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 STATE PANEL QME MAZE OR "TO STRIKE OR NOT TO STRIKE, THAT IS THE QUESTION!"

FROM THE LOBBY BAR AT THE HYATT:

After a hard day denying benefits I was relaxing with my first martini when I saw Kim, the Hyatt's breathtakingly beautiful cocktail waitress, approaching me with my second martini in tow.

It doesn't get better than this I thought, i.e., relaxing with a Beefeaters martini straight up with two olives and being waited on hand and foot by a beautiful cocktail waitress.

Unfortunately my enjoyment was short-lived due to a constant "thump, thump, thump" coming from the direction of the bar.

I tore my eyes away from Kim and saw that George the Bartender was trying to comfort his attorney, Ron Summers, who for some reason was **"banging"** his head on the bar and repeating over and over again, "It's not fair!" Having practiced on the defense side for more than 30 years prior to the enactment of **SB899** I was certainly familiar with the phrase, "It's just not fair!"

From past experience I knew that Ron's unhappiness probably had something to do with receiving an adverse ruling on one of his applicant's workers' compensation cases.

While George was trying to console his attorney, I left my seat in the bar and went over to get the scoop on just what had gone wrong in Ron's life. To stop the **"banging"** I offered to buy Ron a cocktail and Ron explained to me the cause of his discontent.

Ron told me that he had obtained a three-member QME panel on one of his new cases pursuant to Labor Code §4062.2 and a panel was assigned by the Administrative Director on June 15, 2006. On June 23, 2006, defendant had faxed Ron a letter wanting to know if Ron wanted to go to an Agreed Medical Examiner. Ron did not reply. Therefore the defense attorney struck one of the panel members pursuant to Labor Code §4062.2(c).

On June 29, 2006 the defense attorney chose Dr. Sanford Corngold from the panel. On July 5, 2006, Ron struck Dr. Corngold from the panel. Upon hearing this I exclaimed, "Why would you want to

do this as Dr. Corngold is fair and objective?" Ron groaned, "But I don't want fair and objective. I want benefits and attorney's fees."

Ron advised that to make matters worse the defense claimed that he did not strike Dr. Corngold on a timely basis pursuant to Labor Code §4062.2(c) and that this was affirmed by the Workers' Compensation Judge.

On his Petition for Reconsideration and/or Removal, Ron argued that he timely struck Dr. Corngold from the panel pursuant to the provisions of the Code of Civil Procedure §1013(a) which extends the time to respond by five days when service is made by mail.

In his report on Ron's Petition for Reconsideration/Removal, the WCJ noted that Labor Code §4062.2(c) is distinguishable from the extension of CCP §1013 as it provides that the time to act is from the date of the assignment of the QME panel, not service of the QME panel.

The Board then dismissed the Petition for Reconsideration and denied removal.

Although the above case and parties are entirely hypothetical and a product of my warped imagination, this issue was recently addressed by the Board in *Jose Lewis Alvarado v. Workers' Compensation Appeals Board, Ruskin Mfg., AIG Ins. Administered by Gallagher Bassett Services*[1]. This is a writ denied case and pursuant to the authority of the Court of Appeal decision in *Wings West Airline v. WCAB* (1986), 187 Cal.App.3d 1047, 51 CCC 609, in the footnote on page 1053, the decision can be brought to the attention of the courts and/or Board. **Please note that I have used the same dates in Ron's case as the parties did in *Alvarado*.**

DISCLAIMER: The bad news is that many in our industry start counting the 10 days to agree to an AME either from the actual receipt of the panel or from the date we commence negotiations for an AME.

The good news is that the losing attorneys in ***Alvarado*** were Graiwer & Kaplan.

However, a strict construction of Labor Code §4062.2 and also the instructions from the Administrative Director clearly give us 10 days **from the actual assignment** of a panel by the Administrative Director to confer to see if the parties can agree on an AME. If the parties have not

[1] *Anyone requesting a copy of the Alvarado case should respond by e-mail.*

agreed on an AME by the tenth day after assignment of the panel "each party may then strike one name from the panel" and the remaining Qualified Medical Evaluator shall serve as the Medical Evaluator.

This section goes on to indicate, "If a party fails to exercise the right to strike a name from the panel within three working days of getting the right to do so (which occurs on the tenth day after the panel is assigned) then either party may select any physician who remains on the panel to serve as a Medical Evaluator. . . ."

Therefore we always want to start counting our 10 days from the actual date of the panel QME form reflecting the date the panel was assigned. A premature strike would appear to be just as bad as a late "strike" as Labor Code §4062.2(c) refers to the fact that you can only "strike" once you gain the right to strike–and people wonder why I drink!

Caution, as the opening stanza goes in the Kingston Trio's rendition of their classic song, *The MTA* – "This could happen to you."

Make mine a double, George.

– Joe Truce