ANOTHER INSTALLMENT IN THE *GEORGE THE BARTENDER* SERIES

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RE: GEORGE THE HOMEOWNER AND THE PERILS OF HIRING AN INDEPENDENT CONTRACTOR OR *I DIDN'T GIVE YOU LICENSE TO DRIVE ME CRAZY*[1]

FROM THE LOBBY BAR AT THE HYATT

Tittering with excitement, I could not wait to get to the Lobby Bar to show Ron Summers, George the Bartender's workers' compensation attorney, a Workers' Compensation Appeals Board decision that vastly improved my defense in a case I was litigating against him. My need to put a dour on Ron's day was only eclipsed of course by the need to see Kim, the Hyatt's breathtakingly beautiful cocktail waitress, and receive her gift of a Beefeater's martini straight up with two olives.[2]

Allow me to give you some background, loyal Lobby Bar patron. The case between Ron and I involved a workers' compensation claim filed against my client, National Motorcycle Club of Southern California. The club was founded in 1910 and first started issuing insurance policies in 1920. It wasn't until 1980 that this carrier started writing homeowner policies, which included coverage for workers' compensation for domestic employees.

Homeowner policies had traditionally only provided insurance against loss by fire, theft and personal liability. It wasn't until 1975 and the passage of California Insurance Code §11590[3] that homeowner policies were required to provide workers' compensation coverage. That year also saw the passage of Labor Code §3351(d) and §3352. These codes, all born from the same statue, took effect on January 1, 1977.[4]

Both the Governor at the time, Jerry Brown (yes, that Jerry Brown), and the State Legislature recognized that under the traditional test of employment, workers' compensation coverage for a

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[1] For those new patrons to the Lobby Bar, George the Bartender's workers' compensation case involves an injury to his elbow, epicondylitis (tennis elbow), sustained from the repetitive serving of martinis to me. If there ever was an admitted industrial injury, this is it!

[2] A Beefeater's martini, straight up, is best served at 38° Fahrenheit.

[3] Insurance Code 11590 states in relevant parts as follows: "No policy providing comprehensive personal liability insurance may be issued or renewed in this state on or after January 1, 1977, unless it contains a provision for coverage against liability for the payment of compensation, as defined in Section 3207 of the Labor Code, to any person defined as an employee by subdivision (d) of section 3351 of the Labor Code. Any such policy in effect on or after January 1, 1977, whether or not actually containing such provisions, shall be construed as if such provisions were embodied therein."

[4] As we know, loyal Lobby Bar patron, §3352 sets out to define what excludes a person from being defined as an "employee," while §3351 sets out what is included in the definition of "employee."

homeowner could open a Pandora's box as Labor Code §2750, which addresses employment contracts, provides in relevant part as follows:

> The contract of employment is a contract by which one, who is called the employer, engages another, who is called the employee, to do something for the benefit of the employer or a third person.

Under this section a homeowner who requested that their next door neighbor's child cut their grass would be creating an employer-employee relationship. Thus, they would be liable for workers' compensation benefits if the kid broke their toe when they tripped over a sprinkler head in the course of mowing the lawn.

Therefore, in 1977 both Governor Brown and the Legislature felt the definition of "employee" needed to be fleshed out some more and, voilà, Labor Code §3352(h) was born.[5] This subsection provides that anyone hired by a homeowner must work 52 hours for the homeowner in the 90 days prior to the injury, and be paid at least $100.00 in order to be considered an employee.

Labor Code §3352(h) also refers back to §3351(d) which defines an employee as follows:

> (d) Except as provided in subdivision (h) of Section 3352, any person employed by the owner or occupant of a residential dwelling whose duties are incidental to the ownership, maintenance, or use of the dwelling, including the care and supervision of children, or whose duties are personal and not in the course of the trade, business, profession, or occupation of the owner or occupant.

These sections exempted homeowners from the traditional definition of an "employer/employee relationship" and served as an added protection for homeowners.

However, the Legislature also promulgated Labor Code §2750.5, enacted in 1979, as an additional protection to domestic workers:

> There is a rebuttable presumption affecting the burden of proof that a worker performing services for which a license is required pursuant to Chapter 9 (commencing with Section 7000) of Division 3 of the Business and Professions Code, or who is performing such services for a person who is required to obtain such a license is an employee rather than an independent contractor. Proof of independent contractor status includes satisfactory proof of these factors . . .

The key issue between Ron and me in our case was the definition of this Labor Code section. The person with whom my client contracted to paint their home had alleged to be a licensed independent contractor. Therefore, under the strict meaning of §2750.5, the applicant in Ron's case would be an employee and my client would have to pay workers' compensation benefits.

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[5] Effective March 25, 1977, just as Sections 3351(d), 3352(a) and 11590 were taking their first steps, so to speak.

However, there was a strange twist in my case. The applicant's claim that they were a licensed independent contractor proved to be false!

At trial my client, without contradiction from the applicant, testified that the applicant represented to him that he held a valid contractor's license as a painter with the State of California. However, the facts at trial indicated otherwise and the applicant admitted under oath that he did not have a contractor's license.

After the last witness testified at trial, Ron argued to the Workers' Compensation Judge (WCJ) that §2750.5 was clear and if the person with whom the homeowner contracted did not have a valid contractor's license, then it is a matter of law that this person (Ron's client) became an employee and was thus entitled to workers' compensation benefits.

I argued to the WCJ that the fact that the applicant willfully misrepresented his status as a licensed independent contractor to the homeowner created an estoppel for the applicant to hide behind the provisions of Labor Code §2750.5. The WCJ gave us 30 days to file Points and Authorities in support of our representative positions.

