

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 UNDOCUMENTED WORKER DILEMMA OR NOT ALL LEGAL CITATIONS ARE CREATED EQUAL*¹

FROM THE LOBBY BAR AT THE HYATT:

After a hard day denying benefits, I arrived at the Lobby Bar to find an incensed Frank Falls, noted workers' compensation defense attorney, and a beaming Ron Summers, notorious applicant attorney and George the Bartender's workers' compensation attorney.

My initial feeling was that Ron had somehow managed to best Frank in a case. Although I was very interested in hearing the reason for these two fellows' moods I remembered my primary reason for coming to the Lobby Bar, i.e., ordering a Beefeater's martini, straight up with two olives from Kim, the Hyatt's breathtakingly beautiful cocktail waitress.²

The apparent dispute between Ron and Frank was certainly one-sided, as Frank demonstrated wildly about the bar, boisterously declaring, "My client is entitled to due process and equal protection of the law under the 14th Amendment! We will have justice!" Ron remained peacefully on his stool, still grinning ear to ear.

Always looking to help a colleague down on his luck I bought Frank a cocktail. After a few sips he finally calmed down and explained to me the source of his rage.

One of Frank's larger self-insured clients was a national hamburger chain by the name of Burger Queen.³

Frank went on to explain that the applicant in his case had sustained a low back injury. When Ron filed his appearance for the applicant, the case, of course, was litigated and Dr. Nickelsberg placed the applicant on ongoing temporary disability.⁴

Eventually, Dr. Nickelsberg found that the applicant could return to work but with restrictions.

Frank's client, Burger Queen, then made an offer of modified work to accommodate the applicant's work restrictions. However, through the deposition process, Frank found out that

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 man has his priorities.

³ Burger Queen is a new national hamburger franchise. Originally known as Burger Monarchy, the owners went through a divorce and subsequent to dissolution proceedings and breaking up of the empire, the Queen went her way and the King went his.

⁴ Dr. Nickelsberg is also George the Bartender's workers' compensation primary treating physician.

the applicant was an undocumented worker and was not legally entitled to be in the United States.

Therefore, when the applicant showed up at work to accept their modified job, the employer refused to take the applicant back to work as it was now known that the applicant was an illegal immigrant.

In his Findings and Award the Workers' Compensation Judge (WCJ) granted the applicant continuing total temporary disability benefits. The WCJ commented in his Opinion on Decision that it was axiomatic in California and pursuant to case law that an employer who could not accommodate an applicant's work restrictions when the applicant was "temporarily partially disabled" meant that, as a matter of law, the applicant became "temporarily totally disabled."

Frank angrily told me that this decision was contrary to Federal law. Had the employer allowed the applicant to return to work the employer would have been breaking the law.

After taking a long sip of his cocktail, Frank swore that he would appeal this case to the highest court in the land.

At this point, I decided to lift Frank's spirits a bit by advising him that the Appeals Board had recently issued a Panel decision in *Sarahi Cubedo v. Leemar Enterprises, Incorporated* 2011 Cal. Wrk. Comp. P.D. LEXIS 356 (Cal. Wrk. Comp. P.D. 2011) in which the Board agreed with Frank and reversed a WCJ in a similar case.⁵

Clearly the issue of undocumented workers and illegal immigrants is a hot button issue in this country. However, the Board weighed in on this particular issue by sticking to the letter of the law and noting as follows:

In 2002, the California Legislature declared that the immigration status of a person employed in California is irrelevant when it comes to extending "all protections, rights and remedies available under state law."

The Board in a footnote referred to Labor Code §1171.5 which provides as follows:

The Legislature finds and declares the following: (a) All protections, rights, and remedies available under state law, *except any reinstatement remedy prohibited by federal law*, are available to all individuals regardless of immigration status who have applied for employment, or who are or who have been employed, in this state. (emphasis added)

The Board then addressed the issue in this case by referring to the published Court of Appeal decision in *Del Taco v. Workers' Compensation Appeals Board* (2000) 79 Cal. App. 4th 1437;

⁵ The Panel decision in *Cubedo* was filed and served by the Board on August 8, 2011. Anyone wishing a copy should submit their request via e-mail.

94 Cal. Rptr. 2d 825; 2000 Cal. App. LEXIS 304; 65 Cal. Comp. Cas 342 and commented as follows:

. . . the Appeals Court held that, although an injured worker's immigration status is not relevant to the issue of entitlement to temporary disability, the injured worker is not entitled to vocational rehabilitation benefits where the employee is unable to return to work solely because of immigration status.

