ANOTHER INSTALLMENT IN THE *GEORGE THE BARTENDER* SERIES

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RE: GEORGE THE BARTENDER ANALYZES THE *BENAVIDES* DECISION OR *A NEW DECISION SHOULD FURTHER THE LEGAL DISCOURSE AND NOT LEAVE US SCRATCHING OUR HEADS, RIGHT?*[1]

FROM THE LOBBY BAR AT THE HYATT:

After a hard day of denying benefits, I made my way to the Lobby Bar seeking my favorite libation, a Beefeater's martini straight up with two olives.[2] Taking my seat at the bar I gazed unrequitedly at the Hyatt's breathtakingly beautiful cocktail waitress, Kim, who approached me with my martini in tow, a little perk of being a regular.

The moment of bliss I experience upon taking the first sip of my martini after a long day of work is indescribable. Rest assured Loyal Lobby Bar patron it is quite blissful. But this night, like all good things in life, it was only fleeting, interrupted by a raucous tiff at the other end of the bar between Frank Falls, noted defense attorney, and Ron Summers, George the Bartender's workers' compensation attorney. As this squabble had been going on for more than a week, I was well aware of the issue in dispute.[3]

Frank and Ron had stipulated in a case that the applicant was 51% permanently disabled. The rating was based on the AME's finding of Ron's client's orthopedic disability to her low back, which took a Category IV Diagnosis Related Estimate (DRE) and which rated at a 21% Whole Person Impairment.

Prior to the Stipulated Findings and Award, the applicant had an electromyogram (EMG) of the lower extremities which was an abnormal study demonstrating that the applicant had radiculopathy. However, the EMG was never reviewed by the AME and the case was settled.

Within five years from the applicant's date of injury in this case, Ron filed a timely Petition to Reopen alleging new and further disability. The applicant was then examined by the same AME who previously examined her prior to the settlement. The doctor found that the applicant's impairment had now increased to a DRE Category V under the AMA Guides to the Evaluation of Permanent Impairment, (Fifth Edition), but the AME also found that the worsening of the applicant's condition had occurred before the Stipulated Findings and Award of July 23, 2008.

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[1] For those new patrons to the Lobby Bar, located in the Hyatt Regency Long Beach on South Pine Avenue, 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] You may be wondering to yourself Loyal Lobby Bar patron who in their right mind would keep frequenting this establishment only to have their moments of bliss perpetually interrupted by arguments? My answer is threefold: 1) I have been coming here for what seems like decades and I am a creature of habit. 2) Kim. 3) They make a great martini.

In listening again to the argument raging between Ron and Frank, I heard Frank yelling to Ron, "I may not be a medical doctor but there is no way in the world the applicant's condition could have worsened since the Stipulated Findings and Award."

However, tonight Ron brought with him the recent California Court of Appeal decision in *Leopoldo Benavides v. Workers' Compensation Appeals Board et al.,* 227 Cal. App. 4th 1496; 174 Cal. Rptr. 3d 589; 2014 Cal. App. LEXIS 634 filed on July 18, 2014. In an increasingly louder voice Ron explained to Frank that *Benavides* was certified for publication and that it is now the law of all trial courts in California. Ron emphasized to Frank that *Benavides* was similar to their case as the applicant had initially received a Stipulated Findings and Award for 51% on the basis of the AME report.

Ron explained that he filed a Petition to Reopen for New and Further Disability, as Benavides also had an abnormal EMG performed prior to the Stipulated Findings and Award, which also was never brought to the attention of the AME. Ron continued and gleefully pointed out to Frank that the Court of Appeal had granted the applicant's Petition for Writ of Review on the basis that the AME had not reviewed the abnormal EMG at the time of his examination of the applicant on which the original Stipulated Findings and Award was based.

The Court of Appeal in *Benavides* concluded in relevant part as follows:

> Section 5803 accords the appeals board continuing jurisdiction to rescind or revise its awards, "upon good cause shown." Such cause may consist of newly discovered evidence previously unavailable, a change in the law, or "any factor or circumstance unknown at the time the original award or order was made which renders the previous findings and award 'inequitable.'" More specifically, an award based upon a stipulation may be reopened or rescinded if the "stipulation has been 'entered into through inadvertence, excusable neglect, fraud, mistake of fact or law, ... or where special circumstances exist rendering it unjust to enforce the stipulation.'" "If the stipulation does not adequately reflect the disability of the applicant, it should not be accepted by the workers' compensation judge as the basis for his or her award."

In closing the Court of Appeal stated:

> . . . the WCJ approved the parties' stipulation, unaware of the fact that an existing EMG demonstrated Benavidas's spinal condition was significantly worse than reflected in Dr. Sohn's report. Whether the stipulation was the result of inadvertence, excusable neglect, or mistake of fact, the error justifies reopening the resulting award.

Smugly, Ron handed Frank a copy of *Benavides* and I could see Frank visibly shaken. Frank then saw me over at my end of the bar with my own copy in hand and mouthed the words: "I'm a goner."

Shaking my head no, I ordered a round of drinks for Ron and Frank and made my way to the other end of the bar. Upon my arrival I pulled from my trusty briefcase two copies of a California Court of Appeal Decision that I knew would assist Frank in his predicament: *Nicky Blair's Restaurant et al. v. Workers' Compensation Appeals Board (Juan Macias)* 109 Cal. App. 3d 941; 167 Cal. Rptr. 516; 1980 Cal. App. LEXIS 2215; 45 Cal. Comp. Cas 876. This case was filed way back on August 29, 1980. I handed a copy to Frank and Ron.[4]

I told Frank that *Nicky Blair's Restaurant* was the landmark decision on new and further disability at the time and it has never been overturned.[5] The applicant in *Nicky Blair's Restaurant* was evaluated by Independent Medical Examiner, Dr. Michael Patzakis, and on cross-examination Dr. Patzakis said:

> . . . in his opinion there has been no real change or progression in Macias' condition from March 1975. According to him, there is no objective evidence of deterioration but there is an increase in symptomatology. The headaches and shoulder problems, Dr. Patzakis maintains, are unrelated to the industrial injury. Of importance is that Dr. Patzakis states that if Dr. Patzakis had seen Macias in March 1975 the doctor would have placed the same work restriction upon Macias.

