ANOTHER INSTALLMENT IN THE *GEORGE THE BARTENDER* SERIES

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RE: GEORGE THE BARTENDER AND THE FAIRNESS DOCTRINE PURSUANT TO THE BOARD'S *EN BANC* DECISION IN *RAMIREZ*

FROM THE LOBBY BAR AT THE HYATT:

"I am not against the concept of due process but the Board went too far in its decision in *Ramirez,*"[1] complained Attorney Ron Summers to anyone that would listen.

As Ron is George the Bartender's workers' compensation attorney, George cocked an ear toward Ron's discomfort. While pouring my usual Beefeater's martini, straight up with two olives, George asked what I knew about the *Ramirez* case and why it was such a blow to his attorney.

After taking the first sip of my martini and pronouncing it perfect, I gave a smile to Kim, the Hyatt's breathtakingly beautiful cocktail waitress. I then started to tell George about the history of Labor Code §5814 and the reform movement in general, which eventually culminated in the passage of Senate Bill 899.

I told George that all workers' compensation systems, including California's, provide provisions to penalize employers and insurance carriers for denying and/or delaying the delivery of workers' compensation benefits to injured workers.

Our statute is Labor Code §5814, which originally mandated a 10% penalty for benefits delayed to an injured worker. In the 1970's, 1980's and the first half of the 1990's, no one was really sure as to how the 10% penalty was calculated, so when a Labor Code §5814 penalty was settled there was usually a compromise.

Originally, the applicant attorneys claimed that the Labor Code §5814 10% penalty applied against all benefits, but eventually the law crystallized that the penalty only applied to the species of benefits that were delayed and/or denied. In the years that followed there were disputes as to whether the penalty actually applied to the precise amount of the benefit that was delayed (the employer's position) or whether the penalty applied to the actual benefit delayed plus future benefits which would give the defendant credit for the benefits already provided.

With the industry in a state of flux most applicant attorneys only filed for penalty pursuant to Labor Code §5814 when it was obvious that a benefit was being denied and/or delayed to the detriment of the injured worker. This soon changed courtesy of the California Supreme Court's decision in the *Rhiner v. WCAB (1993) 4 Cal 4th 1213; 58 CCC 172* case, which held that the 10% penalty applied against past, present and future benefits and that defendant received no credit for the benefits that were previously paid on a timely basis.

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[1]The Board's *en banc* decision in *Ramirez* is the most recent decision by the Appeals Board regarding the calculation of Labor Code §5814 penalties. An *en banc* decision by the Board is legally binding on all parties, Workers' Compensation Judges and panels of the Appeals Board.

Soon we had a feeding frenzy of penalty petitions, or Declarations of Readiness to Proceed, on simply the issue of penalty. The applicant's bar in Southern California began raising multiple penalties on every case and then, as an afterthought, requested the benefit printout as to benefits provided to see if there **actually** was a penalty.

The defense community then began receiving adverse decisions from the Board and from the courts as to the calculation of the 10% penalty. In cases where multiple penalties were sought the actual value of the case was quite often dwarfed by the size of the penalty.

The Appellate Courts soon held that travel expense was a part of the medical benefit and therefore any delay and/or denial of travel expense would be a 10% penalty on not only on the travel expense itself but the entire species of medical treatment.

I told George that a minuscule delay in reimbursing travel expense of $5.00 for attendance at a medical exam could result in a penalty of $50,000 when the underlying medical expenditures in a ten-year-old case were $500,000. I remarked dryly that Ron did not seem concerned about the concept of due process then.

We were also told by the Appellate Courts that the automatic 10% increase in Labor Code §4650 was a separate and distinct penalty from a Labor Code §5814 penalty, resulting in double liability for penalties for the same. As a result of these continuing adverse decisions we experienced a veritable **"feeding frenzy"**[2] in our industry with respect to penalties, penalties and more penalties and then we were hit with the concept of multiple penalties.

Applicant attorneys began going back to their cases to see whether or not the defendants timely paid travel expense to their clients. They also demanded benefit printouts in order to scour the printouts for delayed payments.

If an applicant's attorney spotted a payment of temporary disability to which was added a 10% Labor Code §4650 increase, this meant that we received by return mail a Petition for a Labor Code §5814 Penalty.

During this so-called feeding frenzy I would walk in to the Appeals Board and the applicant's attorney would be there with his calculator, benefit printout and a wide grin as if he had just hit the jackpot!

We were advised by various groups studying the administrative chaos at the various Appeals Board offices that (especially in Southern California) most of the Board time was now consumed with adjudicating penalty issues, as opposed to the delivery of benefits to injured workers.

When the Labor Code §5814 runaway locomotive was combined with the runaway medical system, not to mention the subjective system for determining the nature and extent of permanent disability, something had to give!

It did and the result was Senate Bill 899, which was signed by the governor on April 19, 2004. This bill, among other things, revised Labor Code §5814 to provide that only the amount of the benefit **actually delayed** is subject to a penalty and further provides: "The amount of the payment unreasonably delayed or refused should be increased up to 25% or up to $10,000.00. . . whichever is less. . . "

Labor Code §5814 goes on to provide as follows:

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2 As you can see I love this phrase.

> **"In any proceeding under this section, the Appeals Board shall use its discretion to accomplish a fair balance in substantial adjustments between the parties."**

In other words the penalty can be up to 25% but the Board is mandated by Labor Code §5814 to determine an amount (presumably between zero and 25%).

Clearly the plain meaning of the statute mandates a Workers Compensation Judge (WCJ) to use his or her discretion and take into account mitigating and/or aggravating circumstances when determining the severity of the penalty.

The Board has now addressed this issue in their *en banc* decision in *Ramirez* mandating that the WCJ consider at least nine mitigating and/or aggravating factors. The factors include the evidence of the amount of payment delayed, the length of the delay, whether or not the delay was inadvertent, etc.

The applicant's bar regarded the amendment to Labor Code §5814 by SB 899 as draconian in nature. I assume Ron's reaction as above means that the *Ramirez* case will be greeted by the same lack of enthusiasm.

The mantra of the applicant's bar has always been that defendants will have no real incentive to provide benefits in a timely manner without a "big stick" such as the pre-SB 899 penalty provisions of Labor Code §5814.

However, our new Administrative Director, Carrie Nevins, has addressed this issue by way of the State Audit Unit which provides for hefty penalties against carriers and/or employers for repeated violations of Labor Code §5814.

Yes, Labor Code §5814 is still a deterrent to the delay and/or denial of benefits but the monetary bonanza will be collected by the Audit Unit of the State of California rather than as a profit center for the applicants' bar.

DISCLAIMER:

The above hypothetical story about Ron's sorrows over the Board's *en banc* decision in *Ramirez* is another plus for the workers' compensation system brought about by Senate Bill 899.

Make mine a double, George.

– Joe Truce

Anyone wishing a copy of the Ramirez case, please advise and we will forward a copy.