ANOTHER INSTALLMENT IN THE *GEORGE THE BARTENDER* SERIES

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RE: GEORGE THE BARTENDER AND THE HAZARDS OF FILING AN ANSWER TO AN APPLICATION FOR ADJUDICATION OF CLAIM OR *A TALE FROM THE WILD, WILD WEST DAYS OF WORKERS' COMP*[1]

FROM THE LOBBY BAR OF THE HYATT:

Another hard day of denying benefits behind me I took my usual seat at the Lobby Bar and ordered my cocktail of choice, a Beefeater's martini straight up with two olives.[2]

Down at the other end of the bar I spied a forlorn looking Frank Falls, a friend and noted workers' compensation defense attorney.

As it appeared that Frank needed cheering up I decided to join him. Before doing so I signaled to George to make Frank a cocktail and put it on my tab. I then set off with my martini in tow.

Briefly delayed by a run-in with Kim, the Hyatt's breathtakingly beautiful cocktail waitress (in which we exchanged our usual pleasantries), I arrived at the stool next to Frank.

Frank laid out his tale of woe thusly. He had recently tried a case with Ron Summers, George the Bartender's workers' compensation attorney, and that day had received an adverse decision from the Workers' Compensation Judge (WCJ) on the issue of earnings.

Frank explained that at his firm it was the responsibility of the paralegals to file Answers to each Application for Adjudication of Claim. In this particular case a paralegal had admitted to earnings of $750.00 per week based on the employer's report of work injury (DLSR Form 5020), as the employer had indicated that the applicant was paid $750.00 per week.[3]

It was at this particular moment in Frank's tale that I could tell what was at the core of his melancholy state. However, not wanting to assume nor interrupt Frank, I allowed him to continue.

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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, lateral 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] As an Answer is deemed to be a "pleading" the best practice would be to mandate that all pleadings prepared by paralegals be reviewed and approved by the handling attorney before submission.

Frank added that further investigation and/or discovery showed this information to be grossly incorrect, as the applicant was actually a part-time employee! Based on the applicant's earnings from the prior year they only qualified for minimum temporary and permanent disability rates.

Despite the fact that Frank amended the admission to earnings on the Pretrial Conference Statement on the *Issue* page indicating "earnings were in dispute," the Workers' Compensation Judge unfortunately found that Frank's Answer was an "admission." He also found that the applicant qualified for temporary and permanent disability rates in excess of the minimum rates set forth in the California Labor Code.

Worse still was the fact that Frank's client in this case was none other than Integrity Insurance Company, which comprised well over 50% of Frank's business. Frank told me that he did not think that the Findings and Award of the WCJ was subject to a petition for reconsideration as after all it was his "admission" to earnings that formed the basis of the WCJ's decision.

I told Frank that the WCJ's decision in this case was in conflict with the Board's decision in *Kenneth Bryant v. Staffmark Investment LLC*, 2010 Cal. Wrk. Comp. P.D. LEXIS 172, filed April 26, 2010. I then reached into my trusty briefcase and pulled out a copy of *Bryant* and handed it to Frank.[4]

In *Bryant* the WCJ also relied on the defense's admission in its Answer on the issue of earnings and held that defendant was bound by this admission.

However, in reversing the WCJ the Board held as follows:

> The WCJ does not describe what prejudice applicant may have suffered. In any event, we disagree with the WCJ's analysis of the earnings issue. As further discussed below, defendant's answer dated June 2, 2006 was a pleading, which can be amended in later proceedings . . . admission was not a stipulation and was subject to withdrawal before submission for determination by the WCJ at trial.

The Board went on to note:

> The filing of an answer is not mandatory under *Labor Code section 5505*. Furthermore, *Labor Code section 5500* makes it clear that an answer is a form of pleading, which according to the language of the statute may provide for "the furnishing of *any additional information as the appeals board may properly determine necessary* to expedite its hearing and *determination of the claim*." (Italics added.) In addition, there is no requirement that an answer be verified, and *WCAB Rule 10492* states that "[t]he pleadings shall be deemed amended to conform to the stipulations and statement of issues agreed to by the parties on the

[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. Anyone wishing a copy *Bryant* should submit their request via email.

> record . . . The parties' execution of the stipulations and issues statement was sufficient to withdraw defendant's prior admitted earnings of $ 241.70

When I started as a defense attorney in the wonderful world of workers' compensation on September 16, 19 … well, I suppose the exact date really isn't too important. Suffice it to say it was some time ago and a few of you loyal Lobby Bar patrons probably weren't yet conceived. Let's just say it was prior to the passage of the *Margolin-Bill Greene Reform Act of 1989* and leave it at that. [5]

In this "frontier" period the concept of a Mandatory Settlement Conference was non-existent. Nor was there any requirement that the parties, at Conference, complete a Pretrial Conference Statement listing issues, Stipulations, witnesses and exhibits.

"Elder Truce, tell us, what was it then that you used in lieu of a Mandatory Settlement Conference Statement and a Pretrial Conference Statement?" I'm glad you ask, loyal Lobby Bar patron. The defense's only recourse was the Answer, which would advise disputed issues and, as in *Bryant*, would make admissions on issues, such as earnings.

However, with the creation of the Mandatory Settlement Conference and the Pretrial Conference Statement, Answers no longer served this useful purpose. As we all know today parties make stipulations and frame issues at the MSC, and parties are bound by these stipulations.

Prior to the *Margolin-Bill Greene Reform Act of 1989* the only indication as to issues and stipulations might be the Application and Answer.

In our present practice the Answer, for all practical purposes, has been replaced by the Pretrial Conference Statement listing issues and stipulations.

DISCLAIMER:

All characters at the Lobby Bar, aside from George, Kim and I are fictional, as is the storyline.

The filing of an Answer has never been mandatory pursuant to Labor Code §5505, but as I just touched on may well have been made totally unnecessary by reason of today's Mandatory Settlement Conference at which stipulations and issues are framed.

Make mine a double, George.

-Joe Truce

[5] Effective for injuries on or after January 1, 1990, this act birthed the concept of a Mandatory Settlement Conference.