

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 THE DEMISE OF THE VOCATIONAL EXPERT OR *IS SENATE BILL 863 THE NAIL IN THE COFFIN FOR LEBOEUF?*¹

FROM THE LOBBY BAR AT THE HYATT:

Fresh off my annual-month long Hawaiian escapade I strode through the entrance of the Hyatt, briefcase in tow, making my way to the friendly and familiar confines of the Lobby Bar. A far cry from the warm sandy beaches and swaying hips of sun-kissed hula girls, I saddled up to my favorite seat. I longed to be sipping Mai Tais again, relaxing under a large beach umbrella, admiring the sun setting over the Pacific, the red and orange of the sky bleeding into purple, a cool breeze wafting over me.

I was pulled out of my state of reverie by none other than Kim, the Hyatt's breathtakingly beautiful cocktail waitress, tapping me on the shoulder and setting down in front of me my cocktail of choice, a Beefeater's martini straight up with two olives.

Thanking her, I turned my attention to the rest of the bar. The usual cast of characters were already enjoying libations, i.e. the cartel of chicanery themselves, Ron Summers, George the Bartender's workers' compensation attorney, George's primary treating physician, Dr. Nickelsberg, and of course Lenny and Larry Lien.

At the other end of the bar I spied Frank Falls, a friend and noted workers' compensation defense attorney, intently reading what appeared to be a small stack of documents.

Frank had this grave look of despair on his face and I knew right away that the documents he was reviewing must have meant bad news for him, which usually portends bad news for us in the defense community.

Deciding to do what I could to lift Frank's spirits I came down to his end of the bar, sat down and ordered another round of drinks for us.

Frank then began to explain the reason for his current state of anguish. It turns out he was reviewing a Findings and Award on one of his cases, along with the judge's Opinion on Decision. The Findings and Award was not in his favor.

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!

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Frank told me that he had recently tried a workers' compensation case against Ron Summers and had just received a 100% award in which the trial judge found that Ron's client was permanently and totally disabled.²

The WCJ had relied on Ron's favorite primary treating physician, Dr. Nickelsberg, and his report. The coup de grâce was the fact that Ron brought in a vocational expert, one Lenny Lien, who testified that he had interviewed the applicant and had given him vocational tests. Mr. Lien had made a determination that the applicant was precluded from all jobs in the open labor market and had no future earning capacity.

Frank told me that the injury in this case was fairly serious. Dr. Nickelsberg had given the applicant a rating under the American Medical Association (AMA) Guides to the Evaluation of Permanent Impairment (5th Edition) of approximately 80% but that the WCJ, on the basis of Lenny Lien's testimony, had found that the applicant was not employable in the labor market and was therefore 100% disabled.

Flabbergasted, I wanted to know if this Mr. Lien was the same Lenny Lien of the infamous Lien Brothers, Larry and Lenny Lien, who work for Dr. Nickelsberg.

No sooner had this thought formed in my head than Lenny Lien left his party and made his way over to where Frank and I were at the bar to answer the question himself.

I asked Lenny to explain if he had added to his bevy of job titles. Lenny confirmed that he was in fact the vocational expert who testified in the case Frank was handling. Lenny said that he saw the writing on the wall and realized that the workers' compensation judges, the Appeals Board, the Amended Rules of Practice and Procedure and statutory law were all combining to demand that lien claimants actually prove their case. He lamented that lien claimants were now required to attend all lien conferences (whether they be Status Conferences, Lien Claim Conferences or Mandatory Settlement Conferences) and complete the same Pre-Trial Conference Statement as required by the parties (listing issues, stipulations, exhibits and witnesses).

Lenny knew that his days of easy money as a lien representative were numbered and opted to change professions.

Ever the opportunist, Lenny, with the help of Ron Summers, had begun taking "courses" in vocational rehabilitation and was now proficient in administering vocational testing, as well as analyzing whether or not a claimant could work in the open labor market and had any future earning capacity.

Frank, growing steadily more morose, chimed in that at least this was Lenny's testimony at trial in which he qualified himself as an "expert witness."

² An exercise that could cause even the best attorney amongst us to file a stress claim.

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Frank added that to make things worse he did not think that the decision of the trial judge could be overturned by way of a Petition for Reconsideration. Worse still, the decision was against his largest client, the Integrity Insurance Company, which Frank feared would soon be on its way to becoming a former client.

Still full of the island spirit I decided now was an opportune time to bring some cheer to Frank's otherwise dismal day. I reached into my briefcase and dusted the sand off a recent panel decision by the Board entitled *Bruce Bates vs. Valley Vintners Wine Company* (ADJ1286359) filed and served March 12, 2013.³

I gave it to Frank and he began reading it. His face immediately lit up with a smile.

In *Bates* the Board made it clear that similar to a medical report by a panel QME or even an AME (Agreed Medical Examiner) the opinion of a vocational rehabilitation expert must constitute substantial evidence.

A mere opinion will not suffice. In *Bates* the Board stated in relevant part as follows:

Upon our review, we are not persuaded that Mr. Schmidt's opinion is substantial evidence. In his September 22, 2009 report, Mr. Schmidt opined that applicant "is unable to do past work, does not have transferable skills for other work, and cannot reasonably expect to return to work in other jobs." . . . However, he reached this conclusion without conducting a labor market survey. He testified that "[h]e didn't feel it was appropriate to do a labor market survey because he already felt that the applicant wasn't employable at all" . . . "[h]e did not do any research or exploration into the issue of whether or not Mr. Bates could work outside the home." Based on this testimony, we find his opinion conclusory and not substantial.

