

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 EXPANSION OF THE GOOD FAITH PERSONNEL ACTION DEFENSE OR HAVE A LITTLE FAITH IN THE SYSTEM*¹

FROM THE LOBBY BAR AT THE HYATT

After a hard day of denying benefits, I made my way to the Lobby Bar with visions of Kim, the Hyatt's breathtaking beautiful cocktail waitress, bringing my Beefeater martini, straight up with two olives.²

I was also looking forward to some peace and solitude as I had had an exhausting day at trial dealing with lien claimants.

However, peace and solitude were not in order on this particular night.

As I entered the Lobby Bar I was greeted with the sounds of anguish at the other end of the bar. I looked down to see a rather sorrowful sight: Frank Falls, noted defense attorney, in an animated conversation with his chief client, Pat Pennipincher, claims manager for Integrity Insurance Company.

Feeling sympathetic for the obvious discomfort of my comrades in arms I bought a round of drinks for them and joined in their conversation.

After taking a gulp of his cocktail, Frank explained the situation to me.

At an upcoming trial with Ron Summers (George the Bartender's workers' compensation attorney), Frank was defending a cumulative trauma claim in which the applicant was alleging not only injury to his psyche but also his cardiovascular system.

In the Pre-Trial Conference Statement filed at a recent Mandatory Settlement Conference, Frank raised the "good faith personnel action" defense to the applicant's allegation of an injury to his psyche.

At this point, Mr. Pennipincher interjected that he was not worried about the applicant's psyche claim. Rather, Mr. Pennipincher's anger stemmed from what Frank had just explained to him: a good faith personnel action defense did not apply to a physical injury.

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.

Frank chimed in to explain that he told Pat that California Labor Code §3208.3 governed the defense of a good faith personnel action and that this section only applied to injuries to the applicant's psyche.

Apparently, settlement negotiations in Frank's case over the applicant's heart injury (which rated in the life pension category) had been ongoing. Ron indicated to both Frank and Pat that he would let them off the hook for bargain basement price for a Compromise and Release in the amount of \$450,000.

At this point, Ron Summers strode pridefully into the Lobby Bar. He joined our group, apparently for no reason other than to rub salt in Pat's and Frank's wounds, as the first words out of his grinning mouth were, "Why the long faces?"

I saw an opportunity here to help turn the tide of Frank's case, and subsequently knock Ron off his high horse. I indicated to the three of them that the Court of Appeal in *County of San Bernardino v. WCAB (McCoy)* 203 Cal. App. 4th 1469 (Cal. App. 4th Dist. 2012) had ruled that a defense of good faith personnel action could also bar a claim of physical injury related to a psychiatric injury. Ron scoffed at this and said that he was familiar with *McCoy* and that this case was an anomaly, quite narrowly construed. He said he was confident that the principle of *McCoy* would not apply to the case he and Frank were litigating.

It was at this point, loyal Lobby Bar patron, that I hit Ron with a haymaker! I reached into my trusted briefcase and pulled out copies of the panel decision by the Board in the case of *Dennis Stolp v. California Department of Development Services, Sonoma Developmental Center*³ filed on August 25, 2015. I handed a copy to each of them.

Much to Ron's chagrin, I pointed out that in *Stolp*, the Board applied the principles in *McCoy* to a heart case resulting from a psychiatric injury.

In its decision, the Board cited the *McCoy* case and observed as follows:

. . . the Court of Appeal found that in enacting section 3208.3 the Legislature made quite clear that it intended to limit claims for psychiatric injury due to their proliferation and the potential for fraud and abuse. Therefore, any interpretation of the section that would lead to more or broader claims should be examined closely to avoid violating express legislative intent.

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 *Stolp* can be obtained by email request. The Board adopted and incorporated the articulate lengthy decision of Judge James Johnson (Santa Rosa office of the Appeals Board) so the quotes I have used in this edition are actually quotes from the Report and Recommendation on the Petition for Reconsideration by Judge Johnson.

The Board went on to note:

The McCoy court further found that Labor Code section 3208.3(h) precludes recovery for physical manifestations that are directly and solely resulting from a psychological injury suffered as a result of "good faith personnel actions". The McCoy court found that any other result would undermine the purpose of the law to limit such claims because of their potential for fraud and abuse. Accordingly, the McCoy court held that a "good faith personnel action defense" precludes recovery for psychiatric injuries with resulting physiological manifestations solely caused by the stress from such actions.

At this point in my dissertation, Ron was became obviously uncomfortable and pointed out that the *McCoy* principle could not possibly extend to a heart case.

Grinning, I then read further:

Based upon the reports of the Agreed Medical Examiner Dr. Anderson (WCAB Exhibit 2), it was found that the injuries to the applicant's cardiovascular system were directly and solely caused by the psychological injury resulting from the defendant's lawful, non-discriminatory, good faith personnel action.

At this point, Ron appeared flummoxed, so I went on:

In his report dated May 13, 2014, Dr. Anderson concluded that the overall personnel action sequence suggested that applicant was accused of serious issues that led to secondary depression and anxiety and in the wake of these activities had hypertension probably due to increased sympathetic outflow, including increased secretion of epinephrine and norepinephrine. Dr. Anderson found that in the setting of this high stress level of high blood pressure, the applicant developed cardiac arrhythmia.

My analysis complete, Frank and Pat were ecstatic, as they could tell that *Stolp* was very similar to their case. Frank indicated he would immediately provide a trial brief to the Workers' Compensation Judge.

I cherished the look on Ron's face, as I could tell he certainly forgot about his demand and was now probably worrying about the compensability of his entire case.

My job was done.

DISCLAIMER:

Aside from Kim, George and I, all characters of the Lobby Bar are fictitious, as is the storyline, and are products of my vivid and warped imagination.

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However, the Court of Appeal in *McCoy* and the Board's panel decision in *Stolp* provide food for thought for the defense in terms of a good faith personnel action defense.

Make mine a double, George.

-Joe Truce