I pointed out to Frank that the Court of Appeal in *Nicky Blair's Restaurant* stated:

> Section 5410 fails to define the phrase "new and further disability" and it has not been given a comprehensive definition by judicial interpretation . . . Thus, its meaning is not entirely clear. . . It is clear, however, that the phrase refers to disability which must be both "new" and "further."

I reminded Frank that in *Benavides* the increased disability award was neither "new" nor "further." In *Nicky Blair's Restaurant* the Court of Appeal went on to define the term "new and further" thusly:

> "The term 'new and further disability' has been defined to mean disability which results from some demonstrable change in an employee's condition."

In concluding their decision denying the applicant's Petition for New and Further Disability the Court of Appeal summarized:

> Thus, if Macias' condition is unchanged from the time of the original decision in 1975, there is no "new and further disability" within the meaning of section 5410 to permit reopening of the case.

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[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 *Benavides* and *Nicky Blair's Restaurant* can be obtained by an email request.

[5] An oldie but a goodie to be sure.

In *Nicky Blair's Restaurant* the Court of Appeal went on to observe:

> To reopen for "good cause" there must exist some ground, not within the knowledge of the appeals board at the time of making the former award or orders which render said original award or orders inequitable; this cannot be premised upon a mere change of opinion by the appeals board.
>
> The principle of reopening for "good cause" does not permit an attempt to simply relitigate the original award. A petition to reopen may not be used to litigate issues which should have been raised by a timely petition for reconsideration.
>
> "Good cause" to reopen does not consist of medical evidence obtained subsequent to the original decision which merely disagrees with the medical opinion relied upon by the Board at the time of the original decision.

I told Frank that given this, the failure of the applicant attorney in *Benavides* to bring the abnormal EMG to the attention of the Agreed Medical Examiner should have been addressed on a Petition for Reconsideration alleging newly discovered evidence.

Frank pointed out that the Court of Appeal in *Benavides* apparently made a big deal out of the fact that the Appeals Board did not know about the abnormal EMG and that is why they granted applicant's Petition for Writ of Review.

I referred Frank to the following section in the *Nicky Blair's Restaurant*:

> Through many court decisions it has become well settled that, in order to constitute 'good cause' for reopening, new evidence (a) must present some good ground, not previously known to the Appeals Board, which renders the original award inequitable, (b) must be more than merely cumulative or a restatement of the original evidence or contentions, and (c) must be accompanied by a showing that such evidence could not with reasonable diligence have been discovered and produced at the original hearing.

I expressed to Frank that undoubtedly in *Benavides* and Ron's case the abnormal EMG could have been discovered using reasonable diligence and, therefore, the decision in *Nicky Blair's Restaurant* was in direct conflict with the Court of Appeal's decision in *Benavides*. Ironically, both decisions came out of the Second Appellate District, Division 3. Frank stated the obvious at this point: why then was *Nicky Blair's Restaurant* not mentioned in the Court of Appeal's decision in Benavides? I said I was not sure whether or not this was argued in the briefs submitted to the Court of Appeal.

I advised Frank to argue that the abnormal EMG could have been discovered by the exercise of reasonable diligence by Ron and to predicate his argument on the Court of Appeal decision in *Nicky Blair's Restaurant*.

DISCLAIMER:

All characters in the Lobby Bar aside from George the Bartender, Kim and I are fictional and a product of my vivid and warped imagination, as is the story line.

Fun fact, California Court of Appeal decisions are not binding between districts (1-6), divisions (varies from 1-8 within each district), or even between panels of the same division as we've seen from this edition of *George the Bartender*. See *Alexis Sarti v. Salt Creek LTD.* 167 Cal. App. 4th 1187; 85 Cal. Rptr. 3d 506; 2008 Cal. App. LEXIS 1704 and *Gilbert Saucedo v. Mercury Savings and Loan Association et al.*, 111 Cal. App. 3d 309; 168 Cal. Rptr. 552; 1980 Cal. App. LEXIS 2353 for more info.

As stated previously, I am unsure whether the Court of Appeal in *Benavides* reviewed its own decision in *Nicky Blair's Restaurant* or whether this was even argued. Typically we get conflicting legal decisions on the same topic issued by Courts of Appeal in different districts or even different divisions. In this case we have the same division of the same appellate district issuing apparently conflicting decisions. The division is the same but the judges are different. In *Benavides* the Court of Appeal justices were Justices Kitching, Klein and Aldrich. In *Nicky Blair's Restaurant* the panel was justices Cobey, Allport and Potter.

In the case of conflicting decisions the lower courts are required to choose between the conflicting divisions, as was decided by the Supreme Court of California in *Auto Equity Sales, Inc., et al., v. The Superior Court of Santa Clara County* 57 Cal. 2d 450; 369 P.2d 937; 20 Cal. Rptr. 321; 1962 Cal. LEXIS 186.

You must remember this: in a Petition to Reopen for New and Further Disability the standard definition of "new and further disability" was set by the Court of Appeal decision in *Nicky Blair's Restaurant*, and that definition still stands.

Make mine a double, George.

-Joe Truce