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 ADMISSIBILITY OF SURVEILLANCE VIDEO IN LIGHT OF CALIFORNIA CODE OF REGULATIONS TITLE 8 §35(d) OR *THE ONGOING BATTLE BETWEEN TRUTH, JUSTICE AND PRIVACY* [1]

FROM THE LOBBY BAR AT THE HYATT:

After a hard day of denying benefits I hastened to the Lobby Bar for some much needed respite in the form of my favorite chilled, shaken beverage – a Beefeater's martini, straight up with two olives.[2] I could not wait to discuss a recent panel decision issued by the Board with George the Bartender's workers' compensation attorney, Ron Summers.

Walking through the entrance, I made my way to my usual spot. Kim, the Hyatt's breathtakingly beautiful cocktail waitress, appeared seemingly out of nowhere, my aforementioned libation in her hand. Taking it from her, I enjoyed a long first sip.

Now allow me to bring you up to speed, loyal Lobby Bar patron. Ron and I were involved in heavy litigation over a case in which Ron's client alleged as a result of his injuries he could not sit or stand for longer than five minutes at a time and was unable to drive a motor vehicle.

As this was an admitted injury to the applicant's neck and back, the parties submitted the case to a Panel QME pursuant to Labor Code §4062 and/or §4061. One among the myriad of problems facing those in the defense community in a medical examination is that the doctor can only take a history of the applicant's complaints from the applicant, effectively getting only one side of the story, for as we know employers are banned from the examining room.[3]

Therefore, when the defendant obtains impeaching information (such as surveillance video) defense counsel will invariably make a motion that the evidence be submitted to the Panel QME. Information, especially non-medical information, that can be sent to the Panel QME (PQME) is guided by Title 8, Division 1, Chapter 1, Article 3, §35 of the *California Code of Regulations* (abbreviated 8 CCR 35) which covers the exchange of info and ex parte communications. It states in relevant parts as follows:

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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] Just from a spatial standpoint this makes a lot of sense considering the size of most exam rooms is that of a small utility closet. Not to mention the whole privacy thing as well, but I digress.

> (a) The claims administrator, or if none the employer, shall provide, and the injured worker may provide, the following information to the evaluator, whether an AME, Agreed panel QME or QME:
>
> > (5) Non-medical records, including films and videotapes, which are relevant to determination of medical issue(s) in dispute, after compliance with subdivision 35(c) of Title 8 of the California Code of Regulations.
>
> (c) At least twenty (20) days before the information is to be provided to the evaluator, the party providing such medical and non-medical reports and information shall serve it on the opposing party.
>
> (d) If the opposing party objects within 10 days to any non-medical records or information proposed to be sent to an evaluator, those records and that information shall not be provided to the evaluator unless so ordered by a Workers' Compensation Administrative Law Judge.

In my case with Ron the Panel QME bought the applicant's history and complaints "hook, line and sinker," and in his initial report found that the applicant was totally temporarily disabled!

Luckily my client had obtained surveillance video showing that the applicant misled the Panel QME, as he was observed driving, sitting and standing for longer than what he reported to the Panel QME. In my opinion these films were impeaching to the credibility of the applicant and I wanted them to be viewed by the Panel QME.

Being a stickler for the law I sent this non-medical evidence to Ron and true to form he promptly and vehemently objected, precluding me from sending the videos to the Panel QME. However, it dawned on me that my salvation lay in subdivision 35(e), which provides in relevant part as follows:

> (e) In no event shall any party forward to the evaluator: (1) any medical/legal report which has been rejected by a party as untimely pursuant to Labor Code section 4062.5; (2) any evaluation or consulting report written by any physician other than a treating physician, the primary treating physician or secondary physician, or an evaluator through the medical-legal process in Labor Code sections 4060 through 4062, that addresses permanent impairment, permanent disability or apportionment under California workers' compensation laws, unless that physician's report has first been ruled admissible by a Workers' Compensation Administrative Law Judge; or (3) any medical report or record or other information or thing which has been stricken, or found inadequate or inadmissible by a Workers' Compensation Administrative Law Judge, or which otherwise has been deemed inadmissible to the evaluator as a matter of law.

As you can see loyal Lobby Bar patron, surveillance videos are not excluded, so I filed a Rule 35 Motion with the Appeals Board. The case was set for hearing the following week.

For the past couple of weeks Ron and I had been arguing about the merits of my Rule 35 Motion. Ron contended that the surveillance films obtained by my client were inadmissible as the surveillance investigator had filmed the applicant on private property in violation of posted signs prohibiting entry into private property and/or videotaping. Ron was also relying upon California Civil Code §1708.8 which imposes tort liability for the invasion of privacy.[4]

Ron looked to have the upper hand going into our hearing, however, that was until today, and the announcement the Board's panel decision in *Jonathan Duong v. Automobile Club of Southern California, Hartford Insurance Company of the Midwest* 2014 Cal. Wrk. Comp. P.D. LEXIS 492 filed October 7, 2014.[5]

After enjoying my first Beefeater's martini, I looked around the bar for Ron. I spotted him at the other end of the bar, so I ordered another round and made my way over to him. He greeted me with a smirk and I gleefully reached into my trusty briefcase[6] and pulled out a copy of *Duong* for him.

I explained to Ron that in this case the defense counsel, like me, had filed a Rule 35 Motion with the Board after an evidentiary hearing where the workers' compensation judge (WCJ) found they had obtained the surveillance video illegally, rendering it inadmissible.