I pointed out to Frank that the Board had reversed the trial judge's decision in *Bates* of 100% permanent disability and issued their own decision after a reconsideration finding that the applicant was 80% disabled on the basis of the AME report and that the report and/or opinion of the vocational expert was not substantial evidence.

With this decision in hand a happy Frank Falls left the bar, exclaiming that it looked like he had some work to do, which I took to mean that he would start to draft a Petition for Reconsideration for his case. My job done, I then looked around and saw an elated Ron Summers, guessing that he probably hadn't heard of *Bates* either. Never one to miss an opportunity to educate Ron, i.e.

³ Much like Marry 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. Anyone interested in obtaining a copy of *Bates* should submit their request via email. Although this is a panel decision it may be considered by a Workers' Compensation Judge and/or entered into evidence pursuant to Labor Code §5703(g) which states that decisions of the Board on similar issues can be received into evidence.

make a negative adjustment to his level of happiness, I made my way over to his group with another drink and my briefcase in tow.

I produced another copy of *Bates* and handed it over to a grinning Ron. I gave him a few moments to review it and watched as the color left his face. Looking up at me and ready for comment I pointed out that the Board had issued its panel decision in *Bates* on an injury date prior to the most recent reform courtesy of Senate Bill 863.

I further told Ron that Senate Bill 863 provided that the computation of permanent disability as contained in said bill was applicable to injuries on or after January 1, 2013. It was somewhat doubtful as to whether he would be able to argue *LeBoeuf* for injuries after this date.⁴

Ron bypassed angry all together and skipped ahead to astonishment. He asked me to clarify my statements as he felt that case law indicated that he could argue *LeBoeuf* on all cases regardless of the date of injury.

I took this opportunity to give Ron a brief history lesson as to Labor Code §4660.⁵

I told Ron that prior to Senate Bill 899 (which took effect April 19, 2004) one of the factors to be taken into consideration by trial judges and the Board in calculating one's permanent disability was one's employability in the open labor market.

In fact, *LeBoeuf* addressed this very point under the law as it then existed. The California Supreme Court pointed out that it was relevant and one of the factors to be considered was whether or not an applicant was able to compete for gainful employment in an open labor market.

Enter Senate Bill 899. Senate Bill 899 eliminated the concept that permanent disability should be dependent on one's employability in an open labor market but replaced this phrase with the concept of "future earning capacity." Therefore, for injuries on or after April 19, 2004, one of the key issues to consider was whether or not the applicant had sustained a loss in their "future earning capacity" as a result of the industrial injury.

The appellate courts soon found out that there was really no difference as to the "loss of employability in an open labor market" and the "loss of future earning capacity" and indicated that *LeBoeuf* was still alive and well as a defense strategy.

In other words, as long as one of the factors to be taken into account in establishing permanent disability was loss of earnings, *LeBoeuf* couldn't be killed.

Enter Senate Bill 863. Senate Bill 863 deletes both the test of "employability in the open labor market" and the concept as to the "loss of future earning capacity."

⁴ *Richard Gene LeBoeuf v. Workers' Comp. Appeals Bd. and Alameda-Contra Costa Transit District*, 34 Cal. 3d 234 (Cal. 1983)

⁵ Labor Code §4660 is the statute which defines just how permanent disability is to be calculated.

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Instead Labor Code §4660 provides that all injuries resulting in a whole person impairment are to be increased by a factor of 40%.

Therefore, the concept of the “loss of future earning capacity” is out and the American Medical Association (AMA) Guides to the Evaluation of Permanent Impairment (5th Edition) is in.

As a matter of fact the California legislature created a new Labor Code Section: Labor Code §4660.1, which applies to injuries on or after January 1, 2013.

It is significant that the prior statute (Labor Code §4660) had the additional phrase added to it by SB 863 “. . . consideration being given to an employee’s diminished future earning capacity.”

Labor Code §4660.1 specifically deletes this phrase.

In my opinion Labor Code §4660.1(b) is a full declaration of death for *LeBoeuf* as this section provides as follows:

For purposes of this section, the "nature of the physical injury or disfigurement" shall incorporate the descriptions and measurements of physical impairments and the corresponding percentages of impairments published in the American Medical Association (AMA) Guides to the Evaluation of Permanent Impairment (5th Edition) with the employee's whole person impairment, as provided in the Guides, multiplied by an adjustment factor of 1.4.

Note subsection (b) uses the word “shall” which as we know leaves very little wiggle room.

In my opinion *LeBoeuf* is dead and gone. Who would like to read them their last rights?

DISCLAIMER:

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

The principles in *LeBoeuf* still must be tested by appellate review but based on prior decisions of the California Court of Appeal it would appear that the phraseology of Labor Code §4660 which allowed *LeBoeuf* to stand is gone.

I would like to take this opportunity to let you know loyal Lobby Bar patron that the reports of my demise are greatly exaggerated. Recent developments have slightly impeded my ability to produce this publication but there is no cause for concern. I look forward to continuing my contribution to the conversation within the community of workers’ compensation here in California, providing you with an education and a laugh.

Make mine a double, George.

-Joe Truce