

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 CONTEMPLATES THE RIGHTS OF A NON-SIGNING PARTY TO A COMPROMISE AND RELEASE AGREEMENT *OR GOOD TIDINGS I BRING!*¹

FROM THE LOBBY BAR AT THE HYATT

Twas one week before Christmas and all through the Lobby Bar not a creature was stirring, save for three men yelling at each other. I was nestled all snug in my customary seat, scratching my head, I found myself thinking back to the beginning of my day with visions of Kim and Beefeater's martinis dancing in my head, and how peaceful this night would be.

I had merrily made my way to the Lobby Bar after another long day of denying benefits and received my Beefeater's martini straight up with two olives upon entering the bar² from Kim, the Hyatt's breathtakingly beautiful cocktail waitress. This is when the clatter arose.

As it turns out Ron Summers, George the Bartender's workers' compensation attorney, and Frank Falls, noted defense attorney, flanked by his primary client, Pat Pennipincher, claims manager for Integrity Insurance Company, were "negotiating" (as I would learn later) at the other end of the bar.

In order to bring some semblance of calm to the Lobby Bar, I bought a round of cocktails for the angry trio and joined them.

Frank explained to me that they were reviewing the pros and cons of a settlement of a continuing trauma case filed by Ron for the period of January 1, 2007 to January 1, 2008. The injury was an admitted injury to the applicant's low back.

Pat broke in to indicate that the Integrity Insurance Company had 10% of the coverage (at the beginning of the continuing trauma case) and the remaining 90% was the responsibility of Potter Insurance LLC. As a result of this, Potter Insurance LLC provided disability benefits to the applicant, including ongoing medical care.

Frank said that they injury had resulted in multiple surgeries and fusions and the applicant was now on pain medication.

Pat then chimed in to add that the applicant's primary treating physician was a specialist in pain management and had implanted an infusion pump in the applicant, which was refilled with a

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.

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cocktail of pain medication every month at the cost of about \$10,000 per month. As the applicant was only 30 years old, the cost of future medical was going to be phenomenal.

I was bewildered as to why Pat seemed so anxious since 90% of the cost of future medical would be assumed by Potter Insurance LLC and not by Integrity Insurance Company.

At this point, Ron smiled. He told me that at the Mandatory Settlement Conference he had elected against Potter Insurance LLC and therefore, as a matter of law pursuant to Labor Code §5500.5, the Integrity Insurance Company would be barred from participating in the litigation.

I knew that this was a correct statement of the law as “the elected out carrier” cannot participate at Trial or any other proceedings pursuant to the clear wording of Labor Code §5500.5. Ron told me he settled the entire case with Potter Insurance LLC for just \$50,000, which to me seemed like a very small amount for a case involving multiple back surgeries and the extraordinary cost of future medical treatment.

I told Frank and Pat that their only potential liability would be to Potter Insurance LLC when they filed a Petition for Contribution against the Integrity Insurance Company.

Ron, his eyes how they twinkled, advised that since the Integrity Insurance Company had not participated in the Compromise and Release Agreement they were considered non-signing parties so they still had liability to Ron’s client for 100% of future medical care.

I asked Frank to give me a copy of the Compromise and Release Agreement to look over. I immediately noted that the Compromise and Release covered the entire period of the claimed continuing trauma claim from January 1, 2007 to January 1, 2008.

At this point, a big grin spread over my face and I reached into my trusty briefcase and pulled out the recent panel decision of the Board on the case of *Rafael Rodriguez v. Sweet Temptations U.S.A., Inc.* (ADJ7968587) filed on August 7, 2015.³

I gave copies to Ron, Pat and Frank. I advised the trio that in *Rodriguez* the applicant’s attorney, after settlement with a co-defendant in regard to a continuing trauma case, went after the non-signing party claiming that the insurance carrier that did not participate in the Compromise and Release Agreement now had liability for their *pro rata* share of liability.

