ANOTHER INSTALLMENT IN THE *GEORGE THE BARTENDER* SERIES

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RE: GEORGE THE BARTENDER TAKES ON THE DÉJÀ VU INJURY CLAIM OR *WHY SOME THINGS ARE NEVER SETTLED . . . PROPERLY*[1]

FROM THE LOBBY BAR AT THE HYATT

Humming a cheerful tune, I made my way to the Lobby Bar after a rather easy day of denying benefits. I was in a particularly good mood, even more so as I was imminently about to be in the presence of Kim, the Hyatt's breathtakingly beautiful cocktail waitress, who would be waiting for me with my Beefeater's martini straight up with two olives.[2]

As I walked into the bar I spied Frank Falls, noted defense attorney, and Pat Pennipincher, claims manager for Integrity Insurance Company (Frank's largest client). I made my way over to them, as from the looks of things they were in need of some serious cheering up.

The beauteous Kim appeared with my aforementioned cocktail in tow. I asked her to bring a round of drinks for Frank and Pat.

Pat conveyed to me that he had been down in the dumps for the past week and on this particular night was seeking counsel from his favorite defense attorney, Frank, in the hopes that Frank would be able to conjure up a miracle to get him out of an unfortunate situation.

Their drinks arrived and Pat began his tale of woe. Pat had brought his son, Ted, into the "family business" as it were, landing him a job as a claims examiner at Integrity Insurance Company. While one of the senior claim examiners in Ted's department was out on leave, Ted, at the behest of his father, was tasked with covering their caseload on the condition (from the higher-ups in the company) that Pat would oversee each and every decision made by his son. Pat, trusting his son's acumen and decision-making ability, decided to take a vacation.

During this time Ted resolved a continuing trauma claim involving an applicant's low back injury which was caused by repetitive trauma. He was ecstatic as he had given his defense attorney authority up to $25,000.00 and they had settled the case via a Compromise and Release agreement (C&R) for $20,000.00. Unfortunately, the applicant continued working for the same employer and the Integrity Insurance Company remained at risk.

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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

The C&R agreement was paid out pursuant to the order of a Workers' Compensation Judge (WCJ). Then the applicant hired another attorney and filed a similar repetitive trauma claim to the one that was just settled, alleging that their work duties aggravated their back condition, and claimed medical benefits, temporary disability and permanent disability.

Pat's supervisors were livid over the thought of having to pay the same applicant again for a claim they felt was duplicative. Pat realized that perhaps he put too much stock in his son's capabilities and these circumstances not only jeopardized his own standing within the company, but also his son's. The higher ups had already put pressure on Pat to fire his son, a heartbreaking scenario he desperately wanted to avoid. He pleaded to Frank that surely there must be something he could do to prevent this catastrophe.

Frank commiserated with Pat but said as far as he could tell the applicant had sustained a new injury subsequent to the prior C&R agreement.

Pat wrung his hands and took a long, slow drink of his cocktail. He then quietly stared at nothing in particular, a vacant look in his eyes. As it turned out I knew just the thing to cheer him up. I reached into my trusty briefcase and produced copies for Frank and Pat of the Court of Appeal's published decision in the case of *City of Anaheim v. Workers' Compensation Appeals Board (Davis)* 128 Cal. App. 3d 200; 180 Cal. Rptr. 132; 1982 Cal. App. LEXIS 1222; 47 Cal. Comp. Cases 52, filed on January 25, 1982.[3]

An oldie but a goodie[4], in *City of Anaheim* the Court of Appeal granted a Writ of Review to study the Workers' Compensation Appeals Board (WCAB) decision that found that an applicant had sustained a second cumulative trauma injury for a period of time following the approval of the C&R agreement settling their first claim.

The applicant filed an Application for Adjudication on April 26, 1979. They alleged that from January 1, 1975 – March 27, 1979 they suffered colitis caused by work-related stress while employed by the City of Anaheim. This happened to be the same injury they had suffered previously, which was settled by a C&R agreement for $16,430.70 on March 28, 1977.

On December 11, 1980, the Workers' Compensation Judge (WCJ) issued an award in favor of the applicant which stated that the applicant may need further medical treatment for the colitis. The City of Anaheim petitioned for reconsideration to appeal the decision, claiming that this new award on top of the1977 C&R agreement was duplicative.

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[3] 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. A copy of *City of Anaheim* can be obtained by email request.

[4] Much like myself, but I digress.

