply reaffirmed the Board's *en banc* decision in *Almaraz/Guzman II* by holding that the AMA Guides were prima facie evidence as to permanent impairment and that physicians must demonstrate good cause to deviate from a specific impairment rating as defined by the Guides.

Before Ron could respond Dr. Nicklesberg and Dr. Ratbar arrived at the bar, brimming with excitement.

Dr. Nicklesberg had just finished an animated conversation on his cell phone and told me that he had received a call from an official of the California Applicants' Attorney Association (CAAA) advising him that both he and Dr. Ratbar had made the "list."

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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] Anyone wishing a copy of the Court of Appeal decision in *Guzman* should request one by email.

With a quizzical look I asked Dr. Nicklesberg what he meant by the "list."

Before he could respond, Dr. Ratbar told me that the "list" was a roster of physicians who applicant attorneys would agree to utilize as Agreed Medical Examiners. He added that the "list" now includes physicians who previously reported as Qualified Medical Examiners on behalf of applicants and defendants.

Dr. Nicklesberg then proceeded to give me the history of the "list." He explained that with the creation of the panel QME system, defense and applicant Qualified Medical Examiners were basically out of business unless they were selected as treating physicians, Agreed Medical Examiners or panel Qualified Medical Examiners.

While the good doctor continued with his history lesson I went over in my mind some of the issues created by the SB 899 reform.

Aside from the transformation of Labor Code §4660 basing the calculation of permanent disability on the AMA Guides, the panel Qualified Medical Examiner system has basically put defense and applicant Qualified Medical Examiners out of business.

This problem is more acute on the defense side as applicant Qualified Medical Examiners can still write QME reports but disguise these reports by calling themselves "primary" or "secondary" treating physicians.

The traditional defense Qualified Medical Examiners are not so fortunate. The only way that this group of physicians can stay in the game is to either obtain an appointment as a panel Qualified Medical Examiner or become an Agreed Medical Examiner.

However, to become an Agreed Medical Examiner you must first be on the "list."

Clearly though, an Agreed Medical Examiner can only be an Agreed Medical Examiner if the physician is agreed to by both parties.

For years the defense industry (adjusters, defense attorneys, etc.) have bought into the Agreed Medical Examiner system.

We on the defense accept the fact that a great many applicants will sustain permanent disability and we will not eliminate a physician as an Agreed Medical Examiner simply because an AME report awards the applicant a certain percentage of permanent disability so long as the report is logical, objective and does not stray too far afield from the rating manual.

Prior to SB 899, Labor Code §4660 mandated that permanent disability would be determined by the diminished ability of an applicant to compete in open labor market.

In litigated cases every low back injury produced some disability. Even an applicant that had no subjective complaints whatsoever and no objective findings of disability could still be given a prophylactic work restriction, which indicated that even though the applicant has no problem now they may have one in the future should they continue to perform certain activities, i.e. lifting, bending, stooping, etc.

By reason of a prophylactic work restriction, which was a valid indication of permanent disability even without actual disability, everyone received a permanent disability award.

Who among us is not precluded from heavy lifting on a repetitive basis?

However, our system changed dramatically with the introduction of the AMA Guides. The Guides mandate that unless actual impairment and/or disability is established by physical examination and/or diagnostic testing a zero permanent disability rating would result.

Under the old system every applicant attorney in an admitted low back case was assured of an award of permanent disability. Not so under the AMA Guides. Low back sprains with no objective signs of disability fall into DRE I or zero PD. In *Guzman* the Court emphasized that Labor Code §4660 as amended by SB 899 contemplated that a physician should exercise his discretion in cases involving serious medical conditions or injuries in applying the AMA Guides.

However, our day to day cases under the Guides involve low back or neck sprains that would normally fit into DRE I.

Believe me that in crafting its decision in *Guzman* the Court of Appeal did not contemplate that these rather minor injuries would produce cries of "Almaraz/Guzman" and "we certainly cannot mechanically apply the AMA Guides to a simple back sprain."

In these cases we find ourselves being pulled into other chapters of the Guides with allegations of a sleep disorder, sexual dysfunction and that classic hit, psychiatric disability.

Why?

It's because we can't have an injury without a corresponding permanent disability award.

Therefore, an Agreed Medical Examiner on the "list" will no longer be on the "list" if he/she issues an AME report which results in a finding of no disability.

As applicant attorney fees are usually calculated as a percentage of permanent disability a zero PD finding results in no attorney fee.

My reverie was rudely interrupted by Ron's distinct voice and my nausea returned as I was thrust back into the lively conversation at the bar. Ron was telling me that because of the Court of Appeal decision in *Guzman* he was going to file a continuing trauma application on behalf of

George the Bartender as pursuant to the Court's decision in *Guzman*. George would receive an award of permanent disability.

A red flag went up in my mind and I told Ron to hold the phone as George had told me that all of his current diagnostic testing was negative and that he had no subjective complaints of pain and/or discomfort.

With a smile Ron told me that this makes no difference now as he was sure that the defense attorney for the Hyatt would agree to an Agreed Medical Examiner who is on the "list." Since the Agreed Medical Examiner wanted to remain on the "list" a report would be issued awarding George a certain amount of permanent disability.

Ron confided to me that all AMEs' on the "list" were required to have an *Almaraz/Guzman II* caption in their reports to discuss why the case qualifies for a higher rating than contemplated by the Guides. Ron told me that he would prep George to tell his selected AME that he had a sleep disorder, sexual dysfunction and was depressed about his injury, which would put him into three more chapters of the Guides.