At the evidentiary hearing several witnesses gave testimony, including the applicant and an investigator hired by the defense. Duong testified that his adoptive father drove him to his mobile home park, parking in a carport next to his home. An investigator had followed them there, parking in a nearby parking space but never leaving their car, and began filming Duong. He was also filmed inside a local Albertsons market.

Another mobile home owner testified on behalf of Duong, stating that there are two signs posted at all of the entrances to the mobile home park - "Invitees and Guests Only. No Trespassing. Violators will be Prosecuted;" and "Private Property." Also, Duong's attorney submitted a photo from Albertsons of a sign indicating "NO Videotaping, Photography, Audio Taping, anywhere on store premises without prior consent." Duong contended, just like Ron, that the surveillance video violated his rights to privacy as laid out in California Civil Code §1708.8, making it inadmissible.

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[4] A California statute signed into law in 1997 in the wake of the tragic death of Princess Diana and love interest Dodi Fayed in Paris. It was last amended in 2010, and is now commonly referred to as the "Anti-Paparazzi" statute.

[5] A copy of *Duong* can be obtained by email request.

[6] 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.

As previously mentioned, the WCJ was inclined to agree with Duong, finding:

> [W]hether or not the defendant has violated defendant's own testimony, the videotaping on private property and in the face of the prohibitory signs which were clearly posted was at a minimum a violation of the posted rules of the properties where the filming took place.

Ron looked unfazed by any of this so I carried on. The defendant then filed a Petition for Removal pursuant to Labor Code §5310 which was granted by the Board. In its decision after removal the Board reversed the WCJ's decision and held that the surveillance video was justified and admissible as a matter of law and therefore could be viewed by the Panel QME.

The Board held that the WCJ had overstepped their reach and overlooked the letter of the law, failing to identify any legal authority for their decision to exclude the surveillance evidence, stating, "An unidentified policy consideration without reliance on statutory or precedential case law authority cannot be the basis for a decision under section 5903."

The Board also addressed the applicant's claim of a violation of the "Anti-Paparazzi" statute, noting:

> More importantly, Civil Code section 1708.8 addresses civil tort liability for the invasion of privacy. The proceedings before us do not pertain to civil tort liability but rather the admissibility of evidence before the Appeals Board. Therefore, Civil Code section 1708.8 appears to be inapplicable.

The Board went on to hold that the applicant did not have a reasonable expectation of privacy either in the parking lot of the mobile home park or inside the market where he was filmed, concluding:

> Any intrusion that may have occurred is justified by a competing interest. The California Legislature has declared that, "Workers' compensation fraud harms employers by contributing to the increasingly high cost of workers' compensation insurance and self-insurance and harms employees by undermining the perceived legitimacy of all workers' compensation claims." (*Ins. Code, § 1871(d)*.) The Legislature also stated that, "Prevention of workers' compensation insurance fraud may reduce the number of workers' compensation claims and claim payments thereby producing a commensurate reduction in workers' compensation costs. Prevention of workers' compensation insurance fraud will assist in restoring confidence and faith in the workers' compensation system, and will facilitate expedient and full compensation for employees injured at the workplace."

The Board justified their rationale by citing *Teague v. Home Ins. Co. (1985)* 168 Cal. App. 3d 1148; 214 Cal. Rptr. 773; 1985 Cal. App. LEXIS 2177. [7]

My analysis finished, I advised Ron that I would be submitting my trial brief argument to the WCJ in our case along with a copy of *Duong*.

I told Ron that his objection to the surveillance videos reminded me of a comic I once saw years ago in *MAD*.[8] In this particular instance *MAD* did a parity of one of my favorite television series, *Perry Mason*[9], entitled "The Night Perry Masonmint Lost A Case."[10]

In it *MAD* changed the names of the attorneys from the TV series to Perry Masonmint and Hamilton Burgetbits. Perry is submitting misleading evidence in court to a judge. The prosecutor, District Attorney Burgerbits objects and asks a follow up question to the judge, to which Perry replies, “That question is irrelevant, immaterial, and mainly if I answered it, I would ruin my case!” and is then allowed to continue presenting evidence as if there wasn’t an objection.

Except in our case my evidence wasn’t misleading. Ron knew this and he still laughed - ever so slightly. However, I knew he was seething inside as he saw his motion to exclude the surveillance video circling the drain. I had ruined his case.

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.

However, as pointed out by the Board in *Duong* 8 CCR 35 can be the best friend of the defense.

Make mine a double, George.

-Joe Truce

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[7] A copy of *Teague* can be obtained by email request.

[8] But Elder Truce, what’s a *MAD*? Glad you asked. *MAD* is a humorous print publication founded in 1952, which was first released as a comic book and then made the transition to a magazine. *MAD* shaped the cultural landscape in America for the better part of four decades, much like yours truly except in the wonderful world of workers’ comp. Satire was their game, and much like the *Colbert Report* of today, they flourished at it, sparing no one and nothing.

[9] Famed fictional criminal defense counselor, he had a knack for getting his clients acquitted of murder charges while revealing who the real culprit was all in one-hour long episode. Perry’s winning percentage for the duration of the series, running from 1957 through 1966, was a whopping 99%! Regrettably, only six seasons are available for viewing on Netflix. I’ve already started a “strongly worded” letter campaign to have the rest of the series added though. You can thank me later.

[10] From *Mad #48*, 1959