ANOTHER INSTALLMENT IN THE *GEORGE THE BARTENDER* SERIES

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RE: GEORGE THE BARTENDER AND THE MISAPPLICATION OF LABOR CODE §4662 OR *"JUST THE FACT, MA'AM"*[1]

FROM THE LOBBY BAR AT THE HYATT:

Confetti rained down everywhere as the ball had just dropped bringing in a new year. 2014 was upon us. Having received my ceremonial kiss on the cheek from Kim as the clock struck midnight, I thought to myself that all was right with the world and 2014 was off to a good start.

Allow me to rewind the clock a bit though and tell you about my last good deed of 2013. After a hard day of denying benefits I arrived at the Lobby Bar seeking a festive atmosphere and a Beefeater's martini.[2] What I walked into though was far from festive. A shouting match was taking place between Ron Summers, George the Bartender's workers' compensation attorney, and Frank Falls, noted workers' compensation defense attorney.

As this heated lovers' quarrel had been going on for a week I was well acquainted with the substance of the controversy, though the particulars escaped me.

Ron, in his ongoing fight to get around the clear mandate of Labor Code §4660, was claiming that one of his applicants was entitled to a 100% un-apportioned Award pursuant to Labor Code §4662. This section states that certain permanent disabilities are presumed to be completely and utterly impairing, such as the loss of both hands, an injury resulting in near total paralysis and an injury to the brain resulting in incurable mental incapacity or insanity.

In my time[3] as a lawyer no one has really questioned this part of the law. It's the last line of the law that gets most of the attention, resulting in increased litigation since adherence to the American Medical Association (AMA) Guides to the Evaluation of Permanent Impairment (5th Edition) became mandatory on January 1, 2005:

> "In all other cases, permanent total disability shall be determined in accordance with the fact."

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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] Save your Father Time jokes for someone who's retired.

It is indeed ironic that applicant attorneys have only seized upon this phrase since the AMA Guides required objective signs of disability in establishing a whole person impairment rating.

One of the controversies as far as I am concerned surrounding Labor Code §4662 is the sentence structure itself. The phrase "permanent total disability should be determined in accordance with the fact" makes the hair on the back of my neck stand up. Clearly, to make this sentence grammatically correct and logical the word "fact" should be "facts."

At this point I was finishing my first Beefeater's martini and I smiled at Kim, the Hyatt's breathtakingly beautiful cocktail waitress, which is our little sign to bring me another cocktail.[4]

Then the argument between Frank and Ron became louder and I realized that there was no escaping it. I decided to buy a round of cocktails and smooth things over between the two so that I could merrily ring in the New Year.

After receiving their cocktails Ron explained that their case involved an applicant who had sustained both an admitted specific injury and a cumulative trauma injury.

At trial Ron argued by way of medical evidence and the testimony of a vocational rehabilitation expert that Ron's applicant, by virtue of his two injuries, was precluded from earning any future income and pursuant to Labor Code §4662 was 100% disabled.

Ron further argued that since the applicant's disability was determined pursuant to Labor Code §4662 there could be no apportionment.

At this point Frank broke in and advised in a very loud voice that although it was clear there could be no apportionment to those enumerated permanent disabilities in Labor Code §4662 this did not preclude apportionment when there was a finding that total permanent disability was "in accordance with the fact."

Ron broke in to tell me that the Workers' Compensation Judge (WCJ) had adopted his argument and had issued a 100% Award without apportionment.

Frank chimed in saying that he would appeal as the finding of no apportionment did not make sense. Frank said since the medical physicians apportioned 50% of the disability to the specific and 50% to the cumulative trauma the Board's en banc decision in *Diane Benson v. Workers' Comp. Appeals Bd.* (2009) 170 Cal.App.4th *1535* [74 Cal.Comp.Cases 113] applied and each injury should be rated at a WPI of 50%.[5]

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[4] The rapid successive consumption of martinis is a "must" when one is contemplating the logic behind the Labor Code §4662 arguments advanced by some applicant attorneys. Though let me tell you the window of understanding is very narrow. Just enough and you're ready to debate the classics at a professorial level! Too much and the only thing you'll understand is "Drinks go in here. Drinks good. I like drinks." So, tread carefully loyal Lobby Bar patron.

