## ANOTHER INSTALLMENT IN THE *GEORGE THE BARTENDER* SERIES

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## RE: GEORGE THE BARTENDER AND THE PERPLEXITY OF RULES GOVERNING THE APPROVAL OF COMPROMISE AND RELEASE OR *DEAL OR NO DEAL?*[1]

**FROM THE LOBBY BAR OF THE HYATT:**

After a hard day of denying benefits I arrived at the Lobby Bar seeking relaxation and my favorite beverage, a Beefeater's martini straight up with two olives.[2]

I could feel a sense of bliss begin to wash over me as I spied Kim, the Hyatt's breathtakingly beautiful cocktail waitress, approaching me with my drink in tow.

All was right with the world . . . or so I thought. Taking my first sip of my drink I began to survey tonight's Lobby Bar crowd. I spotted Frank Falls, noted defense attorney, in a very animated conversation with the VP in charge of claims for the Integrity Insurance Company, Mr. Pat Pennipincher.

Ever curious I decided to find out what all the commotion was about. I motioned to Kim to make three more cocktails and I made my way down to Frank's end of the bar.

I learned that the conversation I had observed from afar was really a strategy meeting as to a major issue with the Integrity Insurance Company. Choosing to waive their right to attorney/client privilege, I was allowed to sit in on their meeting.[3]

Pat explained that because of the competitive insurance market in the State of California the Integrity Insurance Company had entered into several contractual agreements with large employers.

Although each of these employers was "insured" with the Integrity Insurance Company each employer had a high retention level, or a large deductible, which required that the employer would be responsible for the first one million dollars of each loss.

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[1] All Deals are subject to and governed by applicable federal, state and local laws and regulations, as well as the capricious nature of those applying said laws and regulations. Participation in this Deal is void where prohibited or otherwise restricted by law. No purchase necessary. See California Labor Code for more details.

[2] 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! Also, for those loyal Lobby Bar patrons who didn't know, a Beefeaters martini straight up is best served at 38˚ Fahrenheit.

[3] I'm sure the free round of drinks helped, to say nothing of my effusive charm.

Therefore, even though the name of Integrity was on the line the first million dollars of each loss would be reimbursed to Integrity by the employer.

Integrity was the most recent large insurance carrier to offer this type of insurance policy; that which provided the employer with control of each claim, much like self-insurance. Many large employers preferred this type of arrangement so they would not have to deal with the strict self-insurance laws of the State of California as enforced by the Office of Self-Insurance Plans (OSIP), which is a program within the director's office of the Department of Industrial Relations.

Pat explained that the downside in this arrangement was that the employer and/or its corporate attorneys exercised control over each loss and many times made demands which were unrealistic in the California workers' compensation system.

Frank and Pat were discussing one such case in which Frank had negotiated a Compromise and Release agreement for $50,000.00 to resolve a continuing trauma orthopedic claim for one of their large national clients, Mom's Flat Iron Company. The applicant through their attorney had filed a continuous trauma Application for Adjudication of Claim alleging orthopedic injuries due to their 30 years of employment at the iron factory.

The corporate attorneys for Mom's Flat Iron Company had demanded that Frank attach several addenda to the Compromise and Release agreement. Mom's Flat Iron Company wanted the applicant to agree that this Compromise and Release agreement would release them and the Integrity Insurance Company from any and all claims arising out of the applicant's employment with Mom's Flat Iron Company whether or not said injuries were known or unknown at this time.

After some negotiations the applicant and his attorney agreed to sign the Compromise and Release agreement with the addenda attached and it was submitted to the Board.

Surprisingly the Workers' Compensation Judge (WCJ) refused to approve the Compromise and Release agreement citing the additional language in the addenda. The WCJ's refusal was in the form of a written Order suspending approval of the Compromise and Release agreement until the addenda were withdrawn.

Today's meeting between Frank and Pat was to determine the best strategy for appeasing both the WCJ and also the attorneys at Mom's Flat Iron Company.

Frank moaned that he could not see any way around the Order of the WCJ and told Pat that he would probably have to withdraw the addenda. Pat was upset as he did not know what he was going to tell the attorneys at Mom's Flat Iron Company.

At this point, I reached into my trusty briefcase and pulled out copies of form DWC-CA 10214(c), which is the current edition of the Compromise and Release agreement. [4]

Handing one to Frank and Pat I made them aware that the jurisdiction of the Board in approving a Compromise and Release agreement is limited by WCAB Rule §10870 entitled "Approval of Compromise and Release." The section provides as follows:[5]

> Agreements that provide for the payment of less than the full amount of compensation due or to become due and undertake to release the employer from all future liability will be approved only where it appears that a reasonable doubt exists as to the rights of the parties or that approval is in the best interest of the parties.

I explained to Frank that the right of the parties to enter into a contract or Compromise and Release is explained by Labor Code §5000, which provides in relevant part as follows:

> No contract, rule, or regulation shall exempt the employer from liability for the compensation fixed by this division, but nothing in this division shall:
>
> (a) Impair the right of the parties interested to compromise, subject to the provisions herein contained, any liability which is claimed to exist under this division on account of injury or death.

I further pointed out to Frank and Pat that the sole judicial purpose of the Board in approving a Compromise and Release is to determine the adequacy of the proposed settlement. Once adequacy has been determined the WCJ must approve the Compromise and Release agreement.

