ANOTHER INSTALLMENT IN THE *GEORGE THE BARTENDER* SERIES

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RE: GEORGE THE BARTENDER AND THE BOARD'S REVERSALS IN *BAGLIONE* AND *PENDERGRASS*

FROM THE LOBBY BAR AT THE HYATT:

I had not seen George the Bartender for a month as a result of my annual vacation to Hawaii and I could not wait to show off my tan to George and especially to Kim, the Hyatt's breathtakingly beautiful cocktail waitress, as I was returning to the Mainland as a Bronze God and should heretofore be referred to as "BG."

However when I arrived at the Lobby Bar I quickly noticed that no one was paying any attention to me and that George, with a concerned look on his face, was trying to get the attention of a patron that was slumped face down on the bar, intermittently banging the bar with his empty shot glass and shouting: "It's not fair, it's just not fair."

I suddenly realized that the bar patron in question was none other than Ron Summers, George's attorney, and I commented to George that I was somewhat puzzled as I have known Ron for 20 years and had never known him to be concerned about fairness.

I finally succeeded in getting Ron's attention by offering to fill up his empty shot glass and noticed that in his left hand Ron was clutching the Board's en banc decisions in *Baglione* and *Pendergrass*.

When I left on vacation more than a month ago these decisions had issued and by a 4 to 3 majority the Board had ruled in favor of the applicant's bar by holding that injuries prior to 1/1/05 would be rated under the old permanent disability schedule as opposed to the AMA Guides if the defendant had made ANY payment of TTD prior to 1/1/05 or if a comprehensive medical report had issued prior to 1/1/05 regardless of whether the report made reference to disability or impairment.

In my opinion the Board's majority was clearly wrong and had practiced legal gymnastics as L.C. §4660 clearly states that all dates of injury are to be rated under the new schedule and the AMA Guides unless either a comprehensive medical report or a report of a treating doctor's report has issued prior to 1/1/05 indicating an existence of impairment or disability.

In my opinion this clearly means that this exception applies ONLY if a doctor (either a QME or a treating doctor) has issued a P&S report prior to 1/1/05 setting forth factors of permanent disability or impairment.

L.C. §4660 goes on to state that a second exception applies if the defendant has a legal obligation to send out a L.C. §4061 notice advising the applicant that TTD is being terminated prior to 1/1/05. Until I read the Board's illogical opinion I could not conceive of a situation in which a defendant would have an obligation to send out a notice advising that TTD would be terminated before it was actually terminated.

Therefore, in light of the Board's decisions in *Baglione* and *Pendergrass*, I was at a loss to know why George's attorney was upset. Ron then told me that while I was drinking Mai Tai's in Hawaii, the Board had reversed both *en banc* decisions and the previous minority had now become the majority and vice versa.

Well, they finally got it right.

After the original *en banc* decisions issued on 1/24/07, a member of the majority, Commissioner Merle Rabine, left the Board and was replaced by Commissioner Al Moresi. Therefore when the defendants in the original cases filed Petitions for Reconsideration as newly aggrieved, Commissioner Moresi voted with the previous minority which then became the majority and the Board then issued new *en banc* decisions in *Baglione* and *Pendergrass,* upholding the rule of logic and law and finding that all compensable injuries are subject to the new rating schedule and the AMA Guides unless one of the clear exceptions to L.C. §4660 applies.

Under these new decisions the AMA Guides apply unless TTD is terminated prior to 1/1/05 thereby giving us a legal obligation to send out a L.C. §4061 notice or if there is either a treating doctor's report or a comprehensive medical legal report issued prior to 1/1/05 indicating the existence of impairment or disability.

While I am certain that the applicant attorneys will file further appeals in the appellate courts, it is my opinion that the Board's new *en banc* decisions in *Baglione* and *Pendergrass* represent the only logical interpretation of the clear meaning of L.C. §4660 as amended by SB 899.

The SB 899 reform act was passed as an urgency measure and there can be little doubt that the legislature intended that financial relief be extended to employers and carriers ASAP and the Board's action has accomplished this mandate. The new and improved decisions in *Baglione* and *Pendergrass* issued on 4/6/07 and, by law, are legally binding on all Worker's Compensation Judges and panels of the Board. Anyone wishing copies of these great decisions should notify me via e mail.

DISCLAIMER:

What a difference a month makes! While I was in Hawaii George had kindly referred me to his cousin, Georgia, who tends bar at the Grand Hyatt on Kauai and who, according to George, makes the world's greatest Mai Tai. Therefore for the last month I certainly had Georgia on my mind. However, now that I am back to reality and the ebb and flow of Workers' Comp law, it's back to my Beefeater Martini, straight up with two olives.

Make mine a double, George.

– Joe Truce