

## **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 ASKS, “DOESN’T EVERYONE WANT TO SEE THEIR NAME IN BRIGHT LIGHTS?” (*SHORT ANSWER: YES, BUT DEFINITELY NOT BECAUSE OF A POOR DECISION AFTER RECON.*)<sup>1</sup>**

### **FROM THE LOBBY BAR AT THE HYATT:**

After a hard day denying benefits I hastened to the Lobby Bar to meet Frank Falls, noted defense attorney, as he wanted to discuss with me a very sensitive procedural issue affecting an associate attorney at his firm. As if I needed another reason to hurry to the Lobby Bar which, lest we forget, employs Kim, the Hyatt’s breathtakingly beautiful cocktail waitress!

Approaching the bar to order my cocktail of choice, a Beefeater’s martini straight up with two olives<sup>2</sup>, I was stopped by Kim who surprised me with my drink. Thanking her and taking my first sip of my cocktail I then spied Frank down at the other end of the bar with one of his associates, Shannon Spring.<sup>3</sup>

Frank looked grim and Shannon was solemn with what I would describe as a vacant stare.

I decided to order a round of drinks for the despondent duo, motioned to George at the bar and headed over to join them. Frank filled me in on their current state. A problem had recently occurred at his firm as the result of a Petition for Reconsideration which Shannon had filed on behalf of one of Frank’s major clients, Integrity Insurance Company.

Frank explained that Shannon was a somewhat inexperienced but aggressive attorney in his firm who was incensed at an adverse discovery ruling by a Workers’ Compensation Judge. He said that the actual discovery ruling was really moot at this juncture as that was not his chief concern. Apparently the WCJ had called in a court reporter and taken in exhibits as evidence and then issued the so-called adverse discovery issue against Shannon’s client.

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<sup>1</sup> 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!

<sup>2</sup> A Beefeater’s martini straight up is best served at 38° Fahrenheit.

<sup>3</sup> 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.

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Their drinks had arrived and Shannon picked it up there. She told me that she had worked on the appeal for hours and in short order filed a 30-page Petition for Reconsideration to which she had attached numerous exhibits.

Frank interjected that Shannon filed the Petition before Frank had a chance to review the pleading not only for accuracy but for compliance with the Workers’ Compensation Appeals Board’s Rules of Practice and Procedure (Rules) in Title 8, Division 1, Chapter 4.5, subchapters 1.9 (§ 10210 et seq.) and 2 (§ 10300 et seq.), of the California Code of Regulations.<sup>4</sup>

Shannon said that time was of the essence and as Frank was engaged in trial she took it upon herself to file the Petition with the Board.

Frank told me that he reviewed the Petition after the fact and although he said that Shannon did an excellent job as an advocate on behalf of Integrity Insurance Company, the Petition was defective as it did not comply with the clear meaning of the Rules. Frank listed her errors as follows:

1. First, the discovery Order of the Judge was not a final Order and as such the correct procedure would have been to file a Petition for Removal pursuant to Labor Code §5310 with the Board and not a Petition for Reconsideration. The difference, of course, is that a Petition for Reconsideration divests the WCJ of jurisdiction and everything stops until the Petition for Reconsideration is addressed by the Board.
2. Second, the Petition exceeded the 25-page limit as set forth in the Rules, a rule applicable to any petition or matter pending before the Board.<sup>5</sup>
3. Third, Shannon had incorrectly attached copies of exhibits that were already in evidence, another violation of the Rules.

Frank advised me that his concern was that Shannon would be admonished or, worse still, sanctioned by the Board for violating its rules.

I told Frank that it might be a good idea to request permission from the Board to file a supplemental petition acknowledging Shannon’s mistakes and promising that this would never happen again.

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<sup>4</sup> For the sake of brevity I motion that we hereafter refer to these as the “Rules” and since the possibility of a dissent vote here in the body of this publication is nil the motion automatically carries. Isn’t democracy great!

<sup>5</sup> Yes, loyal Lobby Bar patron, this page limitation does exclude verification, proof of service, exhibit and cover sheet. And yes, you can petition a request to exceed this page limit, but really, who has the time?

