I N T E R - O F F I C E M E M O R A N D U M

TO: ATTORNEYS & CLIENTS

FROM: W. Joseph Truce

DATE: April 15, 2007

RE: **George and the 104 Week Limitation on TTD**

FROM THE LOBBY BAR AT THE HYATT:

On taking my regular bar stool at the bar I was somewhat concerned to see George the Bartender wearing a splint on his jaw. While pouring my Martini George told me not to be alarmed and that although he was feeling fine his attorney, Ron Summers, had come up with a plan to get around the 104 week imitation on t.t.d. as contained in newly amended L.C. 4056. George explained that his attorney had him file a DWC 1 claim form for a continuing trauma injury to his jaw as a result of excessive talking to bar patrons such as myself.

When I asked George how this would help a claim for t.t.d in excess of 104 weeks George told me that according to his attorney one of the exceptions to the t.t.d. limitation was an amputation and that Ron had made an appointment for him to be seen by the Shameless Brothers who jointly own and operate the Dental Injury Clinic. George was told by his attorney that Sam Shameless would "amputate" one of his teeth and this would qualify as an exception to the 104 week limitation.
I told George that I wanted whatever his attorney was smoking as equating pulling a tooth with an amputation was absurd. George then showed me three decisions by Workers Compensation Judges that upheld this rather bizarre interpretation of L.C. 4656. All of these cases have come out of Northern California but I assume that we in Southern California will be confronted with this issue in the near future.

In the case of Henrietta Barclay coming out of Oakland Judge Christopher Miller found that cutting away of part of a bone in a shoulder surgery was an "amputation." In the case of Molly Kirkpatrick, a judge in Salinas found that a diskectomy or removal of a disc constituted an amputation. Finally, in the case of Paul Cruz a WCJ in San Francisco found that a fusion which necessitated a bone graft was an amputation and qualified as an exception to the 104 week limitation on t.t.d.

I noted that all three judges relied on the definition of "amputation" as contained in Webster's Dictionary as well as a medical dictionary. Judge Miller wrote the most comprehensive opinion and quoted from Webster's Unabridged Dictionary as follows: "To prune; to cut off, as branches of trees...to cut off as a limb or other body part of an animal body, especially by surgery." It is the last part of this definition ("or other body part") that all three judges relied on.

After I read and reread this decisions with some amazement, George, knowing my mood, had my Martini, triple strength, already in from of me.

George told me that simply to open the cap on t.t.d. his attorney didn't think unnecessary major surgery should be performed on George, just unnecessary minor surgery, such as a tooth extraction with an implant--and no one does unnecessary surgeries better than the Shameless Brothers. George then showed me the business card of the Shameless Brothers bearing the motto: "We extract, you collect."

Looking worried George told me his teeth felt fine and he asked his attorney whether he could simply have a simple teeth cleaning and wouldn't the "extraction" of plaque" from his teeth constitute an "amputation." George said he also suggested that a hair cut could possibly constitute an amputation as the Barber would be removing part of his hair which would constitute a body part George's attorney said these suggestions had real merit and he would consider these options.

I know that a Petition for Reconsideration has ben filed on at least one of the above cases and I assume the Board may be addressing the key issue of what constitutes an "amputation."

Or, is this the issue at all in these cases? Possibly these three WCJ's only considered the "exceptions" and ignored the clear language of L.C. 4656 (c)(2) which defined when the exceptions would apply. The language is as follows: "Notwithstanding paragraph (1), for an employee who suffers from the following injuries or conditions...." and then the exceptions are listed including amputation.

The above language would suggest that the enumerated exceptions are the actual injuries or conditions caused by the industrial injury. In other words the diagnosis of amputation or some of the other exceptions would bring the case under the exceptions. In Barclay the injury was found to the applicant's left shoulder; In Kirkpatrick and Cruz the injury was to the spine.

Clearly, prior to SB 899 no one, and I mean no one, considered a fusion or diskectomy an amputation and it appears that the applicant's bar has found a small loop hole and are driving a Mack Truck thru it. We all considered an amputation to be the loss of a limb and I assume the Board and/or Courts will agree as even the definitions and reference materials referred to by the above WCJ's support this clear meaning. Anyone wishing copies of the trial court decisions in Cruz, Kirkpatrick or Barclay should send me an e mail.

DISCLAIMER: Except for George and myself the above characters and story are fictional and are a product of my warped imagination.

Although for more than thirty years my mission in life has been to make the world a safer place for Insurance Companies I do have some philosophical issues with the 104 week limitation on t.t.d. Assuming that an employee is a hard working, loyal and valued employee to an employer it does not seem to fulfill the announced intention of the law to deny t.t.d. benefits to a legitimately injured worker who happens to require surgery after his t.t.d. has run out.

How about the employee who goes out on t.t.d. for one day and comes back to work and puts off surgery until the 105th week as his employer badly needs him to complete a very important project?

When SB 899 was enacted I was very surprised at the enumerated exceptions (Chronic lung disease, Hepatitis B &C, etc) as I seldom dealt with these types of injury. Ironically in my true amputation cases the applicant usually becomes P&S within the year.

There would not appear to be any legislative history as to the exceptions. The first proposal contained no exceptions and adding in the exceptions as now contained in L.C. 4656 apparently resulted from a call to UCLA. I was always surprised that major surgeries were not contained in the exceptions. However as opposed to the absurdity of creating fictional definitions to the word "amputation" it would appear that the stakeholders (employers, employees and interest groups) need to return to Sacramento and further discuss L.C. 4656 and the so called exceptions.---Give me another triple George.---joe truce