ANOTHER INSTALLMENT IN THE *GEORGE THE BARTENDER* SERIES

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RE: GEORGE THE BARTENDER CONTEMPLATES THE FIFTH AMENDMENT FALLACY OR GIVE ME LIABILITY, OR GIVE ME DISMISSAL![1]

FROM THE LOBBY BAR AT THE HYATT:

After a hard day denying benefits I arrived at the Lobby Bar to the horrendous sound of a howling Ron Summers, George the Bartender's workers' compensation attorney. Clearly livid about something, Ron was yelling, "It simply is not fair!" and "I intend to take this case to the United States Supreme Court!"

Ron's discomfort always puts me in a good mood, matched only by the sight of Kim, the Hyatt's breathtakingly beautiful cocktail waitress, approaching me with my cocktail of choice, a Beefeater's martini straight up with two olives.

I had seen Ron upset before but this time he was pounding the bar, exclaiming, "It's unconstitutional!" and "It's un-American!"

As I stated previously, nothing makes my day like a frustrated Ron Summers, but this was starting to cross a line. Fearing that Ron's vociferous vituperation would infringe upon the enjoyment of my Beefeater's martini, I decided to calm Ron down a bit by ordering him a round of drinks.

Ron, like me, is deeply immersed in the world of workers' comp 24/7 so I knew that something must have gone terribly wrong on one of his cases. [2]

Ron calmed down a bit after the arrival of his drink. After a few sips of his cocktail Ron told me that in today's mail he received an Order of Dismissal from a workers' compensation judge on the basis that Ron's client refused to produce materials in discovery by asserting their Fifth Amendment right against self-incrimination.

Ron went on to tell me that the defendant had issued a subpoena and/or a Notice to produce certain records in his client's possession as well as his client's bank records.

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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] Believe it or not, before I got into workers' comp I was a very interesting person. I read books, went to plays and people were genuinely interested in my comments on current events.

Ron explained that he had advised his client to assert their Fifth Amendment right against self-incrimination as Ron found out that the records sought by the defendant might implicate his client in a crime.

Ron told me that he has no problem cooperating with a defendant with respect to discovery but draws the line where the discovery might violate a privilege such as the privilege against self-incrimination.

Ron declared emphatically that he was prepared to take this case to the highest court in the land although he was quite certain that the Appeals Board would quickly reverse the decision of the workers' compensation judge upon reviewing his Petition for Reconsideration.

I could hardly conceal my delight in being able to once again rain on Ron's parade. I told Ron that the Board and the courts over the years had considered claims of "privilege" versus a litigant's right to conduct discovery and/or obtain relevant information with respect to a litigated case.

A grimace began to appear on Ron's face as he guessed where I was going with this. Adding more fuel to the fire I then told Ron that for the most part the Board and the courts had ruled in favor of a litigant's right to discovery.

In fact, in each instance the Board had ruled in favor of unfettered discovery and also ruled that if an applicant wanted to shield discovery by resorting to a privilege such as the Fifth Amendment then the applicant's case would be dismissed.

Ron was incredulous and voiced his displeasure with my viewpoint. He told me that this certainly could not be the law.

I then pulled out of my briefcase the recent panel decision in the case of *Bobby Clements v. George Reed, Inc* (ADJ4227582) filed on November 18, 2011.[3]

In this case a workers' compensation judge, over applicant's vehement objections on Fifth Amendment grounds, ordered that the applicant's records be produced as well as the records of his bank despite the fact that these records could implicate him in a crime.

The applicant, like Ron, felt that he was entitled to his claim of privilege even though it impeded the defendant's discovery and filed a Petition for Removal with regard to the Order of the WCJ.

In its Opinion and Order Denying Applicant's Petition for Removal the Board went over the history of a defendant's right to discovery versus privilege and cited a prior Board Decision in the case of *Powers v. Workers' Comp Appeals Board* (1989) 44 Cal.Comp.Cases 906 (writ den.).

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[3] A copy of the *Clements* case may be obtained by an email request.

At this point Ron was starting to drink heavily and I pressed on, telling him that in *Powers* the widow of a deceased claimant had filed an Application for Death Benefits alleging that her husband's death was industrial.

However, Mrs. Powers was also a suspect in her husband's murder investigation! The Board in *Clements* provides us with some insight in this matter:

> The defendant attempted to depose Mrs. Powers regarding her relation to the murderer, but she refused to answer on the ground that her answers might tend to incriminate her. Defendant's position was that its questions were relevant to whether the decedent's murder involved "a personal grievance" and did not arise out of and occur in the course of employment.

As Mrs. Powers asserted her Fifth Amendment right and refused to answer relevant questions, the Appeals Board dismissed her application stating:

> Mrs. Powers had prevented [defendant] from conducting allowable discovery by asking questions reasonably calculated to lead to the discovery of admissible evidence.

Mrs. Powers filed a Petition for Writ of Review which was denied by the Court of Appeal.

However, in denying the Writ filed by Mrs. Powers the court cited "three cases which held the privilege against self-incrimination waived as to matters which are directly relevant to litigation commenced by the holder of the privilege ..."

The cases cited by the court are as follows:

1. ***Britt v. Superior Court of San Diego County* (1978) 20 Cal.3d 844**: In this case, no less an authority than the California Supreme Court declared as follows:

   > . . . in the constitutional realm, the privilege against self-incrimination has been held to be subject to a similar "waiver" exception as to matters which are directly relevant to litigation commenced by the holder of the privilege.

2. ***Shepard v. Superior Court of Alameda County* (1976) 17 Cal.3d 107**: In this case the court held the following:

   > A party seeking civil relief in the courts may not refuse on the grounds of the privilege [against self-incrimination] to testify on matters relevant to his recovery.

3. ***Newson v. City of Oakland*** **(1974) 37 Cal.App.3d 1050**: In this case, as described by the court, the plaintiff in a personal injury case, "moved to strike a question related to the filing of income tax returns, based on plaintiff's privilege against self –incrimination." The court then pointed out, "Newson had a choice of answering the question or withdrawing his claim for earnings and 'couldn't have his cake and eat it too'."

After reviewing the above cases the Board panel concluded as follows:

> We agree with the reasoning of the *Newson* case and conclude that applicant herein cannot have his cake, by receiving temporary disability benefits, and eat it too, by claiming privilege and denying defendant it's equally compelling constitutional right to defend itself by rebutting applicant's claims.

By the time I had finished, Ron was ordering shots at a rapid rate. Feeling that all was right with the world again, I turned my attention back to Kim and my martini.

DISCLAIMER:

All characters at the Lobby Bar, aside from George, Kim and myself are products of my warped imagination. The story line is also fictional.

However, the every-now-and-then attempts to thwart legitimate discovery by invoking the concept of "privilege" is not.

The Board panel in *Clements* got it right. Make mine a double, George.

-Joe Truce