ANOTHER INSTALLMENT IN THE *GEORGE THE BARTENDER* SERIES

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RE: FIVE YEARS OR FOREVER, OR DOES THE "T" IN T.T.D. REALLY MEAN TEMPORARY?

FROM THE LOBBY BAR AT THE HYATT:

George the Bartender was laughing, telling stories and serving martinis when a "black cloud" walked in.

The "black cloud" was actually over the head of Ron Summers, George's workers' compensation attorney.

Ron was fuming and kept repeating, "He can't do this!"

Although my drink of choice as a defense attorney is a Beefeater martini, straight-up with two olives, I knew that Ron, as an applicant's attorney, was in the white wine set. So after ordering a glass of Chardonnay, Ron proceeded to tell me the grueling story of his day at the Board.

Ron's client had sustained an admitted industrial injury to his low back on September 10, 1998, for which benefits were provided, including total temporary disability benefits. The applicant was found to be permanent and stationary in the year 2000, while still in pro per. Ron's client refused to sign any settlement papers and the case was never concluded by way of Compromise and Release Agreement, or even by way of a Stipulated Findings and Award, leaving medical open.

However, in 2003, the applicant's primary treating physician recommended lower back surgery and the defendant's insurance carrier, while authorizing the surgery, refused to authorize temporary disability benefits. This refusal to authorize TTD drove the applicant into the waiting arms of Ron, who gleefully filed an Application for Adjudication of Claim with the Board, as well as a Request for Expedited Hearing on the issue of the applicant's entitlement to temporary disability.

Ron also raised the issue of penalty pursuant to Labor Code §5814 for the defendant's refusal to pay his client temporary disability benefits.[1]

Ron told me that he was quite confident that not only would he obtain a continuing award of temporary total disability but that the defendants would be penalized pursuant to Labor Code §5814 for denying a benefit for which they had no legal, medical or factual doubt was due to the applicant.

Ron went on to tell me that the Expedited Hearing was today and he was dumbfounded and angered by the refusal of the workers' compensation judge to award temporary disability to his client. According to Ron, the judge ruled from the bench that the Board has lost jurisdiction to award the applicant further temporary disability benefits as we were more than five years from the date of injury. In view of this ruling, the judge also denied Ron's petition for penalties pursuant to Labor Code §5814.

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[1] I know! I know! At an Expedited Hearing, the only issues that can be raised are an injured worker's entitlement to medical treatment and temporary disability, and the issue of penalty is off calendar. However, since this story is imaginary, I can do anything I want.

In making his ruling, the judge relied upon the Supreme Court case of Nickelsberg v. Los Angeles Unified School District *(54 Cal Comp. Cas 426; 1989 Cal. Work. Comp. Lexis 2556; 263 Cal. Rptr. 493).*[2]

Waving his glass of white wine at myself and George, while concurrently pounding on the table (this is very difficult - try it), Ron vowed to appeal.

Ron explained to me that his case was different from the **Nickelsberg** decision as there had never been any type of Findings and Award in his case, and **Nickelsberg** required a previous Findings and Award in order to divest the Board of jurisdiction.

I told Ron that before he embarked on his appeal, he wanted to consider the following:

1. First, since the judge advised Ron as to the decision and incorporated the decision in a Minute Order handed to him at the hearing, Ron had only twenty days to file a Petition for Reconsideration from today's date, as he would not get the additional five days for mailing.

2. More important, I advised Ron that he would probably lose. The facts in Ron's case are strikingly similar to a very recent decision of the Court of Appeal in Los Angeles County Department of Parks and Recreation v. WCAB and Merrell Lee Calvillo *(73 Cal. Comp. Cas 798; 2008 Cal. Work. Comp. Lexis 186).*

In its decision in **Calvillo** filed on June 6, 2008, the Court of Appeal interpreted the Supreme Court decision in **Nickelsberg** to allow temporary total disability to extend beyond five years from the date of injury "**only when the period of total temporary disability indemnity commences within five years from the date of injury and is continuous. . .**"

I am proud to say that my reference to the June 6, 2008, Court of Appeal decision in **Calvillo** drove Ron to drink shooters as opposed to white wine.

While Ron was drowning his sorrows in tequila, I reflected back on the ever-changing law with respect to the nature and **extent** of temporary disability as mandated by Labor Code §4656.

When I started practicing workers' compensation law in 1973, Labor Code §4656 was rather straightforward. This section limited the defendant's liability for payment of total temporary disability to two hundred forty weeks during a five-year period from the date of injury.

However, this changed drastically due to a 1978 amendment to Labor Code §4656, which **removed** the 240-week limitation on aggregate temporary **total** disability within a five-year period.

Labor Code §4656 was amended for injuries occurring on or after January 1, 1979, stating that "aggregate disability payments for a single injury occurring on or after January 1, 1979, causing temporary **partial** disability, shall not extend for more than 240 compensable weeks within a period of five years from the date of injury. . ."

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[2]**Nickelsberg** was actually our case, and the injured worker in **Nickelsber**g was denied temporary disability benefits claimed after five years from the date of injury on the basis that there had been a previous award of temporary disability benefits within the five years from the date of injury, and the Board had lost jurisdiction to make a further award in the absence of a timely Petition to Reopen for new and further disability.

In essence the cap was taken off that benefit known as "temporary and total disability." Even though this phrase had "temporary" in its name, the presumption was that a period of temporary disability could now legally go on forever.

True, Labor Code §4656 limited temporary **partial** disability to 240 compensable weeks within 5 years but, in order to take advantage of this limitation an employer would be obligated to offer the applicant a job within his and/or her work restrictions (modified or alternate work). Since this issue would creep up years later, the employment relationship between the employer and the injured employee would have long since been terminated.

