

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 AND THE DOUBLE DENIAL CLAIM CONUNDRUM OR DOUBLING DOWN ON DEATH BENEFIT CLAIMS*¹

FROM THE LOBBY BAR AT THE HYATT:

After another long hard day of denying benefits, I sought out the solace of the Lobby Bar. Today had been an exceptionally tough day for me as I had a trial regarding a death claim with George the Bartender's workers' compensation attorney, Ron Summers.² Not to worry Loyal Lobby Bar patron, George is still alive and mixing. The trial was regarding another of Ron's clients. The key issue in this death claim was whether or not the defendants had issued a timely denial under Labor Code §5402, which states in relevant part as follows:

(b) If liability is not rejected within 90 days after the date the claim form is filed under Section 5401, the injury shall be presumed compensable under this division. The presumption of this subdivision is rebuttable only by evidence discovered subsequent to the 90-day period.

I strode into the Lobby Bar and saddled up to my usual seat at the bar. Kim, the Hyatt's breathtakingly beautiful cocktail waitress, recognized my angst and delivered my usual Beefeater's martini straight up with two olives.³ I took a sip and pondered the events of the day but before I regale you with the details allow me to bring you up to speed.

The applicant filed a Workers' Compensation Claim Form (DWC1) alleging that they had sustained injuries consisting of diabetes, high blood pressure, psychiatric and sleep disorder problems all due to stress on the job. During the course of litigation over this claim the applicant passed away so the claim went from an inter vivos claim to a death claim. It was stipulated between myself and Ron that the inter vivos claim had been timely denied by the employer.

Here's where things get complicated. The applicant's then widow filed an Application for Adjudication of Claim (Death Case) for death benefits alleging that her husband suffered the identical injury (which as we just mentioned was timely denied by the employer) and that he met his death as a result of the original injury.

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 You know sometimes I wonder who goes through more tough days on the job, me or Jack Bauer of 24 fame, but I digress.

³ A Beefeater's martini, straight up, is best served at 38° Fahrenheit.

The employer did not deny the claim for death benefits. Ron claimed that since the employer did not deny the death claim within 90 days of the filing of the Application the death claim was presumed to be compensable by reason of Labor Code §5402.

At the mandatory settlement conference a few months ago Ron had raised this very issue on the Pretrial Conference Statement and although common sense tells us that we do not have to file double denials on what is essentially the same claim of injury, unfortunately I could find no case law to support my position.

All I had to rely on was the wording of the Application for Adjudication of Claim (Death Case). Moreover, Labor Code §5402 specifically refers to a “claim form” for injury and not an “Application for Adjudication of Claim.”

Knowing this much, loyal Lobby Bar patron, let me ask you: Does an employer have to submit a second denial to an Application for Adjudication of Claim (Death Case) when the original injury has been timely denied on the same injury? Well, do they?

Throughout the years this has been a nagging question for the defense community. Additionally, there is also the scenario in which the original injury was admitted and obviously a denial was not filed and subsequently the applicant meets his death and the applicant’s heirs allege that the death was proximately related to the admitted industrial injury. If we read the precise wording of Labor Code §5402, it would not appear that a denial would be necessary in this situation either.⁴ However, just to be sure, I had been telling my clients for years to file the second denial as there was no definite case law authority on either side.

Today my case was submitted to the Workers’ Compensation Judge (WCJ) for decision. Both Ron and I were given 30 days to file trial briefs on the issue of whether or not the defendants had an obligation to file a second denial pursuant to Labor Code §5402 issue.

While at the board today noted defense attorney and friend of mine, Frank Falls, gave me a copy of a decision and told me I might find it interesting. The case was *Miguel Angel Gonzalez v. The Gap, Inc.* (ADJ7099563, ADJ7825176) 2014 Cal. Wrk. Comp. P.D. LEXIS 121 filed on March 7, 2014. I had not had the opportunity to look over the decision until now. Diving right in, martini in hand, I soon realized that in this comprehensive, articulate and well-reasoned decision the Board addressed the very same “double denial” question that was plaguing me!⁵

⁴ Lost yet?

⁵ A copy of *Gonzalez* can be obtained via email request

Gonzalez stated in relevant part as follows:

. . . we conclude that a defendant's timely denial of an inter vivos claim makes it unnecessary for it to timely deny a subsequently filed death benefit claim allegedly arising out of the same injury. (See Civ. Code, § 3532 ("The law neither does nor requires idle acts").) That is, although case law clearly establishes that a surviving dependent's death benefit claim is independent and severable from the inter vivos claim . . . there is nevertheless only one "injury" that may arise from the same specific event or cumulative trauma . . . Therefore, once a defendant has timely denied injury, it has timely denied it for all purposes.

Barely able to contain my elation (and nearly spilling my martini), I took a quick look around the confines of the Lobby Bar. I spotted the infamous Ron Summers at the other end of the bar, along with his ever-present fellow duke of duplicity and go-to Primary Treating Physician, Dr. Nickelsberg. The two looked rather joyful, no doubt celebrating the pickle in which I found myself.

I decided to go share the news with them and in the spirit of civility I had a round of drinks sent over to them. I made my way over to the other end of the bar and upon arriving I handed the copy of *Gonzalez* to Ron.

Ron asked me, "What's this?" and I asked him to just give it a quick look over. Smiling and with drink in hand he humored me and started to read the decision. Before you knew it that big grin of his began to melt away. The ice in his drink began to rattle as he was visibly shaking with frustration as he drew to the end. Placing his drink down at a nearby table he finished up.

Trying to not let his frustration get the better of him Ron advised me that *Gonzalez* was only a Panel Decision, and therefore, I could not bring it to the attention of the Workers' Compensation Judge in my trial brief.⁶

At this, I pulled out my copy of the 2014 Workers' Compensation Laws of California, aka Labor Code, from my trusty brief case and specifically directed Ron to Labor Code §5703(g) sub-titled "**Specific Additional Evidence Allowed**" which states in relevant part as follows:

The appeals board may receive as evidence either at or subsequent to a hearing, and use as proof of any fact in dispute, the following matters, in addition to sworn testimony presented in open hearing: ... (g) Excerpts from expert testimony received by the appeals board upon similar issues of scientific fact in other cases and the prior decisions of the appeals board upon similar issues. (emphasis added)

⁶ Ron's go to rebuttal in instances like this. You would think the poor, sad fool would've learned his lesson by now.

George the Bartender and the Double Denial Claim Conundrum or Doubling Down on Death
Benefit Claims
August 6, 2014
Page 4

I pointed out to Ron that the first sentence of Labor Code §5703 indicated that the Appeals Board may use a panel decision on similar issues as “evidence either at or subsequent to a hearing.” I also told Ron that I would certainly not only argue and include *Gonzalez* in my trial brief but I would “liberally argue from the precise language of Labor Code §5703(g).”

Crest-fallen Ron turned back to his cocktail which he disposed of in one gulp and I knew I had done my job.

DISCLAIMER:

All characters at the Lobby Bar aside from George, Kim and I are fictional and the storyline is simply a product of my warped and vivid imagination.

From time to time over my long and storied career in workers’ compensation many applicant attorneys have raised this issue of the double denial in death cases, but as far as I know, this has never been specifically addressed by the Board or the Courts until now with *Gonzalez*.⁷

To say that our Board is hard-working is an understatement. Pending appointments by the Governor, the Board is now functioning with four Commissioners plus the Chair, Ronnie Caplane, and some extremely hard-working Deputies and staff.

Make mine a double, George.

-Joe Truce

⁷ For the last time, no, I didn’t know Hammurabi.