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: January 8, 2007

RE: **George and the Labor Code Section 4660 Apportionment**

FROM THE LOBBY BAR AT THE HYATT:

I was having trouble getting the attention of George the Bartender for a refill of my martini as George was trying to mediate an argument between his attorney, Ron Summers, and his PTP, Dr. Nickelsberg. The F&A had just come out on George's back case finding 50% apportionment to pre existing degenerative arthritis and George's attorney kept yelling at Dr. Nickelsberg that the good Dr. had promised him that there were be no apportionment as George's pre existing degenerative arthritis was neither disabling nor symptomatic prior to the industrial injury.

Dr. Nickelsberg responded that he was sorry about the finding on apportionment as he had been counting on the Workers Compensation Judge to ignore the Board's en banc decision in Escobedo in which the Board ruled that SB 899 allowed apportionment to pre existing asymtomatic medical conditions or impairments. Dr. Nickelsberg explained that even though the Board's en banc decision in Escobedo was legally binding on WCJ's and panels of the Appeals Board this ruling had been routinely ignored in many subsequent decisions.

George, Ron and Dr. Nickelberg finally became aware of my presence and asked for my opinion which I gave only after my martini was refilled.

I agree with Dr. Nickelsberg that some WCJ's and Board panels have simply ignored the mandate of Escobedo and in these cases have disregarded medical opinions apportioning to prior asymtomatic medical conditions on the premise that the medical opinion was not substantial evidence as required by Escobedo.

We were never told what would constitute substantial evidence on the issue of apportionment but we were certainly told what it was not.

The WCJ in George's case undoubtedly read the recent Court of Appeal decision in E.L. Yeager Construction v. WCAB. The original decision issued on 11/28/06 was not published which meant the this key decision on L.C. 4663 apportionment could not be cited as precedent. However this landmark decision for the defense industry was ordered published on 12/15/06

and can now be cited as legal precedent.

The facts in **Yeager** concerned an admitted industrial injury to the applicant's back and since back injuries are as common in Southern California as smog in August the fact pattern has special relevance for us. The judge appointed Dr. Akmakjian as an Independent Medical Examiner and Dr. Akmakjian apportioned 20% of the applicant's disability to chronic degenerative arthritis. **Sound familiar? At this point applicant's attorneys are jumping up and down and screaming that apportionment is legally invalid as the applicant had not suffered pre existing disability.**

However Dr. Akmakjian not only based his opinion on the findings of the applicant's MRI scan but also described in detail what he OBSERVED in analyzing the MRI pictures and testified that the MRI "showed dehydration, indicating early degenerative changes at almost every disc in his back..that this is a wear and tear phenomenon where the fine structure of the disc begins to change and wear out, loses its blood supply and slowly starts to degenerate."

What does all this mean in lay terminology? It means that when Dr. Akmakjian looked at the MRI he saw VISUAL EVIDENCE that the discs (basically the shock absorbers) between each of the vertebrae in the applicant's spine were losing their flexibility and structure and that eventually we would have bone on bone or vertebrae on vertebrae--a definite visual impairment of the spine that certainly contributed to the applicant's permanent disability.
In Escobedo the degenerative arthritis affected the applicant's knees and there was also visual evidence that the shock absorbers or cartilage was wearing thin and again we would eventually have bone on bone.

In a lot of our cases degenerative arthritis is present and when writing a letter to the QME or treating doctor we want to request the doctor to describe exactly what he sees (as Dr. Akmakjian did in Yeager) and to describe in detail the degenerative arthritis process and how this process relates to the applicant's present factors of permanent disability.

For the FIRST TIME after Escobedo, an appellate court, (Yeager) has issued guidelines on what constitutes substantial evidence in formulating a medical opinion on L.C. 4663 apportionment. The Court in Yeager rejected the WCJ's conclusion that prior disability is a prerequisite for a finding on apportionment and held that a prior asymptotic disease process can be a basis for L.C. 4663 apportionment.

The Court went on to criticize the Board for substituting "it's judgment for that of a medical expert..." In affirming Dr. Akmakjian's opinion the Court concluded: The doctor made a determination based on his medical expertise of the approximate percentage of permanent disability caused by degenerative condition of the applicant's back."

The above statement by the Court sums up our burden in proving L.C. 4663 apportionment--the doctor, in determining the approximate percentage of permanent disability, based his opinion on his medical expertise, and the VISUAL EVIDENCE of the MRI scan.

It looks like the Court has given the determination as to what constitutes apportionment back to the medical experts where it belongs.--Make mine a double George.--joe truce