ANOTHER INSTALLMENT IN THE *GEORGE THE BARTENDER* SERIES

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RE: GEORGE THE BARTENDER AND THE ADMISSIBILITY OF SURVEILLANCE VIDEO OR *TURNING THE APPLICANT INTO YOUR EXPERT WITNESS*[1]

FROM THE LOBBY BAR AT THE HYATT

After a hard day denying benefits I made my way to the Lobby Bar seeking comfort and a lift of my spirits at the sight of Kim, the Hyatt's breathtakingly beautiful cocktail waitress, delivering my cocktail of choice, a Beefeater's martini straight up with two olives.[2]

After receiving my libation of choice from Kim and exchanging our "Hellos," but before I could enjoy my first sip, my attention was immediately drawn to a commotion at the other end of the bar. Looking over I saw my colleague and noted defense attorney, Frank Falls, and his chief client, Pat Pennipincher, claims manager for Integrity Insurance Company.

The pair appeared to be in very intense conversation, looking rather serious. In an effort to cheer them up and perhaps offer them some succor, as the duo typically tended to exclusively argue about workers' compensation cases at the Lobby Bar[3], I ordered a round of drinks and made my way over to them. Upon reaching them Frank started filling me in on their latest crisis.

Frank had a trial the following week with none other than Ron Summers, George the bartender's workers' compensation attorney. The case involved an admitted low back injury in which the primary issue was the nature and extent of the applicant's disability.

The notorious Dr. Nickelsberg, Ron's fellow duke of duplicity, was the primary treating physician (PTP). He found that the applicant's disability put him into the life pension with a Whole Person Impairment (WPI) of 75%.

Although Frank and Pat conceded that the applicant's disability was real, both felt that the applicant was exaggerating his disability in order to obtain a higher rating.

At this point Pat explained to me that he had authorized surveillance on the applicant following a Panel QME (PQME) in which the evaluator found the applicant P&S with a very reasonable rating of 15% WPI. However, Frank pointed out that he and Pat were still nervous because the Workers' Compensation Judge (WCJ) could choose between the findings of the PTP, Dr. Nickelsberg, or the PQME.

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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, 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.

[3] Go figure.

Frank went on to tell me that the good news was they had obtained excellent surveillance footage of the applicant performing the very activities which he had denied to both the PQME and to Dr. Nickelsberg that he could perform. Frank was quite confident this footage would impeach the applicant's credibility.

The footage had been shown to the PQME who agreed with Frank that the applicant's credibility was impeached and lowered his rating to 10% WPI. On the Pretrial Conference Statement Frank told me that he had listed the name of the surveillance investigator and also the surveillance videos.

Frank was prepared to show the surveillance video to the WCJ. The bad news, however, was that Frank's investigator had abruptly left the employ of the investigation firm and despite every effort no one could find him.

Frank looked at me with panic in his eyes and told me that without the investigator he could not lay a foundation to introduce the surveillance video into evidence or establish a chain of custody of the video. Without said evidence the updated PQME report would also not be admissible at trial.

I advised Frank that the Appeals Board had issued a panel decision addressing this very issue some time ago in the case of *Wayne Johnson v. Tenant Company; Century Claims Service* (ADJ1620559) filed on May 21, 2009. The Board in this case reversed the WCJ's decision, citing *Jones v. City of Los Angeles* (1993) 20 Cal.App.4th 436, 440, which quoted McCormick on Evidence (3d ed. 1984) § 214, pp. 673-674, and *People v. Gonzalez* (2006) 38 Cal.4th 932, 952. The Board held as follows:

> In fact, it is routine in workers' compensation matters to allow almost all documents into evidence without formal authentication. For instance, medical evaluators are not called at trial to authenticate their reports. Thus, in the absence of a genuine question regarding whether writings sought to be introduced into evidence are forgeries, there is no need in workers' compensation proceedings for formal authentication of documents.
>
> In any case, we note that even in criminal and civil cases, a chain of custody is not necessary to establish the authenticity of a video. "[T]he reliability and accuracy of the motion picture need not necessarily rest upon the validity of the process used in its creation, but rather may be established by testimony that the motion picture accurately reproduces phenomena actually perceived by the witness. Under this theory, though the requisite foundation may, and usually will, be laid by the photographer, it may also be provided by any witness who perceived the events filmed . . . A video recording is authenticated by testimony or other evidence 'that it accurately depicts what it purports to show."

