ANOTHER INSTALLMENT IN THE *GEORGE THE BARTENDER* SERIES

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RE: GEORGE THE BARTENDER AND THE SUPREME COURT DECISION IN *BRODIE/WELCHER* - IT'S JUST PERFECT! OR IS IT?

FROM THE LOBBY BAR AT THE HYATT:

As I neared the Hyatt lobby bar I picked up the refrains of **"For He's A Jolly Good Fellow"** and when I saw signs around the bar saying: **"Welcome back, Ron,"** I could see that a party was in full swing.

George the Bartender's attorney, Ron Summers, had returned from his brief hospital stay which was precipitated by the ruling of the California Supreme Court in the *Brodie/Welcher* cases.

I was in a magnanimous mood as *Brodie/Welcher* was a resounding victory for the defense with respect to Labor Code §4664 apportionment and I showed my generosity by offering to buy Ron a drink. However, I was somewhat surprised to find Ron in an extremely jovial mood and he happily explained to me that he had found a king-sized loop hole in the Court's decision and he was preparing to drive a Mac truck through it.

Ron had previously explained to me that he was litigating a case in which the applicant was a long-time employee with a public mass transit company and in that case the applicant had a previous Stipulated Findings and Award for 7% in the 1970's. Ron was representing the applicant for a subsequent injury to the applicant's low back in the year 2002 which resulted in three failed back surgeries and the applicant was found to be 100% disabled for the subsequent injury alone by the Agreed Medical Examiner.

Ron confided in me prior to the Supreme Court decision in *Brodie/Welcher* that he was extremely concerned as the defendant in his case, while admitting that the applicant was 100% permanently and totally disabled, claimed that pursuant to Labor Code §4664 they were entitled to subtract the prior 7% award.

In such a scenario, Ron's client would receive 100% minus 7% or 93% plus a life pension.

As a 100% Award would be paid at the temporary disability rate, the difference in money would be staggering.

I pointed out to Ron that the Supreme Court has now ruled that the prior Stipulated F&A must be subtracted pursuant to Labor Code §4664 from the 100% Award for the subsequent injury as both injuries were to the same part of the body.

A positively beaming Ron Summers told me that the Supreme Court had not considered the overlap principle as enunciated by the Board's *en banc* decision in the case of *Virginia Sanchez v. County of Los Angeles*, 70 CCC 1440.

Ron pointed out that the Supreme Court in *Brodie/Welcher*, while confirming that the Legislature intended that a prior Findings and Award to the same region of the body be deducted from a current Award, left standing the Board's decision in *Sanchez* with respect to the principle of "overlapping disabilities."

Ron pointed out that the Stipulated Findings and Award received by his client in the 1970's for 7% was predicated on subjective complaints only and that applicant's current 100% disability was not "overlapped" by the prior Stipulated Findings and Award. **Unfortunately, Ron may have a point**. In its decision in *Sanchez*, the Board held that the defendant has the burden of proving the existence of any prior permanent disability Awards relating to the same region of the body and once this has been established, "The permanent disability underlying any such award is conclusively presumed to still exist, i.e., the applicant is not permitted to show medical rehabilitation of the disabling effects of the earlier industrial injury or injuries. . . ." Although the Supreme Court did comment on this finding by the Board in *Sanchez* the Court did not comment on the Board's next finding:

> "When the defendant has established the existence of any prior permanent disability award relating to the same region of the body, the percentage of permanent disability from the prior Award will be subtracted from the current overall percentage of permanent disability, unless the applicant disproves overlap, i.e., the applicant demonstrates that the prior permanent disability and the current permanent disability affect different abilities to compete and earn, either in whole or in part. . . ."

In ***Sanchez***, the Board found that even though the two injuries were to the same region of the body, "The applicant has demonstrated that there is no overlap between her prior permanent disability, which conclusively still exists, and her current disability. . . ."

Clearly, in the case of a low back injury, a prior award of permanent disability based on a work restriction would totally overlap a subsequent injury causing a greater work restriction and pursuant to *Brodie/Welcher* the prior Findings and Award would be subtracted pursuant to Labor Code §4664.

However, it would appear that there still may be uncertainty as to whether or not a prior Findings and Award based on subjective complaints only would be subtracted from a subsequent injury and resulting disability based on work restrictions.

The defense argument, until this issue is resolved, will be that even 1% permanent disability (whether based on a work restriction or subjective complaints) represents a diminished ability to compete in an open labor market pursuant to Labor Code §4660 and therefore under the rationale by the Supreme Court in *Brodie/Welcher* must be subtracted pursuant to Labor Code §4664.

Although not addressing the question of overlap in their decision, the Supreme Court did affirm apportionment based on pathology and asymptomatic causes as held by the Court of Appeal in *Yeager Construction v. Workers' Comp Appeals Board (2006)* and that pursuant to Labor Code §4664 an employee is prohibited from showing rehabilitation from a former injury in which he received a permanent disability award and thereby affirmed the Court of Appeal decision in *Kopping v. Workers' Comp Appeals Board*. The Court also cited the Board's *en banc* decision in *Sanchez v. County of Los Angeles* (for this **limited issue**).

DISCLAIMER:

Attorney Ron Summers's mythical case is actually a real case which is being handled by Mr. Michael Ingler of our Long Beach office. The issue of Labor Code §4664 has been on hold in Mike's case pending the Supreme

Court's decision in *Brodie/Welcher*. However, the applicant's attorney is now claiming that there is no overlap between the prior Award based on subjective complaints only and the applicant's current disability resulting from the subsequent injury and the three failed back surgeries. The difference in money is staggering. If the prior disability is subtracted, our liability is approximately $225,000 and if the applicant's attorney prevails on his overlap theory, our potential liability is $785,000.

Make mine a double, George.

– Joe Truce