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 AND THE CREDIBILITY DISPUTE OR *DOES A POST-TERMINATION FINDING ELIMINATE LABOR CODE §5710 ATTORNEY FEES?* [1]

FROM THE LOBBY BAR AT THE HYATT

After a hard day denying benefits I made my way to the Lobby Bar. I had just received an adverse decision from a Workers' Compensation Judge (WCJ) despite the fact that I felt I had established a valid post-termination defense pursuant to Labor Code §3600(a)(10).

Even worse was the fact that the applicant's attorney was none other than that duke of duplicity, Ron Summers, George the Bartender's Workers' Compensation attorney.

As such, I was in dire need of some uplifting and couldn't wait to gaze at Kim, the Hyatt's breathtakingly beautiful cocktail waitress, bringing me my cocktail of choice, a Beefeater's Martini straight-up with two olives.[2]

Let me bring you up to speed, loyal Lobby Bar patron. The issues in our case revolved around one of the two exceptions to proving a post-termination defense. Post termination the applicant had claimed a specific back injury occurring approximately six months before he was terminated.

The applicant had not submitted any medical records verifying that he had incurred a back injury before his termination. However, contrary to my defense witnesses, the applicant testified at trial that he had given notice of the injury to his supervisor prior to termination. This, of course, would be an exception to a post-termination defense, if the applicant was a credible witness.

On cross-examination at trial I contested the applicant's credibility, pointing out that he told conflicting stories about giving his so-called "notice" to the employer at deposition.

However, in their decision, the WCJ used the phrase that makes even the most hardened defense attorney's blood run cold, "The court finds that the applicant was a credible witness" and cited the Supreme Court of California decision in *Joe M. Garza v. Workmen's Comp. Appeals Board* (1970) (3 Cal. App. 3d 312, 319 (35 Cal.Comp.Cases 500).

In *Garza*, the Court reasoned that since the judge, aka the trier of fact, had the ability to observe a witness's behavior and demeanor first hand while they were testifying at trial, the trier of fact would be in the best position to make any decision on credibility – rather than a reviewing court relying on a cold record.

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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.

My martini in hand and a bit of courage now flowing through my veins I decided to seek out Ron at the bar. When I found him I told him I had received authority from my client to appeal the WCJ's decision.

Ron smiled his usual wry smile and asked me how I was going to get around *Garza*.

That's when it hit me! I realized I had the perfect decision to support my appeal! Smiling, I pulled out of my trusty briefcase the panel decision of the Workers' Compensation Appeals Board in the case of *Ramiro Hernandez v. Mercury Plastics, Inc., Old Republic Insurance* (ADJ9028464)[3] filed on July 31, 2015.

I pointed out to Ron that *Hernandez* was nearly identical to our case.

In *Hernandez* the WCJ found that the applicant's claim was not barred by the post-termination defense despite the fact that the WCJ wrongfully relied on the applicant's testimony that he did, in fact, report his injury to his employer prior to termination.

On Page 3 of *Hernandez* the Board stated in relevant part as follows:

> Moreover, we disagree with the WCJ that applicant established exception (A) which requires that applicant prove by a preponderance of the evidence that the employer had notice of the injury prior to the notice of termination.
>
> First, the WCJ did not explicitly find applicant to be a credible witness nor did he find the defense witnesses to be not credible . . .
>
> Second, we found applicant's testimony to be inconsistent. On direct examination, applicant testified that he discussed the injury with supervisor Martha Arredondo the day after. (MOH/SOE, 1/29/14, at p. 5:1-3.) However, in cross-examination, he testified that "he had opportunity to report the injury to Martha and in Human Resources but he did not." (Id. at p. 5:6-7.) . . .
>
> Third, we found that the defense witnesses controverted applicant's testimony regarding the occurrence and reporting of the claimed injury.

The Board also stated in relevant part as follows:

> Furthermore, while we accord great weight to WCJs' findings on the credibility of witnesses, if they are supported by "ample, credible evidence" or "substantial evidence," we exercise independent judgment as to whether the evidence satisfies the required elements of the applicable law and may reject findings of the WCJ

[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 *Hernandez* can be obtained by email request.

> upon our review of the record. (Garza v. Workmen's Comp. Appeals Bd. (1970) 3 Ca1.3d 312, 319 [35 Cal.Comp.Cases 500].)

Ron was beginning to lose a bit of his swagger as he realized that the "inconsistencies" pointed out by the Board in *Hernandez* were similar to the inconsistencies in our case. I had brought out several inconsistencies at trial based on the applicant's deposition testimony. The applicant's deposition had gone on for six hours and Ron had submitted a Labor Code §5710 deposition fee request for $2,400.00 based on $400.00 an hour for his time.

