ANOTHER INSTALLMENT IN THE *GEORGE THE BARTENDER* SERIES

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RE: YOU WIN SOME, YOU LOSE SOME OR GEORGE AND THE SURVEILLANCE INVESTIGATOR

FROM THE LOBBY BAR AT THE HYATT:

George the Bartender had just served me my second Beefeater's martini, straight up, with two olives when his attorney, Ron Summers, entered the lobby bar.

After ordering his cocktail, Ron looked at George and said: "Well, you win some, you lose some."

Ron explained that he just concluded an all day trial at the Appeals Board in which his client was claiming that she sustained a psychiatric injury with substantial disability as a result of conflicts with her supervisors.

The case had been denied on the basis that any psychiatric injury and/or disability were due to a good faith, non-discriminatory personnel action.

Ron went on to explain that the **good faith personnel action** was predicated on a "he said, she said" conflict. The defendant brought three employer witnesses to trial, including the applicant's manager and supervisor, to rebut the testimony of the applicant.

The defendant had also obtained what Ron conceded were excellent surveillance films to rebut the applicant's claims of disability.

Ron proudly told us that the Workers' Compensation Judge, on Ron's motion, had excluded the defense witnesses from testifying at trial as the defendant had neglected to serve Ron with the recorded and/or written statements taken from these witnesses in a timely manner.

Enclosed with his appearance letter served on the defendants, along with the original Application for Adjudication of Claim was a **form letter** which Ron had obtained from one of the first California Applicants' Attorneys Association seminars (**CAAA**) that he attended.

The **"form letter"** that Ron referred to should be very familiar to all of us in the industry, as the letter demands service of all investigation reports, surveillance reports, surveillance films and, most importantly, any statements taken from witnesses or the applicant. As a matter of fact, the letter demands that we produce everything with the exception of our first born.

We are so used to seeing this form letter that few of us pay any attention to it any more.

Applicant attorneys lovingly refer to this letter as the **"Hardesty Demand Letter."** Hardesty was the first panel decision of the Appeals Board which pointed out that although the Board was not bound by the Code of Civil Procedure the workers' compensation system mandates full disclosure and informal discovery and that the days of **"trial by ambush"** were over.[1]

For years neither side (applicant or defense) utilized the Hardesty case to their advantage, that is, until the passage of the Margolin Reform Act in 1989.

By the middle of the 1990s, workers' compensation judges were excluding evidence not disclosed in a timely manner.

In the case of City of Livingston v. WCAB (Madrid), 69 CCC 556, the Board excluded the defendant's witnesses as the applicant had previously requested copies of witness statements which were not provided until four days before trial.[2]

Ron broke into my thought process by reaffirming that the trial judge in his case, over the defendant's vehement objections, ruled that witness statements are not privileged and that the defendant's failure to immediately produce these statements at the request of the applicant's attorney merited the sanction of excluding the defendant's witnesses.[3]

Ron went on to boast that since all of the defense witnesses were excluded, the only witness that was allowed to testify was his client and therefore he was assured of a finding on the threshold issue of injury AOE/COE.[4]

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[1] Anyone wishing a copy of the Hardesty case should request a copy by e-mail.

[2] Unfortunately, the City of Livingston case referred to above is an unpublished decision of the Court of Appeal and therefore it is not citable authority. However, the fact remains that the court in this particular case excluded defense witnesses as the statements of the witnesses were not timely produced and were not made available to the applicant's attorney.

[3] In Moreno v. City of Los Angeles (1993), 21 CWCR 108, the Appeals Board held that witness statements are discoverable. This case involved disclosure of statements of defendant's witnesses that were listed on the Mandatory Settlement Conference Statement.

[4] In the case of Garden Grove Unified School District v. WCAB, Paula Cervantes, 69 CCC 280, writ denied, the Board excluded videotape evidence when the surveillance videotapes were not served by defendant until five days prior to the Mandatory Settlement Conference. The defendant in this case had apparently ceased temporary disability payments on the basis of the surveillance films and since the films were excluded the defendant was sanctioned by the Workers' Compensation Judge in the amount of $500.00. A full summary of this decision appears on our website under the heading: "A Bad Day at Black Rock."

As the exclusion of all of the defense witnesses basically guaranteed Ron a victory in his psychiatric stress case, I asked Ron why he was not celebrating. Ron looked at me glumly and advised that although he may have won the battle, he probably lost the war!

Ron went on to tell me that the surveillance films obtained by the defendant were some of the best surveillance films that he had ever seen in a psychiatric case, as they showed the applicant appearing at several seminars as a motivational speaker.

Ron asked me if I thought that these films might discredit the applicant's credibility and my response was: "You think?"