Ron had been boasting at the Lobby Bar ever since the trial that he was sure he was going to prevail. That's where he was wrong though, as today (I previously mentioned) I had stumbled upon my saving grace, the Appeals Board's decision regarding this very issue *Mario Hernandez v. Heidi (aka Haydee) Aceituno; Oscar Aceituno; Uninsured Employer's Benefits Trust Fund* (ADJ3619210) filed on March 11, 2014.[6]

Having brought you up to speed, let us now return to the Lobby Bar so we can locate Ron to inform him of the good news!

Upon entering the Lobby Bar, I quickly scanned the room for Ron. Having located him, I signaled to Kim to bring over a round of drinks. When I reached Ron I pulled from my trusty briefcase[7] a copy of *Hernandez* and handed it to Ron. I indicated that I'd be using this decision in our case and began my analysis for him.

In *Hernandez* the WCJ at the trial was faced with an applicant who had misrepresented to a homeowner **"that he was an independent contractor with proper licensure to do stucco work."** The WCJ found that the applicant's misrepresentation of his status as a licensed independent contractor did not prevent the applicant from raising Labor Code §2750.5.

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[6] A copy of *Hernandez*, which is a landmark case in my opinion on an exception to the rather rigid independent contractor test as contained in Labor Code §2750.5, may be obtained by email request.

[7] Much like Mary Poppins's seemingly bottomless carpetbag (of Disney fame) and Hermione Granger's bottomless handbag (of Harry Potter fame), my briefcase possesses magical powers, granting me the ability to pull out any decision at a moment's notice.

However, on defendant's Petition For Reconsideration the Board reversed the WCJ's decision, holding:

> In his Report, the WCJ confirms that he determined from the evidence that applicant falsely represented to the Aceitunos that the stucco job would be performed under a contractor's license. However, the WCJ did not find that fraudulent conduct to preclude an award of compensation, citing section 2750.5.

The Appeals Board noted further:

> Where we disagree with the WCJ is with his determination that applicant is not estopped from denying that he was an independent contractor as a consequence of his misrepresentation to the Aceitunos that he would perform the stucco work as an independent contractor under the necessary licensure.

The Appeals Board went on to quote from the decision in *State Compensation Insurance Fund v. Workers' Compensation Appeals Board (Meier)* (1985) 40 Cal. 3d 5, 16 17 [50 Cal.Comp.Cases 562] quoting *In re Lisa R.* (1975) 13 Ca1.3d 636:

> The essence of an estoppel is that the party to be estopped has by false language or conduct 'led another to do that which he would not otherwise have done and as a result thereof that he has suffered injury.'

In finding that the applicant was an employee the WCJ dismissed defendant's reliance on the case of *Michael Chiechi v. Workers' Compensation Appeals Board* (2000) 65 Cal. Comp. Cases 541 (writ denied) and concluded that *Chiechi* "…is not 'binding authority' because it is a 'writ denied' decision." However, the Appeals Board noted, "…*Chiechi* is properly citable precedent and the similarity between the facts of that case and the facts in the case before us supports the application of its holding..."

The Appeals Board also cited another appellate court decision to support their holding:

> The facts of this case are also similar to those in the published decision of the Court of Appeal in *Chin v. Namvar*, which is binding precedent under the doctrine of stare decisis.

My analysis finished, you could see that some of the fire had gone out of Ron's eyes. He was dazed, but wasn't going to give up that easily. He commented that he wasn't too worried since *Hernandez* was only a Panel Decision and I could not include it in my Points and Authorities for the WCJ. At this, I again reached into my trusty brief case and pulled out my copy of the 2015 Workers' Compensation Laws of California, aka Labor Code, and directed Ron to Labor Code §5703(g) sub-titled "**Specific Additional Evidence Allowed**" which states in relevant part as follows:

> The appeals board may receive as evidence either at or subsequent to a hearing, and use as proof of any fact in dispute, the following matters, in addition to sworn testimony presented in open hearing: ... (g) Excerpts from expert testimony received by the appeals board upon similar issues of scientific fact in other cases and the prior decisions of the appeals board upon similar issues.

Furthermore, Evidence Code §452(d) provides that judicial notice may be taken of "Records of (1) any court of this state or (2) any court of record of the United States or of any state of the United States."

Plunging the dagger deeper, I indicated that the Appeals Board in *Hernandez* also relied on the Court of Appeal published decision *Kyong T. Chin v. Tony Namvar*, 166 Cal. App. 4th 994; 83 Cal. Rptr. 3d 294; 2008 Cal. App. LEXIS 1415, which was very similar to our case.

At this point our drinks had arrived. Ron abruptly grabbed his and downed it. I opted to sip mine, thoroughly enjoying my victory.

DISCLAIMER:

Aside from Kim, George and I, all characters of the Lobby Bar are fictitious, as is the storyline, and are products of my vivid and warped imagination.

Although it is not clear from the Appeals Board's decision, I am assuming that the applicant in *Hernandez* was probably the one that misrepresented to the homeowners that he had a valid contractor's license. Therefore, there was no real sympathy for Mr. Hernandez.

The moral of the story is that insurance carriers writing homeowner insurance should educate their homeowners to make sure they obtain verification of the independent contractor's license from the State of California, which can be obtained on the website of the Department of Consumer Affairs Contractors State License Board.[8] Homeowners should also be reminded to ensure that the contractor has workers' compensation insurance for any employees they may hire.

Make mine a double, George.

-Joe Truce

[8] Link provided here for your convenience: https://www2.cslb.ca.gov/OnlineServices/CheckLicenseII/CheckLicense.aspx