Ron indicated he was going to file sanctions against me for not paying his Labor Code §5710 fees, as these fees are awarded as a matter of course by the Appeals Board. I reminded him of the exact wording of the post-termination section in Labor Code §3600(a)(10):

> Except for psychiatric injuries governed by subdivision (e) of Section 3208.3, where the claim for compensation is filed after notice of termination or layoff, including voluntary layoff, and the claim is for an injury occurring prior to the time of notice of termination or layoff, **no compensation shall be paid** unless the employee demonstrates by a preponderance of the evidence that one or more of the following conditions apply . . . (emphasis added)

I pointed out to Ron that Labor Code §5710 attorney fees are compensation and all items in Labor Code §5710 are considered "compensation." Labor Code §3207 defines "compensation" as follows:

> "Compensation" means compensation under this division and includes every benefit or payment conferred by this division upon an injured employee, or in the event of his or her death, upon his or her dependents, without regard to negligence.

Ron's face became ashen. Sputtering, he said that Labor Code §5710 attorney's fees are a benefit to the applicant's attorney and not to the applicant and Labor Code §3207 does not apply. I told him he should actually read Labor Code §5710, as this section only awarded benefits to an applicant and not the applicant's attorney.

I pulled out my trusty Workers' Compensation Laws of California (2016 Edition) and forced Ron to read Labor Code §5710 entitled "Deposition of witnesses." I specifically referred Ron to Labor Code §5710(b) which states as follows:

> (b) If the employer or insurance carrier requests a deposition to be taken of an injured employee, or any person claiming benefits as a dependent of an injured employee, **the deponent is entitled to receive in addition to all other benefits** . . . (emphasis added)

I then pointed out to Ron that Labor Code §5710 went on to list all the benefits that the applicant would be entitled to including in subsection (b)(4):

> A reasonable allowance for attorney's fees for the deponent, if represented by an attorney licensed by the State Bar of this state. The fee shall be discretionary with, and, if allowed, shall be set by, the appeals board, but shall be paid by the employer or his or her insurer.

Ron now turned positively white and began stuttering and commented that this cannot be true.

I hadn't noticed till now but our little conversation had drawn a crowd, as Larry and Lenny Lien had joined us at the bar, as well as Ron's fellow duke of duplicity and go-to primary treating physician, Dr. Nickelsberg. They appeared just as aghast as Ron did, so I figured they must have heard most of our conversation.

In our denied case, Dr. Nickelsberg had provided what he referred to as treatment reports and medical-legal reports pursuant to Labor Code §4060 under the guise as the applicant's treating physician.

To drive the dagger home, I advised Dr. Nickelsberg and Larry and Lenny Lien that the phrase "no compensation shall be paid" applied to lien claimants as well.

On the basis of the *Hernandez* decision, I was confident I was going to prevail on appeal, a notion confirmed by the air of absolute despair of my little audience.

A TRUCE CONFESSION

In a bygone era I was a general practitioner, or a jack of all trades, master of none. This pre-dated the amendment to Labor Code §5710 in which the applicant/deponent could be awarded attorney's fees for having his deposition taken. Believe it or not, as a member of the Lawyers Club of Los Angeles, I worked on the wording of this amendment.[4] Prior to this amendment, an applicant attorney requested a fee at the end of their case, whether by C&R or award, detailing the work they put in to the WCJ (then called referees). Usually, this would include the fact that they had to sit through the deposition of the applicant taken by the defendant.

Therefore, attorney fees would be increased because of the applicant attorney appearances at depositions. To resolve this apparent inequity, Labor Code §5710(b)(4) was added to Labor Code §5710 as a separate species of benefits to be awarded to the applicant – not the applicant's attorney.

The same language "no compensation shall be paid" is also contained in Labor Code §3208.3(e) (Good Faith Personnel Defense) and no compensation would be paid there either, including the Labor Code §5710 fees or lien claims.

[4] Sadly, I cannot take credit for helping to edit the Code of Hammurabi. That's just an urban legend. The Magna Carta though, that's a different story for a different time.

DISCLAIMER:

With the exception of Kim, George and myself, all characters at the Lobby Bar are fictional and are a product of my warped imagination, as is the storyline.

However, I have always thought that the phrase “no compensation shall be paid” contained in Labor Code §3600(a)(10) and Labor Code §3208.3(e) means that we do not pay compensation to anybody – lien claimants and applicant attorneys seeking fees pursuant to Labor Code §5710.

Make mine a double, George.

-Joe Truce