

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 AND THE “WEIGHT” OF THE EVIDENCE

FROM THE LOBBY BAR AT THE HYATT:

After a hard day of denying benefits, I arrived at the lobby bar, looking forward not only to my Beefeater martini straight-up with two olives, but also to a dinner consisting of chicken wings and quesadillas.

As today was Thursday, I knew that the lobby bar put on a spread of complimentary finger food and this was going to be my dinner.

Therefore, I was greatly surprised to find that the lobby bar “**buffet**” had been replaced with carrot sticks, celery stalks, cauliflower and a low-cal dip.

I was even more surprised when Kim, the Hyatt’s breathtakingly beautiful cocktail waitress, told me that the “**healthy snacks**” were sponsored by none other than George’s workers’ compensation attorney, Ron Summers, and Ron’s traveling treating physicians, Dr. Nickelsberg and Dr. Ratbar.

I then looked down the bar and spotted Ron and his physicians putting the finishing touches on a sign which proclaimed: “Eat right, eat healthy.”

As I had always considered Ron and his docs to be what I refer to as the “unholy threesome,” I certainly wanted to know what was behind their motivation to improve all of our lives.

However, I did not receive the full story until I had set up Ron and his doctors with a second round of cocktails.

Ron explained that he, Dr. Ratbar and Dr. Nickelsberg had formed a corporation called “Live Right and Eat Right” and this new dietetic corporation was born as a result of the Board’s panel decision in **Andrews vs. Freezer Queen Foods, Incorporated**¹ (2007), Cal. Work Comp. PD Lexis 167.

In **Andrews**, the applicant was an obese quality control technician for Freezer Queen Foods, Incorporated who sustained an admitted cumulative trauma injury to her knees.

The Agreed Medical Examiner (AME) apportioned fifty percent of the applicant’s overall knee disability to her weight, substantiating his opinion by referring to the medical record. The medical record indicated that the applicant’s weight was causing knee pain. The AME also advised that the applicant has osteoarthritis in both knees.

As the Appeals Board and the appellate courts of the state had routinely denied apportionment based on obesity, the applicant’s attorney filed a Petition for Reconsideration. In a lengthy decision the Board affirmed the decision of the workers’ compensation judge (WCJ) and relied on the Court of Appeal decision in **N. L. Yeager vs. WCAB (Gatten)** (2006) 145 Cal. App. 4th 922, and also on the Board’s en banc decision in **Escobedo**. The Board held that based on the medical record it was “overwhelmingly” medically probable that the applicant’s weight was a factor in relationship to her knee problems.

¹ Anyone wishing a copy of the **Andrews** panel decision should reply by email

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At this point Dr. Nickelsberg told me that as a primary treating physician, he **now felt** that obesity was the cause of all evil and that his new corporation and partnership with Ron and Dr. Ratbar was a medical benefit pursuant to Labor Code §4600 to all of Ron’s clients, as counseling and treating obese injured workers was both reasonable and necessary medical treatment.

Dr. Ratbar added that the “healthy finger foods” that they sponsored for the Hyatt buffet are now available in all of their clinics at an extremely reasonable fee schedule price.

Upon listening to Ron, Dr. Nickelsberg and Dr. Ratbar brag about their new dietetic venture, I reflected that prior to the implementation of SB 899 (specifically Labor Code §4663), apportionment to obesity was unthinkable.

The fact that the workers compensation community has ignored the health problems caused by obesity is just another instance of the Hans Christian Anderson fable, “The Emperor’s New Clothes.”²

In this fable the emperor retained two tailors to outfit him in royal finery for a big parade in his kingdom. Of course, the tailors outfitted the king in imaginary clothes but managed to convince the king and his attendants that the clothes were real.

During the parade, the assembled onlookers pretended they were blind and applauded the emperor’s new clothes. It was only when a child exclaimed, “**The emperor is naked,**” that the assembled multitude recognized the reality that the emperor truly had no clothes.

Similarly we have turned a blind eye to the fact that obesity is one of the major health concerns in our nation.

One of the major causes of orthopedic and internal problems (diabetes, hypertension, etc.) is obesity and this has been crystal clear for years.

The only forum in which this was denied was the California Workers’ Compensation System.

On one hand, the employer would not receive apportionment to the applicant’s obesity when there was no doubt that said obesity contributed to the worker’s disability. On the other hand, while we denied that obesity was a contributing factor, the courts were quick to mandate that employers provide weight loss clinics or programs to injured workers who were overweight.

With the advent of the new and improved apportionment law, Lady Justice is no longer blind and recognizes that obesity is certainly a contributing factor to both internal and orthopedic disabilities.

Although the Andrews³ decision cannot be cited as authority to either the Board or the appellate courts, as a panel decision it can be admitted into evidence pursuant to Labor Code §5703(d).

² Anyone wishing a complete copy of the Hans Christian Anderson story “The Emperor’s New Clothes” should reply by email.

³ Labor Code §5703(g) provides as follows “The appeals board may receive as evidence...prior decisions of the appeals board upon similar issues.”

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DISCLAIMER:

My comments on the issue of “**obesity**” come under the heading of: “I should talk.” Although **Andrews** has not been designated as a significant panel decision, it is certainly a significant decision for the defense, and in a case in which we are dealing with an overweight or obese injured worker, the examining physician should certainly be asked (by letter, interrogatory or deposition) as to whether or not an injured worker’s obesity contributes to his overall level of permanent disability and/or impairment.

Make mine a double, George, and add a few carrot sticks.

WJT/lb