

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: ALL GEORGE THE BARTENDER WANTS FOR CHRISTMAS IS 100% USER FUNDING OR A VISIT FROM THE GHOSTS OF WORKERS' COMPENSATION¹

FROM THE LOBBY BAR AT THE HYATT:

After another hard day of denying benefits I arrived at the Lobby Bar and was greeted by Kim, the Hyatt's breathtakingly beautiful cocktail waitress, heading my way with usual drink in tow: a Beefeater's martini, straight up with two olives.

Gazing at Kim, even for a brief moment, never ceases to raise my spirits and tonight was no different. My cup of joy ran over when I noticed that Ron Summers, George the Bartender's workers' compensation attorney, was in a foul mood.

As a matter of fact the phrase "foul" falls short of describing Ron's mood as he was engaged in a very loud conversation with not only George but with George's primary treating physician, Dr. Nickelsberg.

Ron was pounding the bar with his fist and appeared to be extremely irate, which brought a big grin to my face.

From my seat at the other end of the bar I faintly picked up some key phrases from their argument, including "my business will be ruined by this [expletive deleted] presiding judge" and "I might have to start appearing at these [expletive deleted] Mandatory Settlement Conferences myself instead of sending paralegals."

Being the curious creature that I am, I made my way down to the other side of the bar to see what all the commotion was about. I made sure to order the Dukes of Duplicity a round of cocktails as well.

Their drinks delivered, the fuming began to subside and the vein in Ron's forehead began to return to its normal size. Ron was now calm enough to begin to tell me the basis of his tirade.

¹ For those new patrons to the Lobby Bar, George the Bartender's workers' compensation case involves an injury to his elbow, lateral epicondylitis (tennis elbow), sustained from the repetitive serving of martinis to me. If there ever was an admitted industrial injury, this is it!

Apparently the presiding judge at Ron's favorite Board had put in a procedure designed to expedite the Mandatory Settlement Conference process called a "fast track calendar."²

Ron, visibly shaken, reached inside his breast pocket and removed a document, which turned out to be his first Notice of Mandatory Settlement Conference on the "fast track calendar." It read, in part, as follows:

READ THESE INSTRUCTIONS CAREFULLY

. . . as failure to follow these instructions may result in sanctions. The fast track system is designed to reduce the number of hearings necessary to move the case to resolution, thus conserving scarce court resources. The fast track system guarantees the case scheduled for MSC will receive the judge's attention during the hearing and requires legal counsel to come to the hearing fully prepared.

Before I read further I wryly remarked to Ron whether or not he was aghast that he had to come "fully prepared." He was not amused.

The Notice of Mandatory Settlement Conference went on to state:

The parties are expected to have completed the following:

1. Have discussed issues and exchanged settlement demands/offers before the start time of the MSC or to present proof to the MSC judge of all good faith attempts to do so.
2. Have completed a preliminary draft of the Stipulations and Issues, and list of proposed exhibits before the scheduled MSC.
3. Be on time. If running late please notify the court and opposing counsel.
4. Commit their entire attention and time to the MSC, during the entire scheduled time. (The parties will not be excused to handle hearings in other courtrooms or take phone interruptions that are unrelated to the case during the MSC proceedings).
5. Be familiar with the file and ready to answer the judge's questions about the facts and issues of the case.
6. Have all proposed evidence on hand, and be able to identify the report, page and line the party intends to rely on in support of each issue raised.

² Ron filed all of his cases at this particular Board

7. The parties must have someone with settlement authority readily available during the entire time of the MSC.

By the time I got through reading the Notice I thought to myself, "Maybe God does exist?"

Ron told me that he had begun circulating a Petition not only among his fellow applicant attorneys but among defense attorneys as well. The Petition claims that the "fast track calendar" is illegal as it constitutes "local rules."

Ron added that applicant attorneys as well as defense attorneys had in fact both signed his Petition as everyone Ron talked to felt there was not enough time to read their entire file before coming to an MSC.

A DOSE OF HUMBUG

Although the above story is hypothetical, it is based on fact. As some of our more clever loyal Lobby Bar patrons may have probably guessed, the presiding judge in question was the Honorable Jorja L. Frank, former presiding judge of the Los Angeles Appeals Board District Office.

Faced with the daunting task of trying to resolve a backlog of some 800,000 lien claims, Judge Frank formulated a lien claim expedited calendar in an attempt to expedite the process.³

Ever the trailblazer Judge Frank came up with the aforementioned MSC experiment in an attempt to combat another insurmountable issue: the morass that is the Mandatory Settlement Conference calendar that expects workers' compensation judges to process 50 (that's right 5-0) files set for MSC a day.⁴

Unfortunately the "fast track calendar" experiment has been terminated on the basis that it was a local rule.

True, at first glance Judge Frank's experiment does appear to be a local rule, but it bears a closer examination.

