KEGEL, TOBIN & TRUCE
INTER-OFFICE MEMORANDUM

TO: ALL ATTORNEYS/CLIENTS

FROM: JOE TRUCE

DATE: March 2, 2004

RE: **LABOR CODE SECTIONS 4061 AND 4062 AND THE DOUBLE WINDOW CONCEPT**

Labor Code Sections 4061 and 4062 were **created** by the 1989 Margolin Reform Act which was effective for all injuries occurring on or after January 1, 1990.

Labor Code §4062 as originally enacted in 1989 provided that a Labor Code §4062 QME could **only** address the following four issues:

1. The permanent and stationary status of the employee's medical condition.
2. The employee's preclusion or likely preclusion to engage in his or her occupation.
3. The extent and scope of medical treatment.
4. The existence of new and further disability.

The 1989 Margolin Reform Act was designed to cut down on the number of medical examinations, as Labor Code Sections 4061 and 4062 mandated that the only admissible reports would be the reports of treating physicians or Labor Code Section 4061 and/or 4062 QME's.

However, the legislature soon realized that Labor Code §4062 was fatally flawed as the Labor Code §4062 QME who disagreed with the treating physician who felt that an injured worker continued to be temporarily totally disabled, could only offer an opinion as to whether or not the applicant was permanent and stationary but **could not** offer an opinion as to the nature and extent of the applicant's permanent disability.

Under the sections as originally constituted, only a Labor Code §4061 QME could offer an opinion as to the nature and extent of permanent disability. Therefore, the very law that was designed to cut down on the number of medical examinations compelled the party to obtain two QME evaluations (by the same QME), i.e. the 4062 evaluation finding that the applicant was permanent and stationary and (2) the 4061 evaluation commenting as to the nature and extent of the applicant's disability. I initially referred to this as the **"double window concept"** i.e. we would have to go through the AME/QME window to obtain a Labor Code §4062 evaluation that the applicant was permanent and stationary, and then we would have to go through the second window in Labor

Code §4061 to obtain a report as to the applicant's factors of permanent disability.[1]

The legislature then rectified this error by amending Labor Code §4062 by adding the following language: "...The medical evaluation shall address **all** contested medical issues arising from all injuries reported on one or more claim forms prior to the date of the employee's initial appointment with the medical evaluator..."

Presumably the legislature added this language to avoid the "double window problem" that was created by the initial legislation.[2]

Unfortunately, the double window concept was brought back by an unfortunate decision in the case of **Los Angeles Unified School District v. Workers' Compensation Appeals Board, Joycelin J. Perry 66 CCC 533.**[3] The **head note** of the Perry case provides as follows:

> **"Defendant's objection pursuant to Labor Code §4062 to treating physician's report addressing temporary disability did not preserve defendant's right to obtain qualified medical evaluator addressing permanent disability without objecting pursuant to Labor Code §4061 to treating physician's permanent disability findings."**

As the date of injury in this case was on or after January 1, 1994, Labor Code §4062 as amended was definitely operative but the Trial judge apparently still ruled that the defendant should have not only objected pursuant to Labor Code §4062 to obtain a QME evaluation stating that the applicant was permanent and stationary but should have also objected pursuant to Labor Code §4061 to obtain a QME evaluation as to the nature and extent of the applicant's permanent disability. Therefore, this case apparently brought back the **"double window concept"** that was purportedly remedied by the legislature by their amendment to Labor Code §4062.

I have two immediate problems with the holding in this case: (1) Labor Code §4061 does not state or even infer, for that matter, that defendants have any obligation to object to the permanent and stationary report of the treating physician but only compels the defendant to discuss the option of going to an Agreed Medical Examiner with the applicant's attorney. (2) This decision **ignores** the

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[1]A copy of Labor Code §4062 as originally promulgated by the legislature for injuries on or after January 1, 1990 is attached.

[2]A copy of Labor Code §4062 as amended and contained in the 2004 Labor Code is attached..

[3]The Perry case is attached.

explicit language of Labor Code §4062 as amended that a Labor Code §4062 QME evaluation is admissible on all disputed issues. Unfortunately, it would not appear that defense counsel in the **Perry** case presented either of these arguments.

WJT:dab
Attach - Labor Codes §4062; **Perry** case