ANOTHER INSTALLMENT IN THE *GEORGE THE BARTENDER* SERIES

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RE: GEORGE THE BARTENDER AND THE ODYSSEY OF LABOR CODE §5710 DEPOSITION FEES OR "WHOSE BENEFIT IS IT ANYWAY?"

FROM THE LOBBY BAR AT THE HYATT:

A cloud of gloom was hanging over the lobby bar at the Hyatt when I arrived.

Ron Summers, George the Bartender's workers' compensation attorney, had arranged for an office meeting at the lobby bar involving three fledgling attorneys from his office.

Ron was about to give them the bad news. The so-called "bad news" was in the form of two panel decisions recently issued by the Appeals Board regarding the calculation of applicant attorney fees.

On June 8, 2010, the Board issued its panel decision in the case of *Robert Stamps v. Kenny-Shea Traylor Frontier Kemper Joint Venture* (ADJ4094302) and on the following day the Board filed the case of *Carlos Guzman v. Barrett Business Services, Inc* (ADJ4280040).[1]

Both decisions dealt with the calculation of attorney fees pursuant to Labor Code §5801.

Labor Code §5801 provides that in denying a Petition for Writ of Review filed by a defendant carrier or employer, the Court of Appeal can also make a finding that the mere act of filing the Writ was frivolous and without merit, thereby entitling the applicant attorney to a reasonable attorney fee for preparing an Answer to the Petition for Writ of Review. [2]

In *Stamps* the Board issued its Award of Supplemental Attorney's Fees pursuant to Labor Code §5801 to attorney John Irving at the rate of $300.00 per hour.

On the following day the Board addressed the same issue in *Guzman* but noted that the attorney answering the Petition for Writ of Review was only admitted to the Bar as of December 1, 2008 and was not a certified specialist in workers' compensation. Therefore the Board decreed that a reasonable rate for services was $250.00 per hour.

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[1] A copy of the *Guzman* and *Stamps* cases are available via e-mail request.

[2] Labor Code §5801 finds in relevant part as follows: "In the event the injured employee. . . prevails in any petition by the employer for writ of review from an award of the appeals board and the reviewing court finds that there is no reasonable basis for the petition, it shall remand the cause to the appeals board for the purpose of making a supplemental award awarding to the injured employee or his attorney a reasonable attorney's fee for services rendered in connection with the petition for writ of review."

In holding his meeting with his young attorneys, Ron's issue was financial.

Although Ron handled all appearances on his files at the Board he also hired attorneys right out of law school to appear at all depositions of his applicants. These were then charged back pursuant to Labor Code §5710 to the defendant at a rate of anywhere between $350.00 to $400.00 per hour.

There has never been a uniform policy or set of rules for issuing Labor Code §5710 fees with respect to the hourly rate and over the years the rate has differed between Appeals Board offices and even among judges.

As Ron knew that the Board's decisions in *Guzman* and *Stamps* may well carry over into the awarding of attorney's fees pursuant to Labor Code §5710, he was concerned with respect to his profit margin.

This was the reason for meeting with his young associates to convey that there would be some belt tightening in his office.

THE ODYSSEY OF LABOR CODE §5710:

Labor Code §5710 was intially enacted by the California Legislature to allow parties to a litigated workers' compensation case to take depositions of parties or witnesses in a "manner proscribed by law for like depositions in civil actions," pursuant to the Code of Civil Procedure.

Although the workers' compensation system is not strictly bound by the Code of Civil Procedure in California, Labor Code §5710 provides an exception for depositions.

Labor Code §5710 was amended in 1972 and subsection (b) was added to allow the Board to award a reasonable allowance for attorney fees.

From that time to the present Labor Code §5710 reads as follows:

> The deponent is entitled to receive in addition to all other benefits . . . (4) A reasonable allowance for attorney's fees for the deponent . . . the fee shall be discretionary with, and, if allowed, shall be set by, the appeals board, but shall be paid by the employer or his or her insurer.

The "theory" was that the Board would exercise its discretion on a case-by-case basis and deposition fees would be allowed in some cases but not others depending on the facts and circumstances in each case.

The reality is that such a case-by-case analysis by the Board is, at best, impractical, and at worst an impossibility. Therefore, case law has evolved to the point where the awarding of a deposition fee is automatic except in the most egregious cases.

From the inception of the Amendment to Labor Code §5710 in 1972 allowing a reasonable deposition fee, this area of law remained unsettled until the Appeals Board issued its *en banc* in *Mitchell v. Golden Eagle Insurance*, 60 CCC 205 on March 2, 1995.

In *Mitchell* the Board crafted an excellent and scholarly presentation as to the history of the Amendment to Labor Code §5710 as follows:

> Before 1972, there were no formal guidelines for attorney's fees in connection with recovery of workers' compensation benefits. The only standard was that such fee had to be reasonable. Factors to be considered included the responsibility assumed, care employed, time devoted to the case, and the results obtained.