Presumably, a failure by the employer to offer the applicant modified and/or alternate work within his work restrictions would again make the applicant temporarily totally disabled. Now we were off and running on a system that gave us no legal finality to temporary total disability.

When we argued the **Nickelsberg** case before the Supreme Court, we contended that temporary total disability was limited by the jurisdiction of the Board.

Based on the rather narrow facts in **Nickelsberg** the Supreme Court ruled that there was indeed finality to an employer's obligation to pay temporary disability to the applicant when there was a prior Findings and Award.

The facts in **Nickelsberg** are rather simplistic: The applicant sustained an admitted industrial injury for which temporary disability and other benefits were provided. The parties entered into a Stipulated Findings and Award within five years from the date of injury and the applicant was awarded lifetime medical treatment.

After the five-year anniversary from the date of injury expired, the applicant's doctor recommended surgery and temporary disability was requested. However, the Supreme Court ruled that absent a **timely** petition to reopen filed within five years from the date of injury, the Board had lost jurisdiction to award any further disability benefits, including temporary disability.

Ron's argument to the judge was that the facts in his case were diametrically different from those in **Nickelsberg** as there was no prior Findings and Award. Therefore, the Board did not lose jurisdiction.

However, in relying on **Nickelsberg** and a Court of Appeal decision in **Hartsuiker**, the judge ruled that even in the absence of a prior award, temporary total disability would be limited to five years from the date of injury. Additionally, according to the Supreme Court's interpretation of the above-referenced 1978 amendment to §4656, the Board only has jurisdiction to award temporary disability beyond the five-year point "when the period of temporary total disability indemnity commences within five years from the date of injury and is continuous. . ."[3]

Based on the Court of Appeal decision in **Calvillo**, **Hartsuiker** and, specifically, the Supreme Court decision in **Nickelsberg**, we want to perform the following analysis in cases in which temporary disability is claimed more than five years from the date of injury:

1. Has there been a Findings and Award and/or Stipulated Findings and Award previously issued in your case? If so, has a timely Petition to Reopen alleging new and further disability been filed within the five-year period? **If the answer is Yes to the first question and No to the second question, then any further temporary disability would be barred as a matter of law**

[3] Russell Hartsuiker v. Workers Compensation Appeals Board *(58 Cal. Comp. Cas 19; 1993 Cal. Work Comp. Lexis 2737)*

pursuant to Nickelsberg.

2. Even in the absence of a prior Findings and Award (such as in Ron's case and **Calvillo**), we should make a determination as to whether or not the "period of temporary total disability indemnity commences within five years from the date of injury and is continuous. . ." **Pursuant to the Supreme Court in Nickelsberg and the Court of Appeal decisions in Calvillo and Hartsuiker, temporary disability claimed after five years from the date of injury is barred as the Board has lost jurisdiction to award same.**[4]

3. The easiest case to analyze per **Calvillo** would be a case in which the applicant did not receive an award, was found to be P&S within the five years and subsequently a new period of temporary total disability was claimed more than five years from the date of injury.

   As the Courts in **Nickelsberg** and **Calvillo** have attempted to integrate and harmonize L.C. §4656 with L.C. §5410 and L.C. §5404 (which limit the Board's jurisdiction to give years from the date of injury) such a claim for a new period of temporary total disability beyond the five-year mark clearly would be barred.

4. The Court in **Calvillo** carved out an exception to cases where temporary disability was commenced within the five-year period and paid continuously past the five-year anniversary date. Does this mean that commencing within the five-year period means from the date of injury? This is less clear but I would say no.

5. How about the situation in which temporary disability is "commenced" within the five-year period from the date of injury and is paid continuously to year six from the date of injury and the applicant is then found to be P&S? In year seven the applicant is again found to be TTD. Do we own it? I would say no, as this is a new claimed period of TTD beyond the five-year period.

6. Finally, what if the applicant was not actually paid TTD commencing within the five-year period and continuing through the five-year mark but the employer was found to be liable for TTD during this period when the claim for TTD was made beyond the five-year period? My opinion is that the defendant would be liable.

SB 899 amended Labor Code §4656 again as of April 19, 2004. With certain specified exceptions, temporary total disability benefits were limited to one hundred four weeks within a two-year period for injuries on or after the date of the amendment, which is April 19, 2004.

However, the legislature was not done. For injuries occurring on or after January 1, 2008, Labor Code §4656 has been amended to provide in relevant part as follows:

> **Aggregate disability payments for a single injury occurring on or after January 1, 2008, causing temporary disability, shall not extend for more than 104 compensable weeks within a period of five years from the date of injury.**

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[4]Clearly, the Supreme Court's decision in **Nickelsberg** is published and can be relied upon as a precedent, including the Court of Appeal decision in **Hartsuiker**. Unfortunately, the Court of Appeal decision in **Calvillo** is not certified for publication and cannot be relied upon as a precedent. In essence, **Calvillo** is the law of the case but not of the land, but certainly a reliance on the Supreme Court in **Nickelsberg** will be more effective.

DISCLAIMER:

Although the characters at the lobby bar are a product of my warped imagination and Ron's case is purely hypothetical, it does bear a striking resemblance to the facts that the court addressed in **Calvillo**.

The attorneys representing the employer in **Calvillo** attempted to argue that their case was on "**all fours**" with **Nickelsberg**, as there was a prior Award in **Calvillo** just like in **Nickelsberg**. However, the so-called prior Award was not on temporary disability but on other issues, and the Court of Appeal did not buy this argument.

Fortunately, for the County of Los Angeles, the court adopted the employer's last argument, which may have been thrown in as an afterthought.

Make mine a double, George.

– Joe Truce

P.S. – Anyone wishing copies of any of the three cases cited above, please advise and we will forward via e-mail.