In affirming the decision of the Workers’ Compensation Judge (WCJ) the Board found in relevant part as follows:

Because the C&R listed the entire alleged cumulative injury period and released all claims for future medical treatment, we conclude that, in view of Labor Code

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 *Rodriguez* can be obtained by email request.

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section 5005, the order approving the C&R constitutes a bar to liability against CNA for medical treatment. Accordingly, we agree with the WCJ, as stated in his Report, that the C&R at issue in this Petition resolved the entire period of applicant's claimed cumulative injury claim, and therefore, there is no period of exposure not released by the C&R for which applicant can now seek additional recovery from CNA.

The Board further noted:

Double recovery is not allowed under workers' compensation law, and that a release of liability in a compromise and release is an affirmative defense that may be asserted by defendants that were not parties to the compromise and release.

Ron looked as if Santa had rode up to his house and dropped off a large crate of coal. Frank and Pat, on the other hand, were elated and each bought a round of drinks for me. Frank told Pat that on the basis of the *Rodriguez* case he would now file a Petition for Dismissal of Ron's claim.

My drinks delivered, Frank saw this as an opportunity to ask for further assistance in another case being handled by his office. Being full of the Christmas spirit, and the proximity of two free Beefeater's martinis, I decided to oblige him.

In this case, the applicant's attorney had made the decision to settle one-half of the continuing trauma or 50% of the injury before closing the period covered by Bailey Brothers Insurance Inc. and in doing so leaving the period against Frank's client, Marley & Marley Corporation, open.

Frank told me that in light of the notable decision in *Granado*⁴, even if his client had only 1% liability for the continuing trauma case, his client would still be liable for 100% of the future medical.

Not so, I told Frank and I recommended that at the Mandatory Settlement Conference he should be sure to raise Labor Code §5005. I pointed out to Frank that this section would give his client credit for any portion of the continuous trauma period settled, which in this case would be 50% of any medical treatment.

Labor Code §5005 provides in relevant part as follows:

In any case where a compromise and release agreement of a portion of a claim has been made and approved, the employee may elect to proceed as provided in Section 5500.5 against any one or more of the remaining employers, or against an employer for that portion of his exposure not so released; in any such proceeding after election following compromise and release, that portion of liability

⁴ I am of course referring to the oldie but a goody, *Granado v. Workmen's Comp. App. Bd.* (1968) 69 Cal. 2d 399, 405-406 [71 Cal. Rptr. 678, 445 P.2d 294]. [68 Cal. App. 3d 535]. A copy of *Granado* can be obtained by email request.

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attributable to the portion or portions of the exposure so released shall be assessed and deducted from the liability of the remaining defendant or defendants, but any such defendant shall receive no credit for any moneys paid by way of compromise and release in excess of the liability actually assessed against the released employments and the employee shall not receive any further benefits from the released employments for any liability assessed to them above what was paid by way of compromise and release.

I explained to Frank that since the applicant had settled 50% of the injury, Labor Code §5005 would give Frank credit for one-half of every medical modality. For example, if the applicant bought a one-dollar bottle of aspirin, Frank's client would only be liable for \$0.50.

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.

In this day and age an actual election against a defendant in a continuing trauma case is rare. It was quite common when I started practicing workers' compensation law in 1973.

At that time, there was no limitation on continuing trauma cases. It was not uncommon for continuing trauma cases to span the entire period of the applicant's employment – sometimes 30 or 40 years.

Since everyone was joined it was not uncommon to have a room full of employers and their defense attorneys when appearing at the WCAB.

Smart applicant attorneys would elect against the weakest link (which usually meant that employer or insurance carrier that had not really prepared their case).

Labor Code §5005 (as opposed to Labor Code §5500.5) was the best friend of defendants in those days because applicant attorneys did not want to settle a case piecemeal in light of the devastating effects of Labor Code §5005.

From all of us at the Lobby Bar, have a safe and happy holiday. And may all your martinis be doubles.

-Joe Truce