INTER-OFFICE MEMORANDUM

TO: Attorneys and Clients

FROM: Joe Truce

DATE: October 31, 2005

RE: **Another Win for The Good Guys on Apportionment–Yahoo!**

Direct from the lobby bar at the Hyatt:

As you know it really pains me to say the applicant's attorneys are really having a bad year! The Appeals Board has now issued two more outstanding en banc decisions on apportionment – this time dealing with LC 4664. As we all know, LC 4664 mandates that any prior awards (either stipulated findings and award or findings and award after trial) must be subtracted from the applicant's present permanent disability award. Ever since the enactment of Senate Bill 899 on April 19, 2004, applicant's attorneys have refused to acknowledge that LC 4664 says what it says!! In two en banc decisions entitled Jack C. Strong vs. City and County of San Francisco and Virginia Sanchez vs. County of Los Angeles the board has given the applicant's bar a vocabulary lesson. In its en banc decisions in Strong and Sanchez the board made clear that the plain meaning of LC 4664 will prevail. As decisions in Strong and Sanchez are en banc they are legal binding on all panels of the Appeals Board and more importantly all WC judges. In Strong the board addressed the issue of whether or not a prior award to a different part of the body can be subtracted from the present award. The Board's answer was YES with regard to any overlapping permanent disability in the prior award. For example, if an applicant sustained a prior back disability which resulted in a 30% permanent disability award predicated on a restriction from heavy work this will be subtracted from a present award to the applicant's hear (a different part of body) when the heart disability contemplated a light work restriction which, of course, includes a preclusion from heavy work.

Due to the contradictory language of LC 4664 the applicant's bar was still claiming that an applicant could introduce into evidence that he rehabilitated himself from the prior award of permanent disability and therefore was entitled to the same work restriction and/or disability without apportionment. In both Strong and Sanchez the Board held that "the applicant is not permitted to show medical rehabilitation from the disabling effects from the earlier industrial injury or injuries..."

In Strong the Board pointed out that if an applicant receives successive awards to the same body parts it's a "no brainer." Therefore, the applicant receives a prior Award based on a preclusion of heavy work as a result of back injury and then later sustains a subsequent injury resulting in an Award premised on a preclusion from heavy work the prior Award, according to the en banc decision in Strong, must be subtracted from the present Award.

What does this mean to us? (1) the Board held we, defendant, have the burden of establishing the existence of any prior permanent disability awards either by offering the prior F&A into evidence or introducing secondary evidence as to the existence of the prior F&A disability. THEREFORE IN ORDER TO SUSTAIN THIS BURDEN WE MUST INTRODUCE INTO EVIDENCE IN OUR PACKAGE COPIES OF PRIOR F&A AND/OR MEDICAL REPORTS. (2) Once we have introduced the prior F&A into evidence the Board held that the applicant now has the burden of proof (imagine that – the applicant has the burden of proof!) to prove that the "prior permanent disability and the current permanent disability effects different abilities to compete and earn, either in whole or in part..."

Both en banc decisions in Strong and Sanchez are available for download and printing on the website of the Division of Workers' Compensation (DWC).

George, make mine a double. Happy litigating.