In the Report and Recommendation on Petition for Reconsideration the WCJ pointed out that the City of Anaheim was not a party to the 1977 C&R agreement. The WCJ claimed that only their carrier**,** the State Compensation Insurance Fund, was party to the agreement.

In its Order denying reconsideration the Appeals Board summed up the issue in the case as follows:

> The only question before us is whether the stress of applicant's employment after the period covered by the compromise and release aggravated his colitis and contributed to his need for medical treatment for the colitis. The reports of Dr. MacLachlan justify the finding that emotional stress subsequent to 1974 has caused episodes of aggravation and disability. These episodes were industrial injuries and required medical treatment. Petitioner is not, moreover, prejudiced by this award of further medical treatment nor can it be unless a claim for some specific treatment is made.

The City of Anaheim then petitioned the California Court of Appeal. The Court of Appeal overruled the WCAB, noting that the applicant's colitis "has existed since 1970 at the latest, unabated, and that city was discharged for all liability on account of the recurrent episodes and attendant medical expense by an Appeals Board-approved compromise and release in a 1974 workers' compensation case filed by the applicant."

The Court of Appeal ruled that the Appeals Board was mistaken in their assumption of the question before them, citing the explicit language set forth in the 1977 C&R agreement:

> . . . it specifically referred to the applicant's claim of injury to his "stomach, intestines (colitis)"; it specifically stated that the compromise and release was "to cover all aspects of the applicant's injury" and incorporated the medical record by reference; it specifically purported to settle and release the employer from liability on account of all claims "whether now known or ascertained, or which may hereafter arise or develop as a result of said injury"; and it specifically provided that "[unpaid] and future medical and hospital expense is to be assumed . . . solely by applicant.

The Court went on to note:

> An approved workers' compensation compromise and release rests "upon a higher plane than a private contractual release; it is a judgment, with 'the same force and effect as an award made after a full hearing' " . . . Payment of a Board-approved compromise and release terminates the liability of the employer and its insurance carrier on account of the involved injury, including any liability for increased disability, unless the order approving the compromise and release has for legal cause been vacated.

The Appeals Court concluded:

> So even if the Board were correct that Dr. MacLachlan's reports constituted substantial evidence that emotional stress from the employment subsequent to 1974 "has caused episodes of aggravation and disability," it was still required to determine whether the applicant's claim for such "aggravation [of his colitis condition] and disability" was barred by the payment of the approved compromise and release.

I explained to Pat and Frank that *City of Anaheim* decided that a C&R agreement may very well settle future injuries even if an aggravation occurs subsequent to the agreement.

In holding that the prior C&R agreement barred subsequent claim of colitis, the Court stated as follows:

> Flareups during the period January 1, 1975, to March 27, 1979, of a recurrent colitis condition that arose and developed prior to September 1, 1974, cannot be converted into a "new" injury to avoid the effect of the earlier Board-approved compromise and release.

Pat was overjoyed as he realized he was not going to have to fire his son. Frank advised Pat they would certainly raise the *City of Anaheim* as a defense and the bar of the earlier C&R agreement in the new workers' compensation proceedings.

From the time I started in this industry on November 7, 1973, it was axiomatic that if somebody continued working for their employer and the insurance company was still at risk the case was settled by way of a Stipulated Findings and Award, not by way of a C&R agreement. The reasons were twofold:

1. The Stipulated Finding and Award could be used as apportionment on the issue of permanent disability.

2. If the case was settled by way of a C&R agreement and the applicant filed a subsequent claim alleging the same type of injury, we would be paying for future medical twice.

Quite a few major employers have recently decided to settle cases by way of a C&R agreement even if the applicant is still working for them. When I was on the Board of Directors of the California Workers' Compensation Defense Attorneys' Association, a guest speaker at one of our conferences, an executive in claims at a large California employer, gave a presentation in which he indicated that when he started working for the employer, the policy was no Compromise and Release agreements if the employee was still working. The executive quickly changed this policy and most, if not all, cases like this were resolved by way of a C&R agreement.

The proof of the pudding is in the eating, as this executive had statistics to show how much money had been saved on future medical treatment by way of Compromise and Release agreements versus Stipulations with Request for Award leaving medical open. In risk management the goals are to manage and minimize risk, which one can translate to saving money.

DISCLAIMER:

All characters in the Lobby Bar, aside from Kim, George and I, are fictional and are a product of my warped and vivid imagination, as is the storyline. However, the decision in *City of Anaheim* is real and should be in the arsenal of every defense attorney.

Make mine a double, George.

-Joe Truce