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I reminded Frank that including the chairwoman, Ronnie Caplane, we presently have only five of seven Commissioner seats full. I added that in years past the Chair traditionally did not participate in most panel decisions, only *en banc* decisions, but that Ronnie Caplane, in addition to her duties as Chair, is a working Commissioner right beside the other four commissioners, given these vacancies.

Clearly time is a luxury that the Board doesn't have and spending it to go over petitions that turn out to violate the Board's own rules could be time better spent.

I reached into my trusty briefcase and pulled out a recent panel decision by the Board in the case of *Maria Munoz v. Flores Family, Inc., dba McDonalds Restaurant* (ADJ8204664) filed on June 28, 2013.<sup>6</sup>

I told Frank that the *Munoz* case was similar to Shannon's Petition for Reconsideration.

The defense attorney in *Munoz* received an adverse ruling by a WCJ. They then filed a Petition for Reconsideration.

The lead Commissioner in this case was none other than the Chair, Ronnie Caplane, and in the Board's four-page decision she advised that they were issuing a Notice of Intention to impose sanctions of up to \$250.00 on the defense attorney pursuant to Labor Code §5813 for violating Appeals Board Rule 10561(b).

The defense attorney in *Munoz* did everything wrong as they apparently attached copies of exhibits that were already in evidence, exceeded the page limit and finally filed a Petition for Reconsideration to a non-final Order by the WCJ.

*Munoz* was not only a wake-up call to the defense attorney in this case but was a warning bell to the entire workers' compensation community that the Board will not tolerate repeated violations of its rules.

It was here in my musing that I was reminded of a song of my youth. Does everyone remember the famous song by the Kingston Trio, "The MTA?" The song explores the struggle of a man to get off the subway, as the town of Boston had arbitrarily raised the fee on the subway system

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<sup>6</sup> 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.

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(then known as the Metropolitan Transit Authority), which proved impossible since he didn’t have enough money to pay the exit fare. The last line of the pre-verse is a warning, “This could happen to you!”<sup>7</sup>

Frank and Shannon have been warned. I only hope you loyal Lobby Bar patron also take heed.

### **HOW THE SAUSAGE IS MADE**

To find topics for *George the Bartender* I review every panel decision<sup>8</sup> issued by the Board each month and I have to say that the volume of decisions are amazing considering that the Board is operating shorthanded, even with Chairwoman Caplane chipping in.

The Board is dealing with important questions of law that will become more frequent as parties litigate various provisions of SB 863.

I know that when the Board wants to make a point as to transgressions committed by a party the Board’s decision will tend to mention the party by his and/or her full name.

If the Commissioners are really upset, the party’s name will be mentioned multiple times. Although I do not have the statistics at hand nor do I think it is mentioned in the *Guinness World Records 2014*, a review of the *Munoz* case would indicate that the Board mentioned the name of the chief transgressor at least eight times.

As you can see by the title of this George the Bartender episode, one does not want to become famous (or infamous) on account of a poor decision after reconsideration or removal.

### **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 Board’s impatience with parties who continually violate the Rules is not.

As stated earlier in this episode the Board is short two commissioners and we hope that the Board will be brought up to full strength in the very near future.

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<sup>7</sup> “Elder Truce, what’s this Kingston Trio you speak of?” Two words; Pop. Folk. I don’t have time to delve into their contribution to American popular music and how they helped pave the way for the success of folk rock as this is a law publication after all, but suffice it to say you would be doing yourself a great disservice, loyal Lobby Bar patron, if you didn’t look them up on Spotify. You’re welcome in advance.

<sup>8</sup> I figure if crime doesn’t sleep, then why should I?

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I think we can all learn a very valuable lesson from the *Munoz* case before filing our appeals – be they a Petition for Reconsideration or a Petition for Removal. Although we all may think that we know the Board’s Rules, it never hurts to go back and refresh our memories before filing an appeal.

Make mine a double, George.

-Joe Truce