

## **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 \$250,000.00 BOONDOGGLE, OR HOW TO GET BY ON ONLY FOUR HOURS OF WORK**

#### **FROM THE LOBBY BAR AT THE HYATT:**

When I arrived at the lobby bar, I noticed that George and Ron Summers, George's workers' compensation attorney, were trying feverishly to revive one of the long-time patrons of the bar, Mr. Frank Fall.<sup>1</sup>

Frank is a greatly respected and long-time defense attorney in our industry. Ron told me that Frank had passed out at the lobby bar after downing six shots of tequila in rapid succession.

I was somewhat astonished as I did not recall Frank as being a heavy drinker, but Ron explained the situation to me.

Frank's drinking stemmed from his depression after receiving in the mail this morning an adverse decision from a Workers Compensation Judges (WCJ) on one of his most serious cases.

I sympathized, but I told Ron that we had all received adverse decisions on cases that we had tried before the Board and I wanted to know what was particularly significant about this case.

Ron confided in me that the decision Frank just received was consistent with the court of appeal decision in *John C. Duncan v. Workers' Compensation Appeals Board* (2009) ADJ1510738<sup>2</sup>, awarding the applicant's attorney fees in a lump sum of \$250,000 after computing the cost of living increases, or COLA's, pursuant to Labor Code §4659 in a 100% permanent disability life pension case.

Ron's reference to the catastrophic decision in *Duncan* gave me pause for thought as I tried to calculate what had happened.

Apparently, the decision in Frank's case issued in January 2010, and according to Labor Code §4659 and the court in *Duncan*, a life pension award (which, of course, includes a 100% award) contemplates that an applicant is to receive a cost of living increase by way of geometric progression commencing on January 1, 2003.

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<sup>1</sup> In assigning names to my mythical attorneys at the lobby bar the reader will note I have used the four seasons in a year. We now have Ron *Summers* and Frank *Fall*. For those of you my age you may remember the old Howdy Doody TV show in which one of the characters was Princess Summer Fall Winter Spring.

<sup>2</sup> I addressed the horrendous effects of the *Duncan* decision in my George the Bartender memo entitled "George the Bartender Takes the Pepsi® Challenge or Great COLAS I Have Known."

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From that date onward the COLA is to be computed on the percentage increase in the state's average weekly wage (SAWW) from January 1, 2003 to January 1, 2004, from January 1, 2004 to January 1, 2005, etc. This continues until the death of the injured worker or the insolvency of the entire system, whichever comes first.

In reading the *Duncan* case, one would assume that said windfall will not affect employers and/or carriers until the commencement of the life pension, which could be in ten years or more. At this point in my thought process I noticed that Frank was coming around as George had brewed hot coffee, which Frank was drinking in gulps. As Frank neared the point of sobriety he filled me in on the details of his case.

Frank told me that the injury took place in 2008, and that the applicant had sustained rather serious orthopedic injuries resulting in multiple back surgeries.

Knowing my aversion to Agreed Medical Examiners, Frank groaned when he told me that he had utilized one of the more popular AMEs in orthopedics, as the applicant's attorney told Frank he could get a quick exam with Dr. Mangerman, who was the AME de jour in Southern California.<sup>3</sup>

Dr. Mangerman, of course, ignored the plain wording of the AMA Guides and gave the applicant a rating in the life pension category based on a reduced function of the spine pursuant to page 427 of the Guides, which he claimed was predicated on the Board's en banc decision in *Almaraz/Guzman*.

According to Frank, Dr. Mangerman then went on to indicate that the applicant also needed a psychiatric evaluation, as well as an evaluation for a sleep disorder and sexual dysfunction. After all of these reports came in, Frank was looking at a 100% permanent disability rating. Frank told me that his client was prepared for a 100% award as even before the F&A hit Frank's desk the adjuster was considering authorizing a Petition for Reconsideration

However, this was not the worst part of Frank's story.

The judge, at the urging of the applicant's attorney, computed the applicant's life pension using the COLA formula pursuant to the decision in *Duncan* and calculated that at the commencement of the life pension award (100%), the applicant was entitled to the geometric progression of cost of living increases starting on January 1, 2004, and ongoing for the rest of the applicant's life.

Although the normal life pension award for a 100% award would yield an attorney's fee of approximately \$33,000.00 to \$40,000.00, the increased life pension award enhanced by the

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<sup>3</sup> What does this tell you? When the applicant's attorney says he can get a quick exam with a popular AME, red flags, in my opinion, should be hoisted immediately. This is reason #341 never to go to an AME.

COLA netted an attorney's fee of \$250,000.00, calculated at 15% of the applicant's future permanent disability payments.

Frank told me that his client in this case was a medium size insurance carrier, and that the carrier had a retention ceiling of \$500,000.00, and thereafter the excess insurance coverage kicked in.

Frank confided in me that unless the decision of the WCJ was overturned by way of appeal his client, aside from the money they would be paying the applicant for the rest of his life, must also cut a check in one lump sum to the applicant's attorney for \$250,000.00. Due to the large sums of medical treatment expense already paid on this case, this lump sum payment would put his client into the excess policy. To make matters even worse the adjuster told Frank that he had not given notice to the excess carrier who was now denying coverage for lack of notice.

By this time, Frank was on his third cup of coffee and looked as sober as a judge, but I thought better of saying this to him. He told me that the applicant's attorney had probably put no more than four hours into this admitted industrial injury case, consisting of brief appearances at the Mandatory Settlement Conference and trial where the case was submitted on the record.

#### **DISCLAIMER:**

Although the characters at the lobby bar and storyline are mythical, the specter of an attorney's fee of \$250,000.00 awarded under the COLA provisions of Labor Code §4659 and the *Duncan* case is not.

In the recent panel decision of *Fatemeh Shahry Arinejad v City of Los Angeles* ADJ972360/ADJ4352397 filed on November 17, 2009, the Board affirmed a decision by a trial judge awarding approximately \$250,000.00 as attorney's fees pursuant to the COLA provisions of Labor Code §4659.<sup>4</sup> Although the *Duncan* case is not mentioned, the Board's decision incorporates some of the exact language used by the Court of Appeal in *Duncan*.

Please don't shoot the messenger.

Although the Commissioners who issued the panel decision in *Arinejad* may have felt the award of a quarter of a million dollars in attorney's fees was unfair and excessive, the Board's responsibility is to apply and enforce the law and therefore the Board panel did its job.

However, the Board did send a message to the defense industry in its decision in noting that the defendant in their panel decision did not challenge the percentage of allowed attorney's fee in the amount of 15% of the permanent disability awarded. WCAB rule 10775 provides that in determining an appropriate attorney's fee the WCJ must take into account such factors as the "care exercised in representing the applicant" and the "time involved."

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<sup>4</sup> A copy of Labor Code §4659 is available upon request, via e-mail.

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Now that the Board has enforced the law pursuant to the Court of Appeals decision in *Duncan* our job, as defense attorneys, is to change and/or modify the existing law by challenging the process of commutation and the automatic awarding of attorney's fees. We can do so by using a set percentage which usually comes out to between 13% and 15% of the total award of permanent disability.

In my mythical case it is doubtful that four hours of attorney time would have qualified for a \$250,000 attorney fee.

Remember the old Kingston Trio Song, the MTA, about a man named Charlie who could not get off of the subway because the MTA had raised the fare?

The tag line of the song is extremely appropriate to my story line and the *Duncan* decision: "This could happen to you!"

Make mine a double, George.

-Joe Truce