Prior to 1972 the defendant was not required to separately pay a deposition fee for the deposition of the applicant. When the final attorney fee for the applicant was calculated the referee (now Workers' Compensation Judge) would consider the "time spent in discovery" including the time spent at a deposition of the applicant, and the calculated attorney fee would then be deducted from the employee's recovery, i.e., allowed as a lien against the injured employee's recovery whether the recovery was by way of Order Approving Compromise and Release, a Stipulated Findings and Award or a Findings and Award.

In *Mitchell*, the Board explained the need for the amendment allowing a separate award of attorney fees in 1972 as follows:

> Because of increased use of depositions for discovery in workers' compensation cases requiring additional services by employees' attorneys, the Legislature passed A.B. 1705 amending Labor Code section 5710(b)(4) to provide that where the employer or insurance carrier requested a deposition of an injured employee, the employee was entitled to a copy of the transcript of the deposition without cost to the employee and a reasonable attorney's fee where the injured employee was represented by an attorney, with the proviso that such fee 'shall be discretionary with, and if allowed, shall be set by, the appeals board, but shall be paid by the employer or insurer'. (emphasis added)

The Legislature soon realized that this provision allowing a deposition fee for an attorney representing an injured worker did not also include "persons claiming benefits as a dependent of a deceased injured employee" and the Board in *Mitchell* noted that this oversight was cured by the Legislature by way of a 1979 amendment to Labor Code §5710.

The Board continued its analysis: It was noted that although Labor Code §5710 referred to an "injured employee" it was assumed that the Legislature did not mean to infer that a deposition fee would not be payable in cases in which injury was denied or not found.

In *Mitchell* the Board ruled that a claim for a deposition fee pursuant to Labor Code §5710 be on the same footing as a claim for the reimbursement of medical-legal expenses pursuant to

Labor Code §4620 *et seq.* and that said deposition fee will not be payable if it is determined that "the employee has deceitfully or fraudulently brought a claim for workers' compensation benefits . . ."

The Board also advised that the deposition fee issue pursuant to Labor Code §5710(b)(4) should be settled and/or adjudicated immediately unless the "defendant has made a good faith showing that the employee . . . has deceitfully or fraudulently brought a claim for workers' compensation benefits," and in this case "the disputed deposition attorney's fee issue shall be deferred until the hearing on the issues raised in the case-in-chief."

However, the Board noted that a hearing on any other disputed deposition attorney fee issue may be set for a separate proceeding or on a short cause calendar depending on the local Appeals Board Office's procedure.

This part of the Board's decision is troubling for defendants as short cause hearings can be set at the drop of the hat should defendants question the hourly rate or the time spent, even when a good faith payment of what defendant considers reasonable is made.

Most applicants' attorney handle multiple cases at the Board daily and a defendant must determine whether it is cost effective to pay for an attorney to appear and argue this one issue

Although I personally did not agree with the Board's interpretation of Labor Code §5710(b)(4), at the time this issue had been settled law since the issuance of the *en banc* decision in *Mitchell* on March 2, 1995.

However, in retrospect, the Board in *Mitchell* offered the only practical solution to the Labor Code §5710 deposition fee dilemma.

From the 1990's to the present, there have been other changes to Labor Code §5710(b)(4), as well as significant Board decisions.

In the late 1980's and early 1990's, non-attorneys, or hearing representatives, filed Applications on behalf of applicants claiming to have sustained an industrial injury.

As a great many of these claims involved good faith personnel actions or post-termination claims (before the Legislature enacted these defenses) the California Applicants' Attorneys Association, in conjunction with other groups, persuaded the Legislature to amend Labor Code §5710(b)(4) once again by indicating that only an attorney "licensed by the State Bar of this State" was eligible to receive an attorney fee.

Some defendants then argued that a deposition fee was not payable until the deponent signed the original transcript under penalty of perjury.

In answer to this challenge the Board issued a decision in the case of *John Lett v. the Los Angeles County Metropolitan Transportation Authority* 68 CCC 250 in which the Board ruled against defendant's argument that a deposition fee pursuant to Labor Code §5710 was not payable until the applicant actually signed his deposition. The Board ruled that the signing of the deposition transcript was not a condition precedent to receiving a Labor Code §5710 attorney fee.

WHOSE BENEFIT IS IT ANYWAY?

The applicant attorneys perceive that a Labor Code §5710 deposition fee is a benefit to them.

This may be so practically but certainly not according to the wording of Labor Code §5710.

Labor Code §5710(b) provides that in the case of the applicant's deposition "the deponent (you will notice it does not say applicant's attorney) is entitled to receive in addition to all other benefits. . . (4a) a reasonable allowance for attorney's fees for the deponent . . ."

