

## **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 TAKES THE PEPSI® CHALLENGE OR GREAT COLAS I HAVE KNOWN**

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

Upon walking into the lobby bar I was greeted by balloons and signs proclaiming: “Free Rum and Cola.” Judging from the funny hats and noisemakers a celebration was in full swing.

I already knew that the reference to “cola” referred to the cost of living adjustment as contained in Labor Code §4659(c) and the timing of the increases as now mandated by the Court of Appeal decision in *John C. Duncan v. Workers’ Compensation Appeals Board*, ADJ1510738 filed on November 25, 2009.<sup>1</sup>

As I knew that I would simply gag on a rum and coke I ordered my standard cocktail, a Beefeater martini straight up with two olives, from Kim, the Hyatt’s breathtakingly beautiful cocktail waitress.

Kim told me that the sponsors of the celebration were none other than George the Bartender’s workers’ compensation attorney, Ron Summers, and Ron’s constant companion, Dr. Nickelsberg.

Ron was grinning broadly and was engaged in a conversation with his client, George, about the industrial injury that George would have in the year 2020 which would result in a COLA bonanza!

From my review of the *Duncan* decision and Labor Code §4659(c) I knew what Ron was talking about.

In the year 2002 the legislature amended Labor Code §4659 to provide for cost of living increases for injuries on or after January 1, 2003, for those injured workers who qualified for either a life pension or a 100% permanent disability award.

The goal of the legislature was to ensure that an applicant’s life pension would not be eroded by the cost of living. In the *Duncan* decision the court noted that many injured workers did not start receiving their life pension until up to ten or more years from the injury.

The 2002 amendment was meant to address this problem.

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<sup>1</sup> Anyone interested in obtaining a copy of the *Duncan* case, please request so via e-mail

However, a dispute as to the timing of the COLA increases brought about the fairly bizarre decision in *Duncan*.

Labor Code §4659(c) calls for a calculation of cost of living increases based on the yearly percentage increase of the State's Average Weekly Wage (SAWW), which now determines the calculation of the ceiling for temporary disability benefits.

According to the amendment, the cost of living increase is calculated by taking the percentage increase from year to year of the SAWW and then multiplying the corresponding total percentage increase times the initial life pension payment which will then continue to adjust annually thereafter according to the same formula.

In *Duncan* the applicant's attorney contended that the percentage increase in the State's Average Weekly Wage should start being counted as of the date of injury. The defendant contended that we should not start counting the percentage increase until the actual life pension kicks in. As the applicant in *Duncan* was awarded Permanent Total Disability (100%), the life pension would begin at the P&S date several years after the date of injury.

The Court of Appeal in *Duncan* accepted neither theory but relied on a theory proposed by an Amicus Curiae or friend of the court brief filed by the California Applicants' Attorneys Association contending that the COLA should kick in as to the date of the amendment to Labor Code §4659(c) or January 1, 2003.

Since the State's Average Weekly Wage has increased approximately 24.5% since January 1, 2003 an applicant injured in the year 2010 would already have the benefit of his life pension being multiplied by the factor of 24.5% and this is not even counting the additional years of percentage increase until his and/or her life pension commences.<sup>2</sup>

My thought process was interrupted by a very cheerful Ron who indicated that even though I was not having rum and cola he was going to pay for my martini anyway.

After thanking Ron for my cocktail I commented on his conversation with George the Bartender concerning George's yet to be filed injury in the year 2020 and asked Ron just what he meant by this.

Ron told me that George had confided in him that he was going to retire in the year 2020 and naturally Ron would be filing a cumulative trauma claim for George, which included back, upper extremities, lower extremities, sleep disorder and psyche.

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<sup>2</sup> In composing this memo George and I sought assistance from the highest authority available, Richard Jacobsmeyer of the firm Shaw, Jacobsmeyer, Crain, Claffey & Nix, LLP. Richard (aka Jake) is and has been a guiding light for our defense legal community on ongoing issues involving workers' compensation law and the *Duncan* case is no exception. With Jake's permission we are enclosing a Table of SAWW Calculations that he has prepared for the year's 2003-2010. Please hold onto your martini tightly.

Ron pointed out that due to the *Almaraz/Guzman* cases he was confident he could get George into the life pension category and therefore George would be eligible for 17 years of annual cost of living increases and by the time George's life pension began another 10 years will be added to this or 27 years in total. Ron expressed confidence by the time George retired, the baseline value of his life pension, with only a modest level of inflation, will likely have doubled.

If Ron and George's most fervent desire for George comes to pass (a Permanent Total Disability Award), George's Life Pension could end up almost double his compensation rate at retirement and would continue to rise with additional annual adjustments based on the SAWW increases. As disability benefits are not taxable, his life pension rate will effectively double his income upon retirement.

I pointed out to Ron that since George was in a union which mandated cost of living increases that for 17 years of this period he would have received yearly cost of living increases thru his retirement date.

I told Ron point blank that this certainly was not fair! At this tears of joy began running down Ron's cheeks and he almost choked on his rum and coke.