Ron told me he was already preparing his Petition for Reconsideration, as he felt that the surveillance films definitely should be excluded as the defendant's surveillance investigator was unable to establish the chain of custody of the surveillance videos, which Ron asserted was an absolute foundational requirement.

I was careful not to tell Ron about the legal error of his thinking until I bought another cocktail for him. I then explained to Ron that surveillance videos, like a still picture, do not require chain of custody testimony but can be authenticated by a person who was there (such as the surveillance investigator) and testifies that his and/or her observations of the applicant's activities are accurately reflected in the surveillance video.[5]

Upon hearing this, Ron's depression was complete and before ordering his third cocktail (a double), Ron remarked that he was sure that his depression exceeded that of his client's.

You have heard of the Age of Aquarius? We are in the Age of Full Disclosure and the days of surprising an applicant and his or her attorney by bringing in a surveillance investigator at the last moment are over. Every once in a while a defendant will be able to submit great surveillance videos as proper rebuttal evidence, but these cases are the exception rather than the rule.

Although full disclosure has been available for over a decade, applicants' attorneys, thanks to the knowledge that they obtain from the CAAA conventions, have awoken to the fact that surveillance films and defense witnesses can be excluded if we are not careful to dot our i's and cross our t's.

In a case such as Ron's good faith personnel issue, we are put on notice almost from the commencement of litigation that we will need to present testimony by our defense witnesses (usually

[5] In Brinks International v. WCAB (Taylor), 66 CCC 1612, writ denied, the Board held that sub rosa video tapes can be authenticated by a percipient witness who can testify that the surveillance films accurately portray the activities of the applicant which he and/or she observed.

supervisors and managers) and therefore we should develop our plan of action at the earliest possible moment so as to produce admissible evidence.

For years we thought that **"witness statements"** are somehow protected by the attorney-client and/or work product privilege. With the exception of very specific instances, recorded and/or written statements of percipient witnesses are not privileged and are discoverable.[6]

Please remember that when we make the assignment to one of our AOE/COE investigation companies our investigators will probably take recorded statements unless they are told otherwise. In these cases you can be sure that the applicant's attorney will have sent his **Hardesty** letter (form appearance letter) requesting any and all statements of witnesses and, unless disclosed, the witnesses can be excluded from testifying at trial.

THE WORK PRODUCT PRIVILEGE

In Moreno, defendant State Compensation Insurance Fund (SCIF) contended that the witness statements requested by the applicant's attorney were protected by the attorney-client privilege and the work product privilege. In dismissing the arguments of the SCIF, the Board referred to a published decision by the Court of Appeal in Fellows v. Superior Court (1980) 108 Cal. App. 3rd 55, and reasoned as follows:

1. The attorney-client privilege applies exclusively to communications between an attorney and his client and certainly does not include recorded statements of witnesses.
2. The work product privilege does not apply to actual written and/or recorded statements of witnesses. The work product privilege applies when an attorney assigns an investigator to interview (not to take a written or recorded statement of) a witness and reports his impressions and/or notes of the interview back to the attorney. This is referred to as the conditional work product privilege. If the attorney interviews the witness personally and makes notes as to his and/or her impressions of the interview, then these notes and the impressions of the attorney are absolutely privileged.

In Ron's case it would probably have been cost effective to have the defense attorney interview the applicant's supervisor (at least by phone) for three reasons:

First, this would negate a double interview by the investigator and the attorney who would have to interview the witness before trial anyway;

[6] A written and/or recorded statement taken from an owner and/or partner of the insured employer may be entitled to a claim of attorney-client privilege in certain circumstances. However, statements taken from co-employees, supervisors, management personnel, etc. are never privileged.

Second, the notes of an investigator reporting to the attorney would be subject to the CONDITIONAL work product privilege and could be released to the applicant's attorney after an en camera inspection by the Judge and;

Third, the notes of the attorney conversation with the witness cannot be discovered as these notes would have the benefit of the absolute work product.[7]

Disclaimer:

The above legal opinions and analysis are those of the author and mine alone. My opinions were forged not only by case law but my adventures and misadventures before the Board for over 33 years. As an attachment, I am enclosing a white paper entitled **BEST PRACTICES FOR SURVEILLANCE OPERATIVES AND INVESTIGATORS**, which I authored at the request of one of our clients which, of course, means that I have no life.

I yearn for the good old days of no disclosure, no MSC statements and trial by ambush.

Make mine a double, George.

Joe Truce

WJT/cnj

[7] The difference between **absolute** privilege and **conditional** privilege is that the conditional work product privilege may be subject to an en camera review by a judge who would then decide whether or not the information is privileged or not.