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: SHAKY APPORTIONMENT AND GEORGE THE BARTENDER'S 132a ISSUE

FROM THE LOBBY BAR AT THE HYATT:

As I tried to get George the Bartender's attention, he seemed in a daze and kept muttering: "It's not fair!"

George was in what appeared to be a heated discussion with his attorney, Ron Summers, so I ordered my Beefeater's martini straight up with two olives from Kim, the Hyatt's breathtaking, beautiful cocktail waitress.

Kim explained that George's outrage was really her fault, and she went on to tell me that she had recently taken off work on several occasions for treatment of a summer flu virus. While she was able to use her sick leave for her non-industrial condition, George was prohibited from using his sick time and was only **allowed** to use his unused vacation time when he went to Dr. Nickelsberg for treatment of his carpal tunnel syndrome.

Overhearing our conversation, Ron positively beamed and told me that this was an open and shut Labor Code §132a case pursuant to a recent published decision by the Court of Appeal in Anderson v. WCAB, 35 CWCR 109.

Ron went on to point out that the Court of Appeal in ***Anderson*** declared that an employer who allows employees to take time off and use their sick time for non-industrial conditions but only allows injured employees to use their unused vacation time discriminates against said employee pursuant to Labor Code §132a.

In reaching its decision, the Court of Appeal referred to the landmark Supreme Court decision in Department of Rehabilitation v. WCAB (Lauher) (2003) 30 C 4th 1281, 31 CWCR 163, 68 CCC 831.

Ron is right!

The Supreme Court in ***Lauher*** held that an employer may not discriminate between employees injured on the job and those injured off the job.

In ***Anderson***, the City of Santa Barbara discriminated against injured employees by having a policy that allowed non-industrially injured employees to use their accrued sick leave for non-industrial

injuries but restricted industrially injured employees to using only their unused vacation time. However, I could not resist in throwing some water on Ron's parade and dampening his spirits!

I explained to Ron that if he analyzed the language of the Court of Appeal in ***Anderson***, the holdings by the Court can be utilized as either a **"sword or a shield"** as the Court in ***Anderson*** also gave the defense another resounding victory on the issue of apportionment pursuant to Labor Code §4663 by giving a new defense slant regarding its interpretation of the Board's en banc in Escobedo v. CNA Insurance Company (2005) 33 CWCR 100, 70 CCC 604.

In ***Escobedo***, the Board held that Labor Code §4663 apportionment must be based upon substantial evidence and in numerous panel decisions following ***Escobedo*** the Board has struggled to define **substantial evidence** as required by ***Escobedo***.

In ***Anderson***, the Agreed Medical Examiner found 20% apportionment to the applicant's cervical spine and 30% apportionment to the applicant's upper extremities based on "non-industrial activities of daily living. . ."

At his deposition, the **AME** "admitted that the apportionment was to some degree speculative but noted that in any case, apportionment is rather speculative. . ."

The workers' compensation judge, the Board and the Court of Appeal affirmed the AME's finding on apportionment as the AME, in his report and deposition, explained:

> **How and why he reached his apportionment figures. He examined applicant, reviewed the medical history, considered the job description, and 'sifted through' information about applicant's life and the subpoenaed records. He testified that his opinion was based on his best medical judgment, to a reasonable medical probability. . .**[1]

Although George's discrimination case is open and shut, the Court's commentary on Labor Code §4663 apportionment is definitely defense friendly. The Court seems to be saying that the Agreed Medical Examiner was honest in giving his opinion that all apportionment is "speculative" but that he would do the best he could under the circumstances.

[1]The above quote is taken from the summary of the Court's decision by the California Workers' Compensation Reporter, Volume 35, Page 111.

DISCLAIMER:

George's Labor Code §132a case is, of course, fictional, as are all of his friends. **It is certainly ironic that George's attorney is relying on the Supreme Court case in *Lauher*, as the *Lauher* case was an incredible victory for employers everywhere.** Prior to ***Lauher***, a Labor Code §132a case was almost one of strict liability. Before the ***Lauher*** decision, one could not engage in a discussion of Labor Code §132a without mentioning the Supreme Court's prior decision in ***Judson Steel***. Mentioning Labor Code §132a at that time without mentioning ***Judson Steel*** in the same breath was like doing an essay on Bolivia without mentioning tin. Under the forerunner of ***Lauher***, ***Judson Steel***, and subsequent decisions by the Court of Appeal, an employee who had an industrial injury need only show that some sort of job action was taken against him and once this was established, the burden shifted to the defendant to establish that the employer had a **legitimate business reason** for taking such job action and many times this was legally impossible. However, in ***Lauher***, the Supreme Court clarified the doctrine in ***Judson Steel*** and made Labor Code §132a what it was intended to be in the first place, i.e. a statute prohibiting discrimination against employees injured in the course and scope of their employment.

Ever since ***Lauher***, employees seeking redress pursuant to Labor Code §132a must prove that as a result of their industrial injury they were treated differently than non-industrially injured employees, a requirement that was not present prior to the Supreme Court's decision in ***Lauher***.

Anyone wishing copies of the decisions in *Anderson*, *Lauher* or *Escobedo* should make the request by email.

Make mine a double, George.

Joe Truce