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 30, 2007

RE: **George and the First 4660 Interpretation**

FROM THE LOBBY BAR AT THE HYATT:

As George the Bartender served me my first martini he commented that 3:00 p.m. was early, even for me, to start drinking. I told George that my office was next to a large applicant's firm and it was hard to concentrate with all of the whooping, hollering and cheering going on over the Board's en banc decisions in the John Pendergrass and Joseph Baglione cases.

I explained to George that L.C. 4660 as amended by SB 899 clearly states that the the AMA Guides and the new rating schedule apply to all compensable cases with dates of injury prior to 1/1/05 in which there was neither a treating doctors report or a comprehensive medical legal report indicating the existence of permanent disability and that the defendant never had an obligation to send the applicant a L.C. 4061 notice.

George wanted to know what a L.C. 4061 was and I explained that insurance carriers or TPA's were required to send such a notice advising that total temporary disability was being terminated. George then wanted to know what was the benefit of remaining under the old permanent disability schedule and I explained that under the AMA Guides an employee was required to have actual disability or impairment in order to obtain permanent disability benefits as contrasted to the old schedule which awarded permanent disability for prophylactic or preventive work restrictions.

After I explained to George that the Board's en banc decisions basically gutted L.C. 4660 and guaranteed that most injuries prior to 1/1/05 would receive the enhanced ratings under the old schedule he began to get exited about his own admitted 2004 low back case. After pouring my second martini George called his attorney, Ron Summers, and was told that Ron, Dr. Nickelsberg and Dr. Ratbar were out celebrating the Board's decisions but could be reached by phone in their limousine.

George immediately dialed the number of Ron's limo and although someone answered all we could hear for the first few minutes was the chorus of "We are Family..." Finally George got Ron, Dr. Ratbar and Dr. Nickelsberg on the speaker phone. George, of course, wanted to know if his 2004

injury qualified for the old schedule. Ron groaned and told George that under the Board's en banc decisions George was the only one of Ron's client's with an injury prior to 1/1/05 who would be rated under the AMA Guides. Ron advised that there were no comprehensive medial legal reports prior to 1/1/05 in George's file and that the Board in Baglione requires such a report to bring the case under the old schedule.
Dr. Nickelsberg then argued with Ron saying that as George's treating physician he issued numerous comprehensive medical reports prior to 1/1/05. Ron responded that sadly none of Dr. Nickelsberg's reports indicated permanent disability and that a comprehensive medical legal report did not have to show permanent disability to qualify as an exception but unfortunately such a report would have to be by other that the treating physician--presumably an AME or QME.

Although deflated George wanted to know if he qualified for the old schedule because his carrier had an obligation to send him a L.C. 4061 notice. Again, Ron gave him bad news. He reminded George that following his injury George refused to take any time off from his job as he was a very loyal employee and the Lobby Bar was short handed. Dr. Nickelsberg chimmed in and reminded George that he begged him to go on temporary disability like all of Ron Summer's other clients and that had he done so, even for one day, he would have qualified for the old schedule as the Board in Pendergrass ruled the obligation to send a L.C. 4061 notice arises with the first payment of t.t.d.
George's failure to qualify for the old schedule points up the absurdity of the reasoning of the majority in the Board's 4 to 3 decisions in Pendergrass and Baglione. The issue of whether the AMA Guides and the current schedule fairly compensates injured workers for their injuries is a subject for negotiations in the State Legislature and not for legal gymnastics in interpreting the clear language of L.C. 4660.

SB 899 was emergency legislation meant to apply to existing cases. The legislative mandate as contained in L.C. 4660 declares that all cases prior to 1/1/05 will be rated under the AMA Guides and the new permanent disability schedule unless the defendant has a legal obligation to send out a L.C. 4061 notice or there is a comprehensive medical legal report indicating the existence of permanent disability. What could be clearer than that? The legislature contemplated that as long as t.t.d. was not terminated or there was no medical report indicating the existence of permanent disability prior to 1/1/05 the applicant would not be P&S until after 1/1/05 and would therefore come under the AMA Guides and the new schedule.

The Board's majority managed to emasculate the clear meaning of L.C. 4660 by tap dancing around where commas were placed, what words modified other words and whether the past or present tense was used. However, despite the English lesson by the Board's majority does anyone think we would have received the same decision had the AMA Guides actually increased permanent disability?

George's case points out the inequity of the Board's decision in Pendergrass in which the Board held that the first payment of t.t.d. triggers the defendant's obligation to send a L.C. 4061 notice. Mind you, the Board concedes that the providing of t.d. does mean you send the notice NOW but that you will have to do so sometime in the future. This reasoning comes under the heading of: "Give me a Break." Had George listened to the pleadings of Dr. Nickelsberg and gone out on t.t.d. then George would have been eligible for the old schedule, the same as Ron Summer's other clients. However because George was a loyal and hardworking employee he lost out on the bonanza of the old PD schedule.

George would have been in the same position had he gone off on disability and the carrier simply refused to pay t.t.d. because an adjuster reasoned what's more cost effective: a penalty for not paying t.t.d. or the old permanent disability schedule? The decisions in both Pendergrass and Baglione are 4 to 3 decisions and each is sure to be appealed and I think there is a very good chance that these decisions will be overturned. Therefore we want to analyze each of our cases to see whether or not we have a case involving the same issues and factual patterns as presented in Pendergrass and Baglione and discuss with our client as to whether an appeal is warranted. However, for now these en banc decisions are binding on all workers compensation judges. Anyone wishing copies of these decisions should e mail me.---George, make mine a double and you better have one too!

DISCLAIMER: The above story about George and his friends is a product of my imagination and the above rantings and ravings are mine and mine alone. However I would make this observation. These cases will probably turn on what the definition of "is" is.--joe truce