

ANOTHER INSTALLMENT IN THE *GEORGE THE BARTENDER* SERIES

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**RE: “THE EMPIRE STRIKES BACK: THE REVERSE *WILKINSON*
PRINCIPLE”**

FROM THE LOBBY BAR AT THE HYATT:

I could not wait to get to the Hyatt bar early on New Year's Eve in light of the Board's *en banc* decision in *Dianne Benson v. The Permanente Medical Group* filed by the Board on December 13, 2007.

As the *Benson* decision overturned the Supreme Court's decision in *Wilkinson v. Workers' Comp Appeals Board* (1977) 19 Cal 3rd 491 (42 Cal Comp case is 406) which allowed applicant's attorney to obtain unapportioned awards for their clients at the highest possible permanent disability rate, I knew that when I arrived at the lobby bar a funeral dirge would be in progress led by George the bartender's attorney, Ron Summers, and his treating physicians, Dr. Nickelsburg and Dr. Ratbar.

Defense attorneys have been frustrated by *Wilkinson* for decades. Under the *Wilkinson* doctrine, an employee sustaining consecutive and repetitive industrial injuries to a single portion of his body (which usually turns out to be the low back) was entitled to receive an unapportioned award of permanent disability at the permanent disability rate in effect as of his most recent injury as long as all injuries were found to have become permanent and stationary at the same time.

Over the years the *Wilkinson* doctrine has fostered creative pleading as some applicant's attorneys have filed spurious continuing trauma Applications long after an admitted industrial injury to a specific body part and even if only 1% is attributed to the continuing trauma injury, the injured employee could be entitled to an unapportioned award by virtue of a legislatively mandated increase in permanent disability benefits.

As I approached the Hyatt lobby bar the moaning and groaning was audible to all however I must say that hearing Ron, Dr. Nickelsburg and Dr. Ratbar moan in unison was quite gratifying.

After buying a couple of rounds for the moaning trio I was finally able to get some specific complaints from Ron.

Ron told me that he had a backlog of extremely valuable cases in which the injured workers had received multiple surgical procedures from Dr. Nickelsburg in his friendly surgery centers and he was proud to tell me that most of these applicants had been diagnosed, even by the defense QMEs, with “failed back syndromes” and had been found to be totally and permanently disabled by Dr. Nickelsburg.

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Ron advised me that in all of these cases there was really no question that the applicant's disability was originally caused by the specific injury but that he had instructed Dr. Nickelsburg to apportion at least some of the applicant's disability to a continuing trauma theory of injury as this might enable him to maximize his recovery under the *Wilkinson* decision.

Ron told me that he would then file a continuing trauma Application in cases where the applicant went back to work for the employer for a period of time doing modified duty as the applicant's dollar figure for permanent disability might increase as a result of a new permanent disability schedule.

I pointed out to Ron that if he simply stopped filing spurious continuing trauma Applications his practice would not be affected that much by the *Benson* decision.

This produced more moaning from both Ron and Dr. Nickelsburg who was listening to our conversation. Ron was becoming drunk very quickly but managed to point out to me that he was sitting on a very lucrative diary of older cases on which he expected to bring in at least a life pension if not a finding of 100% permanent disability.

Ron went on to indicate that most of these applicants were so disabled from repetitive back surgeries that an Agreed Medical Examiner, or even the defense QME, would have to find substantial permanent disability.

THE REVERSE *WILKINSON* PRINCIPLE

I looked at both Ron and Dr. Nickelsburg and said "Then, what's the problem?" Both looked at me, moaned again, and in unison exclaimed "The reverse *Wilkinson* principle!"

Ron gave me an example of one case in his office in which both Dr. Nickelsburg and the defense QME had agreed that the applicant was limited to semi-sedimentary work and after modification for age and occupation the rating went up to 80%.

In order to maximize his recovery Ron had requested Dr. Nickelsburg to apportion 50% of the applicant's disability to a continuing trauma theory of injury and 50% to the specific injury.

Ron added that he had "prepped his client" to give Dr. Nickelsburg a history of a rather heavy job which required heavy lifting, repetitive bending and stooping and that this job description was gilding the lily in order to set the stage for a continuing trauma claim.

Looking meaningful at Dr. Nickelsburg, Ron told me that unless Dr. Nickelsburg changes his mind and apportions all of the applicant's disability to the specific injury as he legitimately should have done in the first place a Workers' Compensation judge, under *Benson*, would be obligated to split

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the 80% rating in two, i.e., 40% to the specific injury and 40% to the cumulative trauma before modification for age and occupation, and the difference in money would be staggering.

In response Dr. Nickelsburg asked Ron how could he change his opinion at this late date because if he did so he would have no credibility!