[5] A copy of *Benson* is available upon email request

Seeing an opportunity to bolster Frank’s spirits while simultaneous dashing Ron’s I reached into my trusty briefcase and pulled out a recent panel decision of the Appeals Board - *Angel Valenzuela v. State of California-Department of Corrections* (ADJ1415058) filed on August 21, 2013.[6]

The Board in *Valenzuela* addressed the identical question that Ron and Frank debated for the last week, finding:

> A finding of total permanent disability "in accordance with the fact" as provided in section 4662 does not preclude apportionment of the permanent disability between industrial injuries as described in *Benson.*

The Board went on to note as follows:

> In construing section 4662 as it applies in this case it is important to consider that the Legislature describes four specific circumstances where total permanent disability is "conclusively presumed." Each of the four listed disabilities has specific requirements, as follows: "(a) Loss of both eyes or the sight thereof. (b) Loss of both hands or the use thereof. (c) An injury resulting in a practically total paralysis. (d) An injury to the brain resulting in incurable mental incapacity or insanity." A plain reading of section 4662 shows that only those four listed disabilities obtain the conclusive presumption because the last sentence of section 4662 provides that, *"In all other cases,* permanent total disabi1ity shall be determined in accordance with the fact." (Emphasis added.) Thus, in "all other cases" where permanent total disability is determined "in accordance with the fact" under section 4662, the permanent disability is not conclusively presumed to be total.

The Board added:

> Permanent disability is subject to apportionment based upon its causation, including in cases where the injured worker's overall permanent disability is 100%. (Lab. Code, § 4663(a) ["Apportionment of permanent disability shall be based on causation"]; *Brodie v. Workers' Comp. Appeals Bd* (2007) 40 Cal.4th 1313, 1328 (72 Cal.Comp.Cases 565] ["[U]nder Senate Bill No. 899, the new approach to apportionment is to look at the current disability and parcel out its causative sources- nonindustrial, prior industrial, current industrial--and decide the amount directly caused by the current industrial source.”]

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[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. A copy of *Valenzuela* is available upon email request.

The Board concluded by stating:

> Thus, apportionment must be addressed regardless of whether the total permanent disability is determined by rating the employee's whole person impairment, or otherwise "in accordance with the fact" pursuant to the last sentence in section 4662.

At this point Frank's features brightened and you could see a sense of relief wash over him. Ron, on the other hand, appeared crushed.

Ron quickly pulled himself together though and attempted to mount a defense. He told me that other panel decisions had found that apportionment was not available in cases presumed to be total under Labor Code §4662.

I referred Ron to page four of the decision in *Valenzuela* in which the Board noted that although other panel decisions had found no apportionment in Labor Code §4662 cases, in these cases the disability was presumed to be total.

The Board pointed out that the Labor Code §4662 concludes a presumption only applied to the four severe disabilities enumerated in this section and did not apply to the last line of the law.

Frank happily advised me that he was going to rewrite his trial brief in light of *Valenzuela*. Ron, completely disheartened now, slinked back to his corner of the bar.

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 imagination.

However, the ongoing litigation over the meaning of Labor Code §4662 is not. In the near future, we may well obtain some guidance from the Court of Appeal.

Interestingly enough the Board in a footnote in *Valenzuela* indicated that they were not giving an opinion on the four categories that are presumed to be total as to whether apportionment applied, stating ". . .we express no opinion on that issue." In my opinion, this opens the door for us to claim that there may well be apportionment with respect to the four disabilities that are presumed to be total.

Cheers to the New Year!

Make mine a double, George.

-Joe Truce