ANOTHER INSTALLMENT IN THE *GEORGE THE BARTENDER* SERIES

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RE: GEORGE THE BARTENDER AND THE DILEMMA OF THE ALL-ENCOMPASSING COMPROMISE AND RELEASE AGREEMENT WITH ADDENDA

FROM THE LOBBY BAR AT THE HYATT:

When I arrived at my usual seat at the lobby bar, I noticed an extremely nervous Ron Summers, George the Bartender's workers' compensation attorney.

Based on the assumption that anything that made Ron nervous was good for the defense, I offered Ron a cocktail, a Valium and invited conversation. And boy, did Ron not disappoint! Ron began to elaborate on the events of the day at the Appeals Board, which started off extremely well for him.

Ron's case set for trial that morning involved a 58-year-old former schoolteacher that sustained a back sprain in 1999. After undergoing no less than ten low back surgeries and fusions by Ron's good friend, Dr. Nickelsberg, there was no doubt that the applicant was 100% disabled and entitled to lifetime medical care.

Ron told me that much to his joy the defense attorney came into court and made a firm offer of $300,000.00, including a $100,000.00 Medicare Set-Aside Trust, which the carrier was going to guarantee.

I thought to myself that Ron must have had dollar signs dancing in his head as he computed 15% of a $300,000.00 settlement.

Once I computed this figure myself I asked Ron why he was so nervous, as this seemed like a red-letter day.

Ron responded that the trial had been set before a Workers' Compensation Judge who had his own rules as for the language that he would approve in a Compromise and Release Agreement (C&R) with specifically tailored addenda.

Ron explained that along with the $300,000.00 C&R, the insurance carrier had insisted on the following language, which was included in the addenda to the C&R:

> "This is a full and final release which includes, but is not limited to, all known and unknown and unanticipated injuries of whatever nature, resulting from the applicant's employment by the defendant employer. . . ."

Ron told me that for $300,000.00 he would tell his client to sign anything. The defense attorney told Ron that his client simply wanted the applicant and Ron to know that in exchange for the lump sum of $300,000.00 the case was over. The applicant would never again have any right to file a workers' compensation case against the employer and/or carrier.

Ron carefully explained the defendant's position to his client, and the applicant and Ron quickly signed the C&R, as well as the addenda. The C&R was then submitted to the Workers' Compensation Judge (WCJ) for approval.

After reviewing the medical file and analyzing the issues in the case the WCJ told Ron and the defense counsel that in his opinion the C&R was more than adequate.

At this Ron let out a sigh of relief but the WCJ then looked straight at the defense attorney and advised him that he would not approve the C&R as drafted. The WCJ referred to the "offending language;" the C&R settled all "unknown and unanticipated injuries of whatever nature" resulting from applicant's employment with the employer.

Ron had been down this road several times before and not only with this WCJ. He knew that some WCJ's objected to this type of language as contained in C&R's and the "offending language" was eventually deleted by the defense attorney and everyone went home happy.

However, when asked to delete the "offending language" the defense attorney replied with a one-word answer: "No."

According to Ron there was what appeared to be a "pregnant pause" and after a long period of silence the WCJ advised that he would approve the C&R but would delete the objectionable language.

At this point Ron breathed a sigh of relief as the C&R was going to be paid, his attorney's fees were going to be paid and everything was right with the world . . . or so he thought.

Ron was shocked when the defense attorney told the WCJ that pursuant to the Labor Code and the WCAB rules the WCJ had two choices and two choices only: reject the C&R if he found that the C&R was not adequate, or, in the alternative, approve the C&R as written and agreed to by the parties with no deletions.

Much to Ron's chagrin, the WCJ, despite his previous comment that the C&R was adequate, wrote on the Minutes of Hearing that he rejected the C&R as it contained what he referred to as overbroad language.

The defense attorney then advised the WCJ that he would be filing a Petition for Removal on the basis that the WCJ had exceeded his authority in not approving a settlement that he himself said was adequate.

At this point Ron wailed that his attorney fees were out the window as he was certain that the C&R would never be approved.

After buying Ron another cocktail to console him, I told Ron that once the appeal was filed the WCJ would approve the C&R in short order and without deletions or amendment.

Ron was amazed and asked me the basis for my optimistic outlook.

I told Ron that the authority of a WCJ in analyzing a submitted C&R was a determination as to whether or not the submitted C&R was adequate on the basis of the medical record.