I thought to myself that since Dr. Nickelsburg did not have any credibility in the first place, what was the problem? The phrase “hoisted by his own petard” comes to mind.¹

What a great way to spend New Year’s Eve, i.e., being waited on hand and foot by Kim, the Hyatt’s breathtakingly beautiful cocktail waitress, sipping Beefeater martinis, straight up, with two olives, and listening to Ron and Dr. Nickelsburg lament that they should never have filed their spurious continuing trauma cases as they had no merit. As I am dictating this Memorandum to Kim I am thinking back on my own diary of cases in which the applicant’s attorney has indulged in creative pleading and in addition to a legitimate and well established specific injury has created a continuing trauma case in concert with the treating doctor for the sole purpose of maximizing the applicant’s recovery, not to mention attorney’s fees.

In all of those cases you can bet dollars to donuts that the applicant’s medical/legal doctors and/or so called primary treating doctors have apportioned heavily to the continuing trauma case.

Dr. Nickelsburg has a point! Applicants’ doctors cannot now change their opinion on apportionment in light of *Benson* as they can have no compelling or persuasive reasons for doing so.

In running over a mental picture of my files I began using the same analysis as applied by the majority in *Benson* and just before taking the first sip of my second Beefeater’s martini I again read a portion of the Board’s decision (page 3) as follows:

We hold that the rule in *Wilkinson* is not consistent with the new requirement that apportionment be based on causation and, therefore, *Wilkinson* is no longer generally applicable. Rather, we must now determine and apportion to the cause of disability for each injury. Therefore, all potential causes of disability - whether from a current industrial injury, a prior or subsequent industrial injury, or a prior or subsequent non-industrial injury or condition - must be taken into consideration.

¹ The word petard means “to be harmed by one’s own plan to harm someone else” or “to fall in one’s own trap.” Shakespeare used this proverbial verse in *Hamlet*.

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In *Benson* the Agreed Medical Examiner found that the applicant sustained both a specific injury and a cumulative trauma injury to her neck and that the applicant's disability became permanent and stationary on the same date for both injuries.

The AME found that the applicant had a limitation to semi-sedimentary work and found that 50% of the applicant's disability was caused by the specific injury and 50% by the cumulative trauma injury.

Under *Wilkinson* the case rated 62% and, pursuant to *Wilkinson*, the judge so found.

However in *Benson* the Board noted that in light of the recent Supreme Court decision in *Brodie/Welcher* and Labor Code §4663 courtesy of SB 899 the *Wilkinson* doctrine has been superceded by the new reform law and reduced the applicant's award to two 31% awards which represents a substantial savings to the defendant.

THE RETURN OF MR. CALVERT AND MR. COLTHARP ²

I suddenly recalled that I had at least half a dozen cases in which Dr. Nickelsberg was the treating doctor and over the years had referred the applicants repetitively to his S&M Surgery Centers for multiple surgeries.

On one such case the applicant had worked for the same employer for 25 years, had seven low back operations and each time, after a period of disability, returned to his usual and customary job and Dr. Nickelsberg had given the applicant a 70% rating.

In this case the applicant's attorney had filed one CT application. However under the Court of Appeal decision in *Calvert* a cumulative trauma injury ends when the applicant was placed on disability for the first surgery and the second cumulative trauma injury commences when the applicant goes back to work, ends when he goes off work for the second surgery and so on.

Therefore, we could well have seven CT injuries and assuming that 10% is attributed to each injury under *Benson* each case would receive a 10% award.

If we assume this injury occurred in 1999 a 70% unapportioned award is worth \$98,095.00 plus a life pension. On the other hand seven (7) 10% awards, \$4,235 each, times seven, would be worth \$29,645.00 and no life pension.

² Calvert, 88 Cal. App. 3d 19; 43 Cal. Comp. Cas 1280
Coltharp, 35 Cal. App. 3d 329; 38 Cal. Comp. Cas 720

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Remember, we don't have to wait for the applicant's attorney to file all seven Applications as we can point out to the QME that the applicant's deposition testimony and the medical file (showing seven surgeries) suggest that there are seven separate continuing trauma injuries and we can then request that the QME apportion, if appropriate, factors of permanent disability or impairment to each injury.

I expect that the applicant's attorney will try to claim there is just one CT injury here but we can then cite the Court of Appeal decision in *Coltharp* in which the Court of Appeal upheld the anti merger doctrine and ruled that two or more injuries are prohibited from merging into one continuing trauma claim.

Gentlemen, Start your Calvert/Coltharp engines!

DISCLAIMER:

The above characters are entirely fictional, as well as my examples. The analysis of the *Benson* decision is mine, and mine alone.

Make mine a double, George.

P.S.—I will give bonus points to anyone who can tell me the first name of Mr. Coltharp.

Joe Truce