I pointed out to Frank that he could put the applicant on the stand, show the surveillance footage and ask the applicant whether or not he was the one depicted in the surveillance video.

I added that in the event the applicant refused to ID himself or denied that it was he in the video then it was my opinion that Frank could rely on the WCJ to make his/her own determination by comparing the person depicted in the surveillance films to the applicant.

I then referred Frank to another Appeals Board decision by the name of *Dennis Powell v. Vietnam Investment; State Compensation Insurance Fund* (ADJ2051919) filed on April 25, 2016. This case did not deal with introduction of surveillance video, but it did briefly touch on the defendant's usage of computer screenshots regarding a Utilization Review issue.

The WCJ in *Powell* excluded these exhibits from evidence advising that "they were offered without any additional identifying information." The Appeals Board reversed the WCJ's decision, stating in relevant part as follows:

> With respect to the exhibits that the WCJ proposes to exclude from evidence, we note that generally, the Appeals Board is not bound by the common law or by statutory rules of evidence and procedure but may make inquiry in the manner, through oral testimony and records, that is best calculated to ascertain the substantial rights of the parties. (Lab. Code, §§ 5708, 5709; see also, *Gill v. Workers' Comp. Appeals Bd.* (1985) 167 Cal.App.3d 306, 310 [50 Cal.Comp.Cases 258][Court of Appeal holding a WCJ's exclusion of relevant evidence to be a violation of due process].) This rule allows for significant latitude in the admission of relevant evidence. Then, once admitted the weight and sufficiency of the evidence are matters to be determined by the WCJ or Appeals Board and more weight may be given to the evidence presented by one party as opposed to the evidence presented by another. (Lab. Code, § 5312; Cal. Code Regs., tit. 8, § 10348; see also *Clendaniel v. Industrial Acc. Com.* (1941) 17 Cal.2d 659 [6 Cal.Comp.Cases 85].) While a party's failure to lay a foundation, to authenticate, and to corroborate documentary evidence with oral testimony may affect the weight and substantiality of the evidence, these possible deficiencies do not necessarily render that evidence inadmissible.

Although not required, I let Frank and Pat know that another viable option would be to call as a witness the office manager from the investigation company they used. This person could testify to establish custody and offer other general information regarding the surveillance video.

Reaching into my trusty briefcase I pulled out copies of the Board's decisions in *Powell* and *Johnson* and handed them to Frank and Pat[4]. At this point I thought Pat was going to jump for joy as I had just finished showing them another way to skin a cat.

[4] 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 *Powell* and *Johnson* can be obtained by email request.

DISCLAIMER:

With the exception of Kim, George and myself, all characters at the Lobby Bar are fictional and are a product of my warped imagination, as is the storyline.

When I started practicing workers' compensation defense law way back in 1973 great use was made of surveillance films at trial. As a matter of fact we did not have the Pretrial Conference Statement until the Margolin Reform Act of 1989 so we did not even have to declare witnesses or evidence, like surveillance investigators and surveillance films. There weren't rules such as there are now that surveillance films had to be served on the applicant's attorney on or before a mandatory settlement conference.

In today's practice surveillance video is routinely sent to either an AME or Panel QME and the case is settled on that basis. However, in rare cases the defense attorney will want to submit the surveillance films at trial for the viewing of the WCJ and therefore the panel decisions by the Board in *Powell* and *Johnson* could be significant legal authority.

Make mine a double, George.

-Joe Truce