WCAB Rule 10870, entitled Approval of Compromise and Release Agreement, provides that a WCJ is mandated to inquire into the adequacy of a C&R and that the authority of the Board or a WCJ is limited to whether or not said settlement agreement is adequate.[1] I went on to explain that Labor Code §5000 provides as follows:

> "No contract, rule, or regulation shall exempt the employer from liability for the compensation fixed by this division but nothing in this division, shall: (a) impair the right of the parties interested to compromise subject to the provisions herein contained, any liability which is claimed to exist under this division on account of injury or death." (emphasis added)

I told Ron that it was my position that this section allowed the parties to agree to any terms and/or conditions which represent the intentions of the parties so long as the settlement is deemed adequate by the WCJ and/or the Board.

I further advised Ron that this principle has been reaffirmed by no less an authority than the California Supreme Court in the case of *Mary Jefferson v. California Department of Youth Authority* (2002), 28 Cal.4th 299; 67 CCC 727.

Although many WCJ's have taken the position that they will not approve so-called "boilerplate" language contained in many of defense attorneys' addenda, the Supreme Court in *Jefferson* took the opposite view as follows:

> "Jefferson urges us to disregard the attachment because it does not expressly refer to the FEHA action and 'is clearly. . . boilerplate. . . and not something created or specifically negotiated uniquely for [her] workers' compensation action.'

[1]WCAB Rule 10870 provides in relevant part as follows: "Agreements that provide for the payment of less than the full amount of compensation due or to become due and undertake to release the employer from all future liability will be approved only where it appears that a reasonable doubt exists as to the rights of the parties or that approval is in the best interests of the parties." Although I referred to this rule as a WCAB Rule it actually now (in the current Labor Code) is referred to as a rule of the Court Administrator. This change in nomenclature is going to take a while to get used to.

> Assuming she is correct factually that the attachment was not created for this case, she does not explain why a generic attachment should carry less weight in this context than a custom-made one. For our purposes, the critical points are that the parties incorporated the attachment into their compromise and release agreement and that it clearly establishes their intent to include civil claims within the scope of the settlement." (emphasis added)

I told Ron that similar to *Jefferson* the parties specified their intent in the $300,000.00 C&R.

Lastly, I pointed out to Ron that a panel of the Board had recently commented on this very issue in the case of *Laura Everhart v. DSL Printing, Inc.*, ADJ505656, filed March 13, 2009.[2]

In *Everhart* the Board stated in relevant part as follows:

> "The WCJ here overstepped his authority by seeking to dictate the terms and conditions of the parties' settlement before the Compromise and Release Agreement had been duly submitted. 'A court has no authority to fashion a compromise and release agreement to which the parties have not themselves agreed.'"

The Board went on to note as follows:

> "Had the parties actually entered into a Compromise and Release Agreement with the disputed language included, the WCJ would have been authorized to reject it based upon his interpretation of the Medicare Set Aside hold harmless language. However, the WCJ is without authority to require a defendant to agree to a settlement that is contrary to the insurer's requirements. Both applicant and defendant are entitled to negotiate an agreement which is to their own benefit." (emphasis added)

Ron brightened considerably when I told him that I had a similar case involving a WCJ that said the settlement was adequate but objected to like language in my addenda and refused to approve the C&R. I told Ron that I filed a Petition for Removal pursuant to Labor Code §5310, citing the Supreme Court case in *Jefferson*. The next thing I knew the disapproval had been withdrawn and the C&R was approved as submitted.[3]

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[2]Although the *Everhart* case is a panel decision this decision is still admissible as evidence pursuant to Labor Code §5703 which provides in relevant part as follows: "The Appeals Board may receive as evidence . . . (g). . . per decision of the Appeals Board upon similar issues. . ." Anyone wishing to have a copy of this case should reply by email.

[3]Anyone wishing to have a copy of my Petition for Reconsideration and/or Removal filed in the case referred to should reply by email.

DISCLAIMER:

It is my imperfect memory that during the governorship of Governor Gray Davis his then Administrative Director issued a secret memorandum to all presiding judges mandating that in the future all C&R's list the specific injuries and parts of body being settled. It further specified

that said recitation of the dates of injury and body parts being settled and specifically provided that the settlement agreement would only pertain to those specified injuries and body parts.

By "secret memorandum" I mean that this new rule was not subject to public comment or public hearings. However, I did have occasion to see a copy of this memorandum. The memo in question was universally ignored and the parties went about business as usual. The parties continued to settle cases by the "intention of the parties" standard set forth by the Supreme Court in *Jefferson*.

However, without fanfare or public hearings, a new form referred to as DWC Form 15 (revised on October 20, 2005) appeared incorporating the secret memorandum referred to above into the current C&R form.

The way this form is written makes it an invitation to legal malpractice by a defense attorney, as it leaves the door open for an applicant, after the payment of a C&R, to suddenly file for injuries that were not alleged–to the same parts of the body. This would render the finality of the C&R moot as litigation would then commence again, again and again.

Make mine a double, George.

-Joe Truce