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: **September 22, 2006**

RE: **George meets Dykes and Nabors**

From the Lobby Bar at the Hyatt:

I knew that George the Bartender was in a good mood when he gave me three olives with my martini instead of the customary two. After making sure my olives were safe I asked George what was up and he told me that tomorrow was pay day at the WCAB on his carpal tunnel case even though he previously had received a Findings and Award for carpal tunnel in 1972 for 30%. According to George's attorney the defendant can only subtract the dollar amount of the prior F&A from George's present award which the Agreed Medical Examiner had also rated at 30% despite the fact that L.C. 4664 clearly states: "...If the applicant has received a prior award of permanent disability, it shall be conclusively presumed that the prior permanent disability exists at the time of any subsequent industrial injury." George told me that his attorney told him the Court of Appeal in **Dykes** and **Nabors** had decreed that the defendant could only subtract the monetary amount of the prior award and since his 1972 F&A for 30% equaled $8452.50 and his current 30% award equaled $28,820.00 he could pocket the difference in rates even though his disability remained the same. After making sure that my second three olive martini arrived safely I gave George the bad news. The Court of Appeal in a case called **Brodie versus WCAB (1st Appellate District and the same District that issued Nabors but a different division)** last week issued it's decision agreeing with the rationale of **Nabors** and **Dykes** with a twist--the Court held that even though a defendant could only subtract the dollar figures of a prior F&A, the prior F&A should be valued at **today's rates** and therefore George's prior F&A would not be valued at the old rates but the new rates so there would be no windfall to George simply because the rates increased. Shortly after the decision in Brodie the **Court of Appeal**, **3rd Appellate District, issued it's decision in four consolidated cases with the lead case entitled Welcher versus WCAB disagreeing entirely with the decisions of it's brother Court of Appeal in Dykes and Nabors, 1st Appellate District, and held that L.C. 4664 means what it says and entitles a defendant to subtract the prior percentage of a prior Findings and Award from any current award. Now that there is a definite split between appellate districts of the Court of Appeal we are assuming that the Supreme Court will step in and resolve this conflict. However until that happens we, as defendants, are certainly entitled to rely on the well reasoned approach of the Court of Appeal in Welcher et al. Please advise if you would like a copy of the Welcher or Brodie decisions.** --- Joe Truce