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 LABOR CODE §5814 PENALTIES OR *IS THAT A 25% PENALTY IN YOUR POCKET OR ARE YOU JUST HAPPY TO SEE ME?*

FROM THE LOBBY BAR AT THE HYATT:

Gather around loyal Lobby Bar patrons as I dust off and recount to you a story from the *George the Bartender* archives. Pull up a stool and grab your favorite libation and prepare yourself to hear another great pearl of wisdom from yours truly. Enjoy!

Cue dissolve effect. We open on the scene in black and white, with a point of view shot of our narrator approaching a building. He's fixated on a sign. As he gets nearer to the building the sign comes into focus and we can make out two words: "Lobby Bar." The voiceover begins:

The year was 2006. It was a different time, a much simpler time. A time before the ubiquity of smartphones and social networking and me with only 36 years of legal expertise under my belt.[1]

Another successful day of denying benefits behind me, I arrived at the Lobby Bar and made my way to my usual seat. George was in excellent humor as he poured my first Beefeater's martini, straight up with two olives.[2]

Curious as to the reason behind George's elation I inquired with him about his current state. George told me that his attorney, the infamous Ron Summers, had settled his lateral epicondylitis case for $50,000 and the insurance carrier was late in paying the order approving C&R. George you see had sustained this injury, commonly referred to as tennis elbow, from years and years of preparing cocktails, more specifically from the repetitive shaking of cocktails, like martinis.

Even though the insurance carrier added a 10% penalty on the settlement amount Ron claimed that they actually owed an additional penalty of 25% of the C&R amount pursuant to Labor Code §5814 as amended in 2004 by SB899. [3]

George told me that his penalty hearing was tomorrow, or as he called it, "My big payday!"

After taking the last sip of my first martini I told George that before counting the ways in which he could spend all this money he should read the Court of Appeal decision in *New United Motors Manufacturing v WCAB (Gallegos)* 141 Cal. App. 4th 1533; 47 Cal. Rptr. 3d 200; 2006 Cal.

---

[1] Contrary to popular belief I was NOT a classmate of Hammurabi's.

[2] A Beefeater's martini, straight up, is best served at 38˚ Fahrenheit.

[3] 25% of the award or $10,000, whichever is less.

App. LEXIS 1251; 71 Cal. Comp. Cas 1037; 2006 Cal. Daily Op. Service 7544; 2006 Daily Journal DAR 10795, filed and certified for publication on August 15, 2006.

I explained that the additional 10% paid by his insurance carrier was undoubtedly a Labor Code §4650(d) increase and by adding the 10% increase, or penalty, his carrier had escaped liability for the additional 25% Labor Code §5814 penalty.

"That can't be right!" George stated emphatically as he spilled Beefeater Gin on the bar in the midst of pouring my second martini.

“Ron told me that the insurance company can only avoid the larger penalty if they are the ones that discover the delayed payment--in my case it was my attorney who called it to their attention,” George exclaimed!

I explained to George that this was the same argument made by the applicant's attorney in *New United Motors Manufacturing*. I pointed out to George that the Court held as follows:

> . . . *§5814, subd. (b)*, in plain and unambiguous terms, permitted an employer to pay a 10 percent self-imposed penalty in lieu of the penalty in *§5814, subd. (a)*, if a potential violation of *§5814* was discovered by the employer prior to an employee claiming a penalty under the statute, and the penalty was paid within 90 days of the date of the employer's discovery. WCAB erred in concluding that *§5814, subd. (b)*, was inapplicable because the applicant, not the employer, first discovered the "potential violation" of *§5814*.

The Court's decision turned on its interpretation of Labor Code §5814(b) which provides as follows:

> If a potential violation of this section is discovered by the employer prior to an employee claiming a penalty under this section, the employer, within 90 days of the date of the discovery, may pay a self-imposed penalty in the amount of 10 percent of the amount of the payment unreasonably delayed or refused, along with the amount of the payment delayed or refused. This self-imposed penalty shall be in lieu of the penalty in subdivision (a).

Of course, this may encourage applicant attorneys to simply file a penalty petition before notifying the defendant of the delay.

Needless to say George was crestfallen and stomped off to make another patron’s drink, leaving me to my own thoughts and martini.

DISCLAIMER:

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

Make mine a double, George.

-Joe Truce