ANOTHER INSTALLMENT IN THE *GEORGE THE BARTENDER* SERIES

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RE: GEORGE THE BARTENDER AND THE TROUBLE WITH THE HEART PRESUMPTION AFFORDED TO SAFETY MEMBERS OR *SOME PRESUMPTIONS AREN'T FOR THE FAINT OF HEART*[1]

FROM THE LOBBY BAR AT THE HYATT:

After a hard day denying benefits, I arrived at the Lobby Bar seeking silence, solitude and the solace of a Beefeater's martini, straight up with two olives.[2]

Although I was served my drink of choice by Kim, the breathtakingly beautiful cocktail waitress, it was apparent that I would have no peace on this night.

A heated dispute appeared to be coming to a head between Ron Summers, George the Bartender's workers' compensation attorney, and his nemesis, Frank Falls, noted defense attorney.[3]

Having shared the company of Frank last night at the Lobby Bar I was completely familiar with the particulars of the current kerfuffle playing out before me.

The applicant in their case happened to be the sheriff of the small town of Punitive Damagesville. The sheriff had retired from active duty years ago. Then one day, while starting his motorcycle, he had suffered a stroke.

A stroke is not necessarily within the presumption afforded to safety members (such as sheriffs), but can be if the applicant is also able to demonstrate that heart trouble led to the applicant's stroke.

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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] Aside from me, all attorneys appearing at the Lobby Bar have a last name equivalent to one of the four seasons. This is in loving memory of a television program from my youth, The Howdy Doody Show, and one of its main characters (at least as far as I am concerned), Princess Summerfall Winterspring. I've already started a "strongly worded" letter campaign to have it added to Netflix streaming in the hopes of reliving my youth. You can thank me later.

After discussing their case with Frank last night my memory was jogged and I recalled the Board had recently addressed this very issue in *Oscar Carter v. County of Fresno* (ADJ2046824) filed June 24, 2013.[4]

In a thorough and comprehensive discussion of heart trouble and the presumption afforded to safety members the Board observed as follows:

> Thus, a defendant normally has the opportunity to present evidence to rebut the presumption that a correctional officer's heart trouble arose out of and in the course of employment. In *Muznik v. Workers' Comp. Appeals Bd.* (1975) 51 Cal.App.3d 622 [40 Cal.Comp.Cases 578], the court broadly construed the meaning of the term "heart trouble." The court concluded that the legislative intent was to encompass "any affliction to, or additional exertion of, the heart caused directly by that organ or the system to which it belongs, or to it though interaction with other afflicted areas of the body, which, though not envisioned in 1939, might be produced by the stress and strain of the particular jobs covered..."[5]

In *Muznik* the applicant suffered from hypertension, which is normally not covered under the heart presumption. However, the Court reasoned that the applicant's hypertension produced "heart trouble" and therefore fell under the heart presumption.

In *Carter* (supra) the Board then debated a defendant's burden to rebut the presumption, which is extremely difficult. The Board stated in relevant part as follows:

> To rebut the presumption of industrial causation, defendant must show through substantial medical evidence "that some contemporaneous nonwork-related event-for example, a victim's strenuous recreational exertion - was the sole cause" of the applicant's heart trouble.

The Board went on to examine the anti-attribution clause of the heart presumption and analyze the Supreme Court of California case *City and County of San Francisco v. Workers' Compensation Appeals Board (Wiebe)* (1978) 22 Cal.3d 103 [43 Cal.Comp.Cases 94].[6]

The Board pointed out the following:

> However, the Court in *Wiebe* also noted that the anti-attribution clause was enacted to avoid a battle of medical experts as to whether a covered employee's heart condition was due to job stress or to a pre-existing cause. The Court found the Legislature's addition of the anti-attribution clause in 1959 was meant "to

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[4] Anyone wishing a copy of *Carter* should request same by e-mail.

[5] Anyone wishing a copy of *Muzink* should request same by e-mail.

[6] Anyone wishing a copy of *Wiebe* should request same by e-mail.

> preclude the WCAB from finding the statutory work-related presumption rebutted solely on the basis of evidence attributing the heart attack to a pre-existing disease."

In *Carter* the applicant, similar to the former sheriff of Punitive Damagesville, had been retired and obviously not at work. The Board addressed this argument as follows:

> In this case, defendant appears to be arguing that applicant was engaged in purely personal activity when he suffered a stroke, and therefore was not in the course of his employment at the time of injury. Given that the presumption applies for up to 60 months after employment terminates, the fact applicant was not at work when his disease manifested does not rebut the presumption.

In my ongoing role as peacemaker/mediator at large for the Lobby Bar I caught George's attention and asked him to make some drinks for Ron and Frank and put them on my tab. I then went to join the two "lovebirds" and see what I could do about their little quarrel.

When I reached them each raced up to me, attempting to plead their cases simultaneously, stepping over each other's words.

I raised my right arm slightly, palm upraised in a sort of "cease and desist" type fashion. At the same time as luck would have, it their drinks arrived.

At this point Ron and Frank stopped their arguing and were ready to listen to reason.

I explained to Ron and Frank that the legislature of California, similar to other states, has given a special status to safety members, such as sheriffs, police officers, firefighters, etc., not enjoyed by other applicants.

I added that as a matter of fact in *Wiebe* one of the sticking points was an equal protection argument. It was contended that the heart presumption was unconstitutional as it did not provide equal protection of the law to all injured employees.

The eventual Supreme Court of California decision was close (4 – 3), but this decision is still the law of the land in our State.

My musings lead me to realize that although not directly on point with the presumption argument, the Board did address another issue in *Carter* which I knew would be of some interest to Frank and Ron. The applicant, Oscar Carter, suffered slight dementia according to one of his doctors, who stated, "[it is] quite possible that his affliction will preclude gainful employment."

The Board observed that although Labor Code §4662(d) creates a conclusive presumption of 100% permanent disability where injury causes "incurable mental incapacity or insanity," the medical evidence fell short of this standard.

Accordingly the Board sent this case back to the WCJ to develop the record citing *Bernard Tyler v. Workers' Compensation Appeals Board* (1997) 56 Cal. App.4th 389, 393-395 [62 Cal.Comp.Cases 924] and *James McDuffie v. Los Angeles County Metropolitan Transit Authority* (2003) 67 Cal.Comp.Cases 138 (Appeals Board en banc).[7]

In terms of the WCJ issuing his own instructions the Board referred to *Cynthia Blackledge v. Bank of America (2010)* 75 Cal.Comp.Cases 613, 625, fn. 15 (Appeals Board en banc) noting as follows:

> And, in a complex case such as this one, which involves multiple body parts and medical evaluators, rating instructions should be issued. This ensures that the expert opinion of the Disability Evaluation Unit is obtained, which (while not controlling) will help minimize the chance of error.[8]

My lecture done, peace and quiet had been restored to the Lobby Bar . . . at least for tonight.

DISCLAIMER:

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

The Board's decision in *Carter* however is real and provides our industry with a roadmap as to where we have come on the issue of the heart presumption.

Make mine a double, George.

-Joe Truce

[7] These two cases came out of our firm. Anyone wishing a copy of either should request same by e-mail.

[8] This case was one that I handled. Anyone wishing a copy of *Blackledge* should request same by e-mail.