WHAT IS A REASONABLE HOURLY FEE?

Workers' Compensation Judges and the Board have struggled with this question for years.

In our capitalist society the value of goods and services are determined by demand and what someone will pay for said goods or services.

The above is called "marketplace pressures" and the attorney fees for defense attorneys in our industry are determined by the marketplace, i.e., what someone will pay for our legal representation.

This is true almost everywhere except in making a determination as to the hourly rate for an applicant attorney pursuant to Labor Code §5710.

Hourly fees would appear to be determined in a vacuum without regard to the marketplace–even in the face of double-digit unemployment, stock market disasters and economic turmoil.

With the economy taking a nose dive, companies going out of business and retirement 401K's becoming worthless, someone invariably says: "Hey, I have a great idea-- let's raise Labor Code §5710 deposition fees!"

Who do they think they are?—the City Manager for the City of Bell.[3]

[3] As most of us living in Southern California know, this is a reference to an investigation by the *Los Angeles Times* which found that that the City Manager for the City of Bell, population 38,000, was receiving an annual income of $787,637.

It is my recollection (and my recollection is always faulty) that the prior Chairman of the Board, Merle Rabine, advised at a seminar some years ago that the Board might well consider an *en banc* decision on Labor Code §5710 attorney's fees and the rate.

However, this has never occurred–probably due to insurmountable problems with respect to the vastness of our practice and custom that varies regarding various offices of the Appeals Board statewide.

The Board has now done the next best thing in its two panel decisions issued on the consecutive days in *Guzman* and *Stamps.*

Additionally, I think the chronological order of these decisions are significant:

1. In *Stamps* the Board in awarding a Labor Code §5801 attorney's fee for responding to a Petition for Writ of Review, advised that a fee of $300.00 per hour was reasonable for an attorney of unquestioned experience in our industry. [4]

2. On the following day, June 9, 2010, the same panel issued its decision in *Guzman* reducing the hourly fee demand of the applicant's attorney from $350.00 to $250.00 with the following comment: "According to the records of the State Bar of California, he was admitted to the bar on December 1, 2008, and is not a certified specialist in workers' compensation. Therefore, we believe that a reasonable rate for services extended in this matter is $250.00 per hour." [5]

It would appear that the above decisions may set a cap on Labor Code §5710 deposition fees. In analyzing the above hourly fees awarded by the Board to the hourly rate for a Labor Code §5710 deposition fee the issue would be whether researching, writing and filing an answer to a Petition for Writ of Review requires the same effort and skill level as appearing at a deposition. The answer, I think, is obvious.

RON'S DILEMMA:

My thought process as to the odyssey and evolution of Labor Code §5710 law was interrupted by Kim, the Hyatt's breathtakingly beautiful cocktail waitress, bringing my second Beefeater's martini, straight up with two olives.

[4] The attorney in *Stamps* is Mr. John Irving, who is not only an experienced attorney in Workers' Compensation but has a well-earned reputation for excellence in his representation of injured workers.

[5] I am not sure whether or not the information from the State Bar was forwarded to the Board by the defendant in disputing the claimed fee or whether the Board did their own research. My money is on the Commissioners as I think it was intended to make a statement as to the relative value of attorney's fees based on experience and skill.

By this time Ron had finished his meeting with his younger attorneys and joined me for a cocktail.

Ron explained to me that he was going to take a financial hit because of the Board's decision in *Stamps* and *Guzman*.

Ron went on to tell me that it has been his practice for years to hire new lawyers with less than two or three months of experience to sit with his applicants during deposition and then request a fee from anywhere from $350.00 to $400.00 per hour.

He added that most of these fees were paid automatically by insurance carriers.

On every case Ron would instruct his young attorneys to spend at least one hour in "pre-deposition preparation time" as this would be paid for by the defendant.

Ron admitted to me that he was now going to adjust his "profit margin" on the assumption that most defendants would now do exactly what the Board did in *Guzman*, i.e., go into the State Bar website to see how long his attorneys have been practicing.

DISCLAIMER:

Apart from myself, George and Kim, all characters of the Lobby Bar are mythical and the story line is a creation of my imagination.

Since 1972, the Guidelines for paying a Labor Code §5710 deposition fee have been murky at best although our liability for the payment of said fee was determined by the Board's *en banc* decision in *Mitchell*.

However, since that time it has always been questionable as to what constituted a reasonable hourly fee and the Board has now given us guidance with its decisions in *Stamps* and *Guzman*.

The Board has even directed us to another resource, i.e., the State Bar website. [6]

Make mine a double, George.

-Joe Truce

[6] You can visit the links page of the Kegel, Tobin & Truce website, http://kttlaw.us/link.html, for the link to the State Bar of California website.