INTER-OFFICE MEMORANDUM

TO: ALL ATTORNEYS AND CLIENTS

FROM: W. JOSEPH TRUCE

RE: *EN BANC* DECISION OF THE WCAB IN *ESCOBEDO*

DATE: June 30, 2005

By now, everyone is familiar with Labor Code §§4663 and 4664 courtesy of Senate Bill 899 effective April 19, 2005.

The shockwaves and fallout from Senate Bill 899 have sent the applicants bar into a feeding frenzy of denial, and their claims range from "it's illegal and unfair" to "the law on apportionment did not change and is still the same."

Suffice to say, the promulgation of Labor Code §§4663 and 4664 put the applicant's bar in **"denial,"** but the *en banc* decision of the Board in ***Escobedo v. CNA*** moved **"denial"** to **"depression."**[1]

If the promulgation of Labor Code §§4663 and 4664 was a "shot across the bow" of the applicant's bar, then the ***Escobedo*** case was a virtual nuclear explosion.

In answer to the lament of the applicant's bar that Labor Code §4663 did not change the law on apportionment, the Board in ***Escobedo*** answered as follows:

> **"In repealing former Labor Code §4663, 4750, and 4750.5 and enacting new §4663 and 4664, the Legislature undoubtedly intended to change the law relating to apportionment of PD in a significant manner . . ."**

Prior to the enactment of Labor Code §§4663 and 4664, defendants had as much chance of proving apportionment as winning the California lottery or the Pick-Six at Hollywood Park.

Before April 19, 2004 (a date that will be celebrated by employers for a long time), we could expect prolonged laughter from the Workers' Compensation judge and the applicant's attorney when we tried to argue apportionment under the old apportionment laws as contained in Labor Code §§ 4750 and 4663.

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[1]It is our understanding that a Petition for Writ of Review has been filed in ***Escobedo*** and we will keep everyone advised as to the outcome.

How many times were we told that we could not apportion to **pathology** or that our apportionment was not legal because our **QME** gave the applicant a retroactive prophylactic work restriction.

Applicants would get on the stand and, despite the fact that they had sustained a rather devastating non-industrial injury just prior to our industrial injury, would testify that they **"feel great"** and were asymptomatic.

All of this has now changed as of April 19, 2004.

In confirming that Labor Code §§ 4663 and 4664 are **retroactive** in their application, the Board clearly stated as follows:

> **"Apportionment of permanent disability caused by 'other factors both before and subsequent to the industrial injury, including prior industrial injuries,' may include not only disability that could have been apportioned prior to SB 899, but it also may include disability that formerly could not have been apportioned (i.e., pathology, asymptomatic prior conditions, and retroactive prophylactic work restrictions), provided there is substantial medical evidence establishing that these other factors have caused permanent disability . . ."**

Newsflash: We are now back in the game on apportionment!

In all of the celebration by defendants over the ***Escobedo*** case, we have overlooked the fact that the Board, aside from giving us a Christmas present on apportionment, has also established a new and higher threshold of proof for the applicant.

Although the defendant continues to have the burden of proof on the issue of apportionment, the Board in ***Escobedo*** has now established a new threshold of proof with respect to industrial permanent disability on the applicant.

In ***Escobedo***, the Board stated in relevant part as follows:

> **"The applicant has the burden of establishing the percentage of permanent disability directly caused by the industrial injury ..."**

In noting that the applicant continues to have the initial burden of proof in establishing industrial injury by a preponderance of the evidence, the Board held:

> **"In addition, he or she still has the burden of proving, by a**

> **preponderance of the evidence, both the overall level of permanent disability and that at least some of the permanent disability was industrially-caused . . . ."**

The Board went on to declare:

> **"In accordance with §4663(c), however, we conclude that the applicant now also has the burden of establishing the approximate percentage of permanent disability directly caused by the industrial injury . . . ."**

Happy litigating!!

WJT:ib