THE GHOST OF WORKERS' COMPENSATION PAST

If I may, loyal Lobby Bar patron, allow me to assume the role of the Ghost of Workers' Compensation Past and take you on a short educational trip back through time. Perhaps there are

³ As discussed in "George the Bartender and the Haunting of the Los Angeles WCAB or How Judge Frank is Helping to Exorcise the Lien Demons"

⁴ Although it may be different in Northern California the key Boards in Southern California, Van Nuys, Marina Del Rey and Los Angeles, do process 50 or more conferences per judge per day.

some of you who recall the Margolin Reform Act of 1989. This act created the Mandatory Settlement Conference with the expectation that it would be implemented pursuant to Judge Frank's "local rules."

Prior to January 1, 1990, there was no such thing as a Mandatory Settlement Conference in our wonderful system. Cases were usually set for conference and then for trial without the obligation of the parties to list stipulations, issues, exhibits and witnesses or to engage in good faith settlement negotiations.

The 1989 Margolin Reform Act created the Mandatory Settlement Conference pursuant to Labor Code §5502, which if I recall correctly at that time provided in part as follows:

In all cases in which the applicant is represented by an attorney, a Mandatory Settlement Conference shall be conducted by a referee not less than 10 days, and not more than 30 days, after the filing of the Application for Adjudication of Claim. If the dispute is not resolved, the regular hearing shall be held within 75 days after the Application for Adjudication is filed . . . the settlement conference shall be conducted by a referee who is eligible to be a workers' compensation judge or eligible to be an arbitrator under Section 5270. At the Mandatory Settlement Conference the referee shall have the authority to resolve disputes, including the authority to approve a Compromise and Release or to issue a Stipulated Findings and Award, and if the suit cannot be resolved, to frame the issues and stipulations for trial . . . 10 days before the Mandatory Settlement Conference, the parties shall file a conference statement noting the specific issues in dispute, listing the exhibits, and the witnesses. Discovery shall close on the date of the Mandatory Settlement Conference. Evidence not disclosed or obtained thereafter shall not be admissible.

Although Judge Frank's rules might have been considered local rules, they were in fact the rules that were envisioned by the California Legislature in implementing the Margolin Reform Act of 1989.

Although Labor Code §5502 has been amended several times, today's version is essentially the same with respect to the Mandatory Settlement Conference.

The parties are expected to know their file and to have prepared the requisite Pre-Trial Conference Statement before the Mandatory Settlement Conference, listing stipulations, issues, witnesses and exhibits, and to have their exhibits in order at the Mandatory Settlement Conference.

Judge Frank's "fast track calendar" rule may have been local but it was uniformly in compliance with the spirit and intent of the Margolin Reform Act and Labor Code §5502.

THE GHOST OF WORKERS' COMPENSATION PRESENT AND THE STATE OF OUR FUTURE

The experiment that was the Court Administrator is now over as the duties of the Court Administrator were never clearly defined and overlapped the responsibilities of the Appeals Board and the Administrative Director of our system.

Now, if I may, loyal Lobby Bar patron, allow me to assume the role of the the Ghost of Workers' Compensation Present. Take my hand and I'll offer you a glimpse of the condition of our current system and introduce to you what I believe to be the makings an "A-Team."

The Department of Industrial Relations is now headed by Director Christine Baker who is not only talented but is well aware of the critical issues facing us in the workers' compensation community. Ms. Baker is the former Executive Officer of the Commission on Health, Safety and Workers' Compensation (CHSWC), which has been instrumental over the years in analyzing the issues facing our community and proposing useful remedies.

The Division of Workers' Compensation is now presided over by the recently appointed Administrative Director, Rosa Moran. Ms. Moran has an excellent background on the everyday issues facing our system, which she acquired from her tenure as a workers' compensation judge at the Appeals Board District Office in Oakland, California.

To complete this perfect triumvirate, we have a hard-working Workers' Compensation Appeals Board which is both experienced and knowledgeable about key issues facing our system.

However, up to this point the missing ingredient has been the financing of the system which seemingly was resolved by California Assembly Bill 227. This bill, which amended Labor Code §62.5, provides in relevant part as follows:

The Workers' Compensation Administration Revolving Fund is hereby created as a special account in the State Treasury. Money in the fund may be expended by the department, upon appropriation by the Legislature, for all of the following purposes, and may not be used or borrowed for any other purpose:

(A) For the administration of the workers' compensation program set forth in this division and Division 4 (commencing with Section 3200), other than the activities financed pursuant to Section 3702.5.

Labor Code §62.6, entitled "Assessments," provides in relevant part as follows:

Assessments shall be levied by the director upon all employers as defined in Section 3300. The total amount of the assessment shall be allocated between self-

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insured employers and insured employers in proportion to payroll respectively paid in the most recent year for which payroll information is available.

In promulgating 100% user funding per Assembly Bill 227 the legislature contemplated that employers would provide the funding for an efficient and well run system.

These tidings portend a promising future for the world of workers' compensation as we now have this "A-Team" in place to assist in administering the fund affectively, equitably putting the resources of the fund to their most apt use.

DISCLAIMER:

All characters at the Lobby Bar aside from George, Kim and I are fictional as is the story line about Ron's mythical presiding judge.

From all of us at the Lobby Bar, have a safe and happy Holiday. And may all your martinis be doubles.

-Joe Truce