

ANOTHER INSTALLMENT IN THE *GEORGE THE BARTENDER* SERIES

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RE: GEORGE THE BARTENDER AND THE REHAB PEOPLE – WE'RE BAAACK, OR ARE THEY?

FROM THE LOBBY BAR AT THE HYATT:

The last thing I remember was settling in at the lobby bar at the Hyatt and ordering my usual Beefeater's martini straight up with two olives.

My memory after that is somewhat hazy, as the next thing I recall is hearing Kim, the Hyatt's breathtakingly beautiful cocktail waitress, talking to me in a rather loud and worried voice: "Wake up, Joe, wake up! Are you alright?"

I straightened up and realized that I was still in the lobby bar and told a very concerned Kim that I was okay.

I ordered another drink and told Kim that I must have fallen asleep and had a nightmare, where I walked into the lobby bar and was greeted with the spectacle of half a dozen former Vocational Rehabilitation Counselors doing their version of the Bunny Hop, with Larry and Lenny Lien, owners of the 8600 Group, leading the way.

After serving me my martini Kim told me that was no dream I had, as George the Bartender's worker's comp. attorney, Ron Summers, had invited not only George's treating doctors, Dr. Nickelsberg and Dr. Ratbar, to the bar for a celebration, but also six out-of-work rehabilitation counselors, as well as the Lien brothers, Larry and Lenny.

As the memories came flooding back I realized that my nightmare had, in fact, been a reality.

In the midst of the celebration I recall that Ron had told me that the celebration was over the Board's en banc decision in **Costas vs. Hardy Diagnostics**¹, in which the Board advised that applicants' attorneys would be able to submit rebuttal evidence to the new permanent disability Rating Schedule incorporating the AMA Guides.

Ron happily told me that as soon as the **Costas** decision was out he arranged for a celebration party at the lobby bar and had invited six previously out-of-work Rehabilitation Consultants.

I looked at Kim and indicated that I was still not sure why I had actually passed out at the bar. Kim looked over at George, smiled, and then told me that as soon as the music started and the six rehab counselors started doing the bunny hop I started drinking heavily and my last words were, "What a ghastly sight!"

As I was now feeling better I told George and Kim that I actually recognized some of the rehabilitation consultants as so-called "expert witnesses" who had testified on my cases on the so-called **Lebouef** issue.

In the **Lebouef** case the Supreme Court had held that under the prior version of Labor Code §4660 evidence, other than medical reports and/or opinions, could be presented as to the applicant's ability to compete in the

¹ Anyone wishing a copy of Costas case should request same by e-mail

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open labor market and such evidence could actually overrule the Rating Schedule, which was only prima facie evidence and therefore could be rebutted by other more compelling evidence.

Although the rehabilitation counselors had left the lobby bar by the time I regained consciousness, I noticed that Ron and the Lien brothers were still in conference down at the end of the bar.

In interrupting Ron’s conference I wanted to know why Ron was celebrating, as the new and improved Labor Code §4660, amended by Senate Bill 889, did away with the **Lebouef** issue.

Ron happily explained to me that although the Board in **Costas** had upheld the new Rating Schedule based on the AMA Guides and the Rand Corporation study, the Board also indicated that the new Rating Schedule was only prima facie evidence and could be rebutted by other evidence.

Moreover, the Board held that the defendant carrier and/or employer could be held liable for reimbursing the applicant’s experts.

Lenny Lien then chimed in that his company, the 8600 Group, had made arrangements with Ron to collect the expert fees of Ron’s experts (the bunny hopping rehab vendors) to file liens for reimbursement of said experts at the expense of the defendant².

I was now fully awake and, after ordering my third martini from Kim, advised Ron not to invest too heavily in his “rehabilitation experts” as their testimony would probably be inadmissible and their liens and/or expert fees disallowed.

Ron very confidently advised me that his rehabilitation experts already interviewed most of his clients that had sustained work injuries on or after January 1, 2005 and are ready to testify that Ron’s clients have suffered a significant wage loss which certainly rebuts the future earning capacity (**FEC**) component of the new Rating Schedule. “And I am ready to collect their fees by filing liens,” added Larry Lien.

After making sure I was a safe distance from Ron I advised him that the type of testimony he was referring to would be irrelevant, as California simply is not a “wage loss” state.

Ron disagreed and pointed to Labor Code §4660, which mandates that in determining the permanent impairment of an injured worker account shall be taken of his “diminished earning capacity.”