Finished taking this all in Frank told me that the WCJ in his case, in rejecting the addendum language, relied on paragraph 3 found on page 5 in the form DWC-CA 10214(c):

> This agreement is limited to settlement of the body parts, conditions, or systems and for the dates of injury set forth in Paragraph No. 1 and further explained in Paragraph No. 9 despite any language to the contrary elsewhere in this document or any addendum.

I told Frank that this section of the form was in conflict with decisions of the California Supreme Court allowing parties to a settlement in a workers' compensation case to insert language which contemplated settlement of issues outside of the dates of injury listed in the Compromise and Release agreement.

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[4] 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/document at a moment's notice.

[5] Citation found in §10870 of the California Code of Regulations, Title 8, Chapter 4.5 Division of Workers' Compensation, Subchapter 2 Workers' Compensation Appeals Board- Rules and Practice Procedure, Article 18

I told Frank that in my opinion the CA Supreme Court case of *Mary Jefferson v. California Department of Youth Authority*, 28 Cal. 4th 299; 48 P.3d 423; 121 Cal. Rptr. 2d 391; 2002 Cal. LEXIS 4202; 67 Cal. Comp. Cas 727, took precedence over paragraph 3 found on page 5 in the form DWC-CA 10214(c).

In *Jefferson* the CA Supreme Court found that the intent of the parties in inserting language into a Compromise and Release agreement was paramount and assumed said intent language inserted into such an agreement is valid.

The Court in *Jefferson* stated in relevant part as follows:

> Jefferson urges us to disregard the attachment because it does not expressly refer to the FEHA action and "is clearly . . . boilerplate . . . and not something created or specifically negotiated uniquely for [her] workers' compensation action." Assuming she is correct factually that the attachment was not created for this case, she does not explain why a generic attachment should carry less weight in this context than a custom-made one. For our purposes, the critical points are that the parties incorporated the attachment into their compromise and release agreement and that it clearly establishes their intent to include civil claims within the scope of their settlement.

So much for the claim that “boilerplate language” is not legally binding.

I told Frank that if the applicant and his attorney made clear their intent in the Compromise and Release agreement to settle any and all claims, whether known or unknown, during the applicant’s employment then this agreement is valid per *Jefferson* and certainly overrides paragraph 3 found on page 5 in the form DWC-CA 10214(c).

I advised Frank that I was faced with a similar situation back in 2008 in which a now retired WCJ refused to approve a Compromise and Release agreement unless the following language (agreed to by all parties) was deleted from the agreement:

> It is expressly agreed between the parties that this Compromise and Release is to cover any and all aspects of the applicant's alleged injury including all disability and/or need for medical treatment the applicant may have sustained as a result of any and all employment by defendant herein, and any and all parts of the body demonstrated by the medical record or claimed in applicant's deposition which are hereby incorporated by reference. This is a full and final release which includes, but is limited to, all known, unknown, and unanticipated injuries of whatever nature, resulting from the applicant's employment by the defendant

Never being one to settle for “no” I filed a Petition for Removal and in response the WCJ rescinded his refusal to approve the Compromise and Release agreement and issued an approval.[6]

[6] Anyone wishing a copy of my Petition for Removal should request same by email.

Enlightening Pat and Frank further I quoted from the Labor Code (as I'm wont to do), more specifically Labor Code §5500.3 entitled "Uniformity Among Offices," which provides in relevant part as follows:

> (a) The appeals board shall establish uniform district office procedures, uniform forms, and uniform time of court settings for all district offices of the appeals board. No district office of the appeals board or workers' compensation administrative law judge shall require forms or procedures other than as established by the appeals board. A workers' compensation administrative law judge who violates this section may be subject to disciplinary proceedings.
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> (b) The appeals board shall establish uniform court procedures and uniform forms for all other proceedings of the appeals board.

The above law became effective as of January 1, 1990, and the Board has done its best in enforcing this rule, which is sometimes easier said than done.

The practice of approving or disapproving a Compromise and Release agreement as a result of language contained in attachments or addenda varies not only from Board Office to Board Office but from WCJ to WCJ.

Different judges exercise different standards as to language contained in the addendum to a Compromise and Release agreement they will approve. Certain judges refuse to allow any addendum whatsoever to be attached to this form unless the language can be inserted in the "comments section" in paragraph nine of the form found on page seven.

Everybody in the industry has their own addendum they use in an attempt to guarantee that their case will never re-open.

I think this can all be boiled down to two words: "It's over."

Ok, ok, for you English majors that's really three words but you get the idea.

**DISCLAIMER:**

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

However, the varying approval standards for Compromise and Release agreements between Appeals Boards and WCJ's are not. Assuming adequacy of the Compromise and Release agreement itself, it would appear that the intent of the parties pursuant to the CA Supreme Court's decision in *Jefferson* must prevail over paragraph three in our standard C&R form.

Today we find ourselves in an environment where more and more large employers are demanding that extra protection be given them when a case is settled by way of Compromise and Release agreement and pursuant to *Jefferson* the intent of the parties should prevail.

Unfortunately, as I've lamented here this isn't always the case and from time to time WCJ's need to be reminded of the myriad rules of the game we play by, just like the rest of us.

Make mine a double, George.

-Joe Truce