In applying the facts of *Cubedo*, the Board held as follows:

With regard to temporary partial disability and pursuant to the holding in *Del Taco*, we believe that if defendant made a legitimate offer of modified work that applicant could not accept solely because of her residency status, defendant is not alternatively liable for temporary total disability benefits.

Frank's spirits brightened considerably as I handed him a copy of the *Cubedo* case. A dark storm cloud appeared to be forming over Ron, who was eavesdropping on our conversation. All was right with the world!

TO CITE OR NOT TO CITE, THAT IS THE QUESTION!

The next line of appeal after the Board acts on a Petition for Reconsideration is a Petition for Writ of Review filed in the Court of Appeal.

These Petitions for Writ of Review have a small percentage of success and even when successful the Court often refuses to publish the decision. In these cases the Court of Appeal unpublished decision becomes the law of the case—not of the land.

It is even rarer for the California Supreme Court to weigh in on a workers' compensation issue.

Therefore, workers' compensation practitioners seek guidance from the Board's en banc decisions, Writ Denied decisions published in the California Compensation Cases and Appeals Board Panel decisions.

An en banc decision by the Board is legally binding on Panels of the Appeals Board, the parties in the case and Workers' Compensation Judges.

However, what about Writ Denied cases or Panel decisions of the Board such as *Cubedo*?

The Court of Appeal in *Wings West Airlines v. Workers' Compensation Appeals Board and Industrial Relations* (1986) 187 Cal. App. 3d 1047; 232 Cal. Rptr. 343; 1986 Cal. App. LEXIS 2321; 51 Cal. Comp. Cas 609 told us that decisions of the Appeals Board can be brought to their attention as examples of contemporaneous workers' compensation law and as to the position of the Board on certain issues. Therefore, although not precedent as a citation, the court will consider decisions of the Board on workers' compensation issues.

Additionally, Labor Code §5703(g), with regard to what evidence may be presented to the Board, indicates that decisions of the Board on similar issues can be received into evidence.

What about a decision by a Workers' Compensation Judge that was not appealed to the Board on a Petition for Reconsideration? Does this qualify as a decision of the Board under Labor Code §5703(g) that can either be brought to the attention of the Board or received into evidence?

In *Cubedo*, the Board answers yes to this question as a decision by a Workers' Compensation Judge is a decision of the Board. The Board noted in *Cubedo* as follows:

Pursuant to its statutory authority, however, the Appeals Board *delegates* its judicial powers to "Workers' Compensation Administrative Law Judges" (WCJ) to conduct trials and render initial determinations in workers' compensation cases. (*Lab. Code*, §§ 5309, 5310.) Unless the Appeals Board grants reconsideration (*Lab. Code*, § 5900 *et seq.*), a decision of a WCJ is the decision of the Appeals Board. (*Cal. Code Regs.*, tit. 8, § 10348.)⁶

CAN A RULE OF LAW IN A COURT OF APPEAL UNPUBLISHED CASE BE BROUGHT TO THE BOARD'S ATTENTION?

In *Cubedo*, the Board answered no to this question.

The WCJ in *Cubedo* had apparently relied on an unpublished case and the Board observed as follows:

It was improper for the WCJ to rely on the unpublished decision in *Liberty Mutual Insurance Comp. v. Workers' Comp. Appeals Bd. (Pinzon)* (2002) 67 *Cal.Comp.Cases* 12.

The Board went on to cite Rule 8.1115(a) of The California Rules of Court, which states that unpublished Court of Appeal cases may not be cited as authority.

In *Cubedo*, the Board advised the WCJ that "future compliance with the Rules of Court is expected."

⁶ In utilizing the above language, the Board was sending a message to the WCJ that "future compliance with proper terminology is expected." Panel decisions of the Appeals Board can be brought to the attention of a Workers' Compensation Judge or the Board by virtue of Labor Code §5703(g) which provides 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 . . . (g) . . . the prior decisions of the appeals board upon similar issues.

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DISCLAIMER:

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

However, the national debate on undocumented workers and immigration reform is all too real and ongoing. Fortunately, both the Court in *Del Taco* and the Board in *Cubedo* have drawn a bright line for us on this issue.

Make mine a double, George.

-Joe Truce