

## **ANOTHER INSTALLMENT IN THE *GEORGE THE BARTENDER* SERIES**

**For other installments of the George the Bartender series, please visit our web site at <http://www.kttlaw.us/memos.html>**

**RE:           GEORGE THE BARTENDER AND UNEVEN APPLICATION OF  
LABOR CODE §5402**

### **FROM THE LOBBY BAR AT THE HYATT:**

After a hard day denying benefits I arrived at the lobby bar at approximately 7:30 p.m. and was greeted by a chorus line headed by George's attorneys and doctors: Ron Summers, Dr. Nickelsberg and Dr. Ratbar singing "Happy Days are Here Again."

Failing to catch the attention of George's attorney, I finally ordered my Beefeater's Martini, straight up, with two olives and George told me that Ron was celebrating as he had narrowly escaped a claim of legal malpractice by one of his clients.

By this time George's attorney had stopped singing and dancing as the General Manager had come down to tell him that as the Hyatt did not have a cabaret license singing and dancing in the lobby bar was prohibited.

Although he was out of breath, Ron filled me in on his near escape from malpractice. Ron, as a sole practitioner, routinely hires contract attorneys and sometimes hearing representatives to fill in for him when he has a conflict or is on vacation. In the case in question, Ron's client had sustained a rather horrific industrial injury to his back, upper extremities and lower extremities due to a fall. Ron referred the applicant to Drs. Nickelsberg and Ratbar and their subsequent reports rated in the life pension area. Ron viewed this case as a gold mine for himself with respect to attorney's fees.

Due to a conflict on his calendar, Ron employed a hearing representative to appear at the Mandatory Settlement Conference in his place. As no settlement was reached at the **MSC** the parties prepared the **Pre-Trial Conference Statement** as required by Labor Code §5502 and the matter was continued for trial.

Ron told me that he was absolutely devastated when he found out from reviewing the file that his independent contractor hearing representative had not listed any exhibits or witnesses and that the defendant was now claiming that the applicant would be precluded from testifying and that Ron would not be able to enter into evidence the reports of either Dr. Nickelsberg or Dr. Ratbar.

On hearing this I expressed sympathy to Ron but I also indicated that Labor Code §5502 cuts both ways and that in legions of cases since Labor Code §5502 became the law as of January 1, 1990, defendants had been precluded from introducing evidence or witnesses not listed on the PTC Statement statement.

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Ron told me that he had reviewed those prior cases which deepened his depression, but he is now relying on a great decision by the Board in the case of Mohamed vs. Exxon-Mobil Corporation 35CWCR59.

In the *Mohamed* case the applicant's attorney requested a continuance so he could attend his son's graduation. The request for continuance was denied and the applicant's attorney arranged for a hearing representative to appear for the applicant at the Mandatory Settlement Conference.

As in Ron's case, the hearing representative did not list exhibits or witnesses on the MSC statement.

The defendant correctly claimed at trial that the applicant was precluded from introducing any evidence as said evidence was not listed on the MSC statement. Defendant's motion was denied by the Workers' Compensation Judge who issued an Award based on the applicant's "**evidence.**"

In it's opinion denying the defendant's Petition for Reconsideration the Board sustained the WCJ by noting, "There was no evidence that defendant had been prejudiced in any way by the WCJ's receipt of the evidence in question . . ."

The Board went on to note that applicant's medical report had been served on defendants prior to the Mandatory Settlement Conference and commented, "There was no indication that petitioner would have conducted his defense any differently if the evidence had been listed on the MSC statement."

The Board went on to state that the "failure to list the evidence at the MSC appeared to have resulted from mistake, inadvertence or excusable neglect rather than a deliberate tactical decision or attempt to "sand bag" defendant."

Finally, in adding insult to injury for doing the same thing to the applicant that applicants had been doing to defendants for years, the Board warned that "petitioner litigating this issue all the way the Board appeared to be an exercise in gamesmanship. Such tactics delay resolution of claims, increase litigation costs, and waste judicial resources. They are inconsistent with the Constitutional mandate that the WCAB accomplish justice expeditiously, inexpensively, and without incumbrance. Petitioner was admonished that this type of gamesmanship could lead to the imposition of sanction . . ."

**Disclaimer:** The Board's decision in *Mohamed* comes under the heading of: "Give me a break!" One of the long time commentators on workers' compensation issues, the Honorable Mark Kahn, Associate Chief Judge for the Southern Region, has referred to Labor Code §5502 as the "Gottcha" Statute. For years we, as defendants, have been told that exhibits and/or witnesses not listed on the

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Pre-Trial Conference Statement as mandated by Labor Code §5502 cannot be utilized as evidence and the industry's pleadings that such admission was due to excusable neglect or was not prejudicial to the applicant fell on deaf ears.

According to the Board's decision in *Mohamed* we now have a new standard i.e, did the omission to list evidence and witnesses prejudice the other side and/or was the omission to list evidence on the MSC statement due to excusable neglect and/or inadvertence. Under the cover of "**What is good for the goose is good for the gander**" we may be able to use the *Mohamed* case when we "**inadvertently**" forget to list an exhibit or a witness. The *Mohamed* case can be entered into evidence pursuant to Labor Code §5703(g) and anyone wishing a copy should request same by e-mail.

Make mine a triple, George.

Joe Truce