Ron went on to note that the testimony of his rehabilitation counselors would establish the “**diminished earning capacity**” of his clients pursuant to the mandate of Labor Code §4660.

I told Ron that he, like other applicant attorneys, had not read the entire section, as subsection (b)(2) defined what was meant by taking into account “future earning capacity.”

² It is my understanding that the so called expert witness fees of applicants’ attorneys’ “rehabilitation experts” are running between \$4000 and \$5000.

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Subsection (b)(2) clearly states that the “diminished earning capacity” contemplated is not with respect to a specific injured worker (such as Ron’s clients) but contemplates the “diminished earning capacity” of similarly situated workers with the same type of injury.

I explained to Ron that in **Costas** the so-called rebuttal evidence by vocational experts testifying on behalf of the applicant consisted of testimony as to the applicant’s wage loss in that **particular case** and in its en banc decision the Board ruled that this testimony was not sufficient to overcome either the future incapacity component of the new Rating Schedule, not to mention the clear language of Labor Code §4660 (b)(2).

Turning to Larry Lien, I advised that although the Board in **Costas** had ruled the Rating Schedule was only prima facie evidence and could be rebutted by evidence submitted to rebut the **FEC** component of the Rating Schedule, evidence as to wage loss of a specific worker not only did not suffice as credible rebuttal evidence but the trial judge in **Costas**, when the case was returned to him from the Board for evaluation of the fees of applicant’s “expert” had denied reimbursement on the basis that their testimony was neither reasonable, necessary or relevant.

I advised a crestfallen Larry Lien that the Board in all probability would embrace the decision of the trial judge and would probably issue **Costas II** denying reimbursement to applicants’ experts.

The frontal attack by the applicants’ bar on Labor Code §4660 and the new and improved Rating Schedule has come in two parts:

1. In **Costas I**, the applicants’ attorneys claimed that Vocational Rehabilitation experts can rebut the Rating Schedule and specifically the **FEC** component. This argument has been shot down by the Board as Labor Code §4660 (b)(2) clearly mandates that California is not a wage loss state and the future earning capacity component of the Rating Schedule is not based on the loss of earning capacity of any specific injured worker but on similarly situated applicants in the labor market sustaining a like-type injury. We anticipate therefore that there will be no reimbursement to vocational rehabilitation experts testifying as to the wage loss of a specific employee and the only expert testimony that would be relevant on this issue would be expert testimony as to the loss of earning capacity of all workers similarly situated with a specific type of injury. This does not seem very likely as the Rand study addressing this very issue is far from perfect and it cost in excess of \$20 million.
2. The second and more recent attack by the applicants’ attorneys concerns the allegation that the future earnings capacity component of the new Rating Schedule is not representative of what it purports to show as said **FEC** component is based on an imperfect Rand study. The Board has recently addressed this allegation in its en banc decision in **Scott Bougher**. In **Bougher** the trial judge had found that the Rand study was fatally flawed as it did not address the future earning capacity of similarly situated workers with like injuries and therefore the permanent disability rating schedule based on the Rand Study must also fail.

In reversing the trial judge in **Bougher** the Board did not hold or say that the Rand study was perfect but did hold that the applicant had not submitted sufficient evidence to show that the

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Rules and Regulations of the Administrative Director interpreting Labor Code §4660 were not arbitrary nor capricious which is the legal standard for overturning an Administrative Rule.³

Although there has been a flood of litigation over the **FEC** component of the new Rating Schedule (with more to come), it seems pretty clear that the legislature never envisioned a wage loss state and certainly did not contemplate that the loss of wages for one injured worker would rebut the clear mandate of Labor Code §4660.

The only study that even comes close to documenting the diminished earning capacity of similarly situated injured workers with the same type of injury is the Rand Corporation study and should an applicant’s attorney want to spend \$20 million plus as the Rand Corporation did, I say, “Go for it!”

DISCLAIMER:

With the image coming back to me of six rehabilitation counselors doing the bunny hop, I turned to George and said, “Make mine a double, George.”

WJT/jal

³ In reading this decision one appreciates the enormous powers of State agencies in promulgating Rules and Regulations interpreting laws passed by the State legislature. In years past I was incensed at Rules and Regulations promulgated by the Rehabilitation Bureau (subsequently called the Rehabilitation Unit) in interpreting the legislative mandate of Labor Code §139.5. “Talk about arbitrary and capricious!”