ANOTHER INSTALLMENT IN THE *GEORGE THE BARTENDER* SERIES

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RE: PD 15% UP, 15% DOWN - THAT IS GEORGE'S QUESTION

FROM THE LOBBY BAR AT THE HYATT:

George the Bartender and his attorney were fuming- a condition that has grown more and more common since the passage of Senate Bill 899!

The latest brouhaha apparently was caused by George's Findings and Award for his carpal tunnel syndrome case being reduced by 15% pursuant to Labor Code §4658(d).

This provision was part of the Senate Bill 899 reform and has caused great concern not only to applicants and applicants' attorneys but also to the employer community.

The goal of Labor Code §4658(d) was laudable, i.e. to provide employers with a motivation to return an injured employee back to regular, modified and/or alternate work.

Basically this provision provides that ". . .within 60 days of a disability becoming permanent and stationary. . ." an employer has the option of offering an injured employee regular, modified and/or alternate work, and if the employer complies with this section, the employer receives a discount of 15% on ". . .each disability payment **remaining** to be paid to the injured employee from the date the offer was made. . ." *(emphasis added)*

Conversely, if the employer **does not** make the offer of regular, modified and/or alternate work, each subsequent weekly payment of permanent disability payment will be **increased** by 15%.

There are several issues on both sides with respect to the implementation and enforcement of Labor Code §4658(d) as follows:

1. Does the 60-day period start to run from the employer's knowledge that the applicant is permanent and stationary or from the date that the Permanent and Stationary Report is received?

2. What if there are two Permanent and Stationary Reports i.e. one by the treating physician and one by the panel Qualified Medical Examiner? In this case, does the 60 days run from the Permanent and Stationary Report of the treating doctor or from the Permanent and Stationary Report of the Qualified Medical Examiner or should this decision be made by the Appeals Board?

3. How does an employer handle a situation in which the employee has made the decision to retire or take himself and/or herself out of the labor market? **Is the employer still required to make an offer of regular, alternate and/or modified work to someone who has no intention of going back to work?**

4. What about an employee who loses no time from work despite an industrial injury and continues to work at his/her usual and customary occupation? Is an employer required to **still** make an offer of regular work to get the 15% discount, and if an employer does not, is the employer liable for the 15% increase?

Apparently, it was this last issue that concerned George the Bartender and his attorney, Ron Summers.

After I ordered another cocktail for George's attorney, Ron explained to me that George had not lost any time from work with respect to his carpal tunnel syndrome case and continued working at his usual and customary job without restriction.

George's attorney told me that George had not received an offer pursuant to Labor Code §4658(d) to return to regular, modified and/or alternate work and, therefore, George should have received a 15% increase with respect to his weekly permanent disability. In frustration, Ron advised that not only did George **not** receive the increase, he received a 15% decrease as his employer claimed that "continuation of a regular job is equivalent to an offer of work."

I explained to George's attorney that the 15% decrease in George's permanent disability payments is pursuant to ***Audiss v. City of Rohnert*, 35 CWCR 123.**

I explained that the Board in ***Audiss*** was faced with a similar situation, as the injured employee, despite her industrial injury, did not lose any time from work and continued in her usual and customary work with the employer.

The Board in ***Audiss*** was faced with two of the issues that I identified above:

1. Does the 60-day period as specified by Labor Code §4658(d) commence to run after the employer's knowledge that the applicant is permanent and stationary or receipt of the actual report? **The Board held that it was reasonable "for defendant to await Dr. Ballinger's comprehensive report before making the formal offer of work. . ."**

2. Does the employer have to make an actual job offer to an employee who has lost no time from work and continues to work in his usual and customary job? **The Board held that the mere fact of the continuation of a regular job "is equivalent to an offer of work."** Therefore, the employer in ***Audiss*** was entitled to the 15% decrease.

DISCLAIMER:

Labor Code §4658(d) is not getting rave reviews from either labor or the employer community. Rather than being modified and/or amended, this section of the **SB 899** reform legislation could be done away with entirely. The above fictional case involving George and his attorney presents a common dilemma facing employers in this state. Is an employer required to go through the fiction of offering a job to someone who is not only working for the employer with no restriction but has never lost any time from work? The Board in the panel decision in ***Audiss*** says no, as the mere fact that the applicant continues to work is equivalent to an offer of work. The Board also held that the 60 days commences to run when the actual Permanent and Stationary Report is received by the defendant - not when the defendant has constructive knowledge that the applicant is permanent and stationary.

Although *Audiss* is a panel decision of the Board, it may be cited as evidence pursuant to Labor Code §5703(d), as decisions of the Board on similar issues. Anyone desiring a copy of the Board's decision in ***Audiss*** should make the request by email.

Make mine a double, George.

Joe Truce