"What do you mean fair? This is workers' comp!" exclaimed Ron.

When Ron recovered from his little joke I told him that since he too was going to retire within ten years he would really not be able to share in the horn of plenty that was promised injured workers by the *Duncan* decision.

Ron expressed amazement and advised that he would begin collecting attorney's fees pursuant to the time of the COLA's as mandated in *Duncan* almost immediately.

Ron advised me that he had several clients who had sustained injuries on or after January 1, 2003, that would qualify for life pensions if not an Award of 100%.

In claiming attorney fees on these cases Ron told me with glee that he was already calculating his share of the COLA increase and that the defendant would be paying his attorney's fees in a lump sum long before the actual COLA's were due to his clients.

Ron explained that a simple commutation of attorney fees would automatically be granted by the Board.

In those cases in which the injured worker, as a result of death, does not reach that plateau to start receiving his and/or her life pension, this would result in a windfall to the applicant's attorney, a windfall that would never be recouped by the employer and/or carrier.

## **THE ART OF RESERVING FOR FUTURE LOSSES WILL HAVE TO BE ADJUSTED**

Although the Department of Insurance is responsible for making sure that insurance carriers have the appropriate reserves to cover their losses, reserving practices of carriers are traditionally policed by internal rather than external audits.

However, self-insured employers are another story entirely.

Self Insured Plans (SIP) is a division of the Department of Industrial Relations and is charged with the responsibility of overseeing proper reserving practices by employers that are self-insured in this State.

SIP conducts regular and special audits of self-insured employers to make sure that these employers reserve future losses at 135% of the expected and/or probable payout over the life of a claim.<sup>3</sup>

In years past I have been retained by self-insured employers to do battle with SIP as sometimes the SIP auditors (in my opinion) predict reserves for a specific claim as the employer's potential liability as opposed to probable liability.

The reserves posted with the State for a self-insured employer must be in cash or an irrevocable line of credit. The cash reserve posted with the State cannot be used for settlement purposes.

If *Duncan* remains the law auditors with SIP may decide that a particular case has the potential to reach a life pension and mandate that the self-insured employer reserve appropriately.

## **WHAT CAN WE DO IF THE *DUNCAN* CASE IS NOT MODIFIED OR OVERTURNED?**

Aside from drinking heavily I am not sure I know how to answer this question!

In ordering my next martini from Kim I told George that the crowd at the lobby bar may reach gigantic proportions.

**The Good News:** There should be a lot fewer 100% and/or life pension cases under the AMA Guides. Although the California Applicants' Attorneys Association is whipping up a great hue and cry over expanded ratings by virtue of the Board's en banc decisions in *Almaraz/Guzman* we have yet to see an actual increase in permanent disability Awards.

What we have seen and will continue to see for the next year or so is a great number of cases going off calendar to "develop the record" per *Almaraz/Guzman*.

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<sup>3</sup> Self-insurance plans routinely have reserves for 135% (not 100%) of the probable value of a claim over its lifetime. The extra 35% is a reserve for administrative costs such as investigation, attorney's fees, etc.

**The Bad News:** The weakness in the defense armor may be psychiatric disability.

*Almaraz/Guzman* decreed that psychiatric injury and/or disability is not controlled by the AMA Guides but rather by the global assessment functioning (GAF) scale. My reading of the GAF scales screams subjective rather than objective factors as a determination of impairment and/or disability.

Although *Duncan* will certainly be appealed to the California Supreme Court the fact of the matter is the Supreme Court takes few appeals from the lower courts although the court may well grant the Petition for hearing this case as it affects a state agency, the Subsequent Injuries Benefit Fund of the State of California. Since the Subsequent Injuries Fund only pays benefits in cases with a combined PD from the work injury and pre-existing disability in excess of 70%, its liability is affected in every case with a date of injury after 1/1/2003. The Subsequent Injuries Fund has requested the Court of Appeals in the 6<sup>th</sup> District rehear the case, arguing the ultimate method adopted by the court was not adequately addressed by the parties' briefs as neither of the Real Parties in Interest (Applicant and SIF) argued for that result.

The *Duncan* opinion came out of the Sixth Appellate District and those defendants not located in this district have the option of trying to obtain a different opinion from another appellate district.

It is indeed ironic that we now join forces with the argument of the applicant's attorney in *Duncan* that the COLA should be computed from the date of the injury and not before.

The argument of the defendant that the COLA be calculated as of the time the life pension is payable is probably pie in the sky thinking when one considers the language of the statute.

**DISCLAIMER:**

The characters at the lobby bar aside from George, Kim and I are, of course, a product of my imagination as is the story line. Also my comments on reserving practices by the insurance industry and self-insured employers are my opinions and my opinions alone. Although I consider myself an expert in reserve practices, nobody else does.

One of the effects of *Duncan* may well be that defendants will throw more money on a Compromise and Release to avoid the potential of a life pension.

George, Kim and I and our fictional characters of the lobby bar wish everyone a happy and prosperous New Year.

Make mine a double, George.

-Joe Truce