After hearing Ron, Dr. Nicklesberg and Dr. Ratbar go on and on about the Court's decision in *Guzman*, I quickly ordered another martini from Kim. In gazing longingly at Kim I thought to myself how it was possible that George had a sexual dysfunction if he got to look at Kim every night, which also made me wonder how he could be suffering from depression.

Despite Ron's interpretation of *Guzman*, neither the Court nor the Board has let the genie out of the bottle with respect to the determination of permanent disability pursuant to Labor Code §4660 and the AMA Guides.

In point of fact, both the Board's *en banc* decision in *Almaraz/Guzman II* and the Court's opinion in *Guzman* are well reasoned, articulate and logical.

The amendment to Labor Code §4060 by way of SB 899 did not create an inflexible system of calculating permanent disability. Instead it created a system in which the objective standards as set forth in the AMA Guides would constitute prima facie evidence as to the existence of permanent disability.

In *Guzman* the Court of Appeal went to great lengths to point out that neither physicians nor the trier of fact were free to roam around in the AMA Guides (metaphorically speaking) to produce a higher permanent disability rating for an injured employee. Instead they mandated that permanent disability and/or impairment pursuant to the appropriate chapter in the AMA Guides would be utilized unless good cause to the contrary is shown.

The Court and the Board contemplated that deviation from a chapter of the Guides may well be appropriate when analyzing a complex injury or an injury resulting in disability that is not described by the Guide.

Certainly a low back sprain does not qualify for such a deviation, unless an AME wants to remain on the “list.” In such a case a permanent disability rating which deviates from the Guides will not constitute substantial evidence and will be overturned.

The good news is that the Court’s decision in *Guzman* has not deviated from the intent of Labor Code §4660 as amended by SB 899.

The bad news is that attorneys such as Ron will attempt to claim that every case constitutes an *Almaraz/Guzman II* exception creating needless litigation on cases that ultimately will be correctly rated pursuant to the Guides.

THE BLAME GAME AND THE ONGOING REFORM OF OUR SYSTEM

I freely confess that I have been a card carrying member of the California Workers’ Compensation Defense Attorneys’ Association for years and have been involved with the ongoing game of reforming our system.

Many lobbying groups, or players, are involved including applicant attorneys, defense attorneys, doctors, lien claimants, employers, insurance carriers and labor groups.

In negotiating reforms my personal opinion is that the “players” that should shape any reform are the individuals that receive workers’ compensation benefits (applicants/labor) and those that pay the benefits (employers/carriers).

The rest of us are simply cottage industries, or vendors (a word I hate), as our business depends on the system. When there is any change we are understandably concerned about our bottom line as we all want to stay in the game.

In any benefit system, such as welfare, food stamps, Social Security, etc., there are always problems involving the delivery of benefits, as there are those who will argue that benefits are too high, too low, too hard to get, too easy to get, etc.

All of us who go to Sacramento to lobby for workers’ compensation reform are concerned that our businesses will suffer unless a certain reform is passed or defeated.

With regard to the agreed upon ills of the system we unanimously agree that the fault lies with the “other guy.”

The ongoing workers’ compensation reform reminds me of the kids’game called musical chairs.

It starts off with more players than chairs. The music starts as we all dance around a circle of chairs, then suddenly stops and we scurry to grab a seat. The player left standing doesn’t have a chair and is out of the game. Then one of the chairs is removed and the game continues.

With the reform that went into effect on January 1, 2004, the music stopped and the vocational rehabilitation "player" was left without a "chair" and the vocational rehabilitation vendors were out of the game. Likewise for the defense and applicant QME's after SB 899 was passed.

The next time the music stops the AME system may be left without a "chair" as this system is flawed and in need of repair.

Perhaps "the list" should be controlled by the Administrative Director, not the parties, and AME's could abide by the same time limits as panel QME's so we no longer have the problem of an AME setting an exam more than a year out. Or maybe panel QME's should be paid the same as AME's.

Finally, a panel QME report should command the same presumption of correctness as the AME report, as both doctors have the prohibition of ex parte contact.

With SB 899 and the Board's decision in *Almarez/Guzman II* and the Court's decision in *Guzman* maybe the music is about to stop.

DISCLAIMER:

Aside from me, Kim and George, all characters at the lobby bar are imaginary. The story line is also fictional, as is my reference to the California Applicants' Attorney Association and their AME "list."

However, the dramatic change in our QME system is fact and AME "lists" abound and membership on the lists is coveted like a membership at a premier country club.

The framers of SB 899 created the panel QME system where membership is determined by the Administrative Director.

We were told right after SB 899 became law that one of the purposes of the panel QME system was to ensure that the selected QME would not feel as though he was "hired" by one of the parties.

Under this system we receive a panel of three QME's, most often consisting of a former defense doctor, applicant doctor or an "I don't know" doctor. These doctors must abide by strict guidelines set forth by the Administrative Director to set exams, depositions and issue reports. On the other hand a case in which an Agreed Medical Examiner is utilized has no time limits for setting exams, taking depositions or issuing reports. Let's face it, as long as a case remains open someone is billing the carrier/employer.

As panel QME's are not selected by the parties our experience is that their reports are straightforward and objective. As defense attorneys what more could we ask for?

An AME, on the other hand, must please both parties to remain on the “list.”

For defendants it would appear that the panel QME system is the only game in town. For those using Agreed Medical Examiners you might want to bring your own chair.

Make mine a double, George

-Joe Truce