

INTER-OFFICE MEMORANDUM

TO: ATTORNEYS & CLIENTS

FROM: W. Joseph Truce

DATE: December 11, 2006

RE: **George and the Attack on the AMA Guides**

FROM THE LOBBY BAR AT THE HYATT:

Due the complex issues created the recent reform legislation and specifically by the ongoing interpretations of SB 899 I found my work day becoming longer and longer and therefore I did not arrive at the Lobby Bar at the Hyatt until 9:00 p.m. The bar was packed and every bar stool was taken but that was OK as I found a seat in back and I knew my martini would arrive shortly as Kim, the breathtakingly beautiful cocktail waitress, had seen me walk in. It had been a very strenuous day denying benefits and while I was waiting for my drink I reread the Board's excellent en banc decision in **Joey M. Costa versus Hardy Diagnostic** in which the Board ruled against an attempt by the applicant's bar to have the new permanent disability rating schedule (**PDRS**) declared invalid. I marveled at the Board's reasoning that the applicant did not meet his burden of proof in trying to invalidate the **PDRS** as the applicant failed to show that the actions of the AD were arbitrary, capricious or inconsistent with L.C. 4660 pursuant to well established law. **I know full well the huge burden one has when trying to overturn an administrative regulation as I learned this lesson when I tried to overturn some of the more idiotic, senseless and unfair administrative rules of the vocation rehabilitation bureau (now Unit) in the early 1980s.**

I must have been so tired from a full day of denying benefits that I dozed off for a couple minutes but woke up suddenly when Kim kept repeating my name. I finally regained my composure and thanked Kim for my martini. Kim told me that I must have been exhausted as I kept repeating: "So many benefits, so little time."

I then sat bolt upright in my chair as I recognized the crowd at the bar which included, of course, George the bartender, George's attorney, Ron Summers, as well as George's physicians, Dr. Nickelsberg and Dr. Ratbar. The other faces looked familiar and I told Kim that they were either the Village People or a collection of rehabilitation counselors and consultants who had cost employers and insurance carriers millions in so called retroactive VRMA benefits and, of course, never caused anyone to actually go back to work.

Kim told me that George, his attorney, his doctors and the rehab people were celebrating their victory in the Board's favorable ruling in Costa. I was shocked and told Kim that Costa was a victory for the defense and not the applicants. Kim called George and his attorney over to explain as follows: Although the Board did not invalidate the new rating schedule the Board

held that the schedule is only prima facie evidence as to impairment or disability and that rebuttal evidence may be offered to rebut a rating under the new schedule. George's attorney smiled urbanely and pointed to the rehab people at the bar and advised that they were all prepared to testify that his clients were permanently and totally disabled from the labor market and that combined with their huge wage loss should be 100% under the new schedule. We're baaack the rehab people sang! Attorney Summers also added that the Board had given all applicant's attorneys an early Christmas present by mandating that employers and carriers would have to pay for the applicant's experts. He then returned to the bar and the celebration continued.

George's attorney and the rehab people may be celebrating prematurely. Although the Board in **Costa** did authorize rebuttal evidence to a rating under the new schedule the Board did not rule as to the type of rebuttal evidence that may be presented. The mere fact that an injured worker is precluded from the labor market or has establish a huge wage loss may not necessarily qualify as competent rebuttal evidence as the AMA Guides are not based on a diminished ability to compete in the open Labor Market and L.C. 4660 is not a wage loss statute as it talks in terms of "...the average percentage of long term loss of income from each type of injury for similarly situated employees." In **Costa** the Board specifically held that "as to what evidence may actually rebut a rating under the new PDRS will be decided, at least initially, on a case by case basis..." However the Board did indicate that the applicant's expert may be reimbursed pursuant to L.C. 5811 which is the catch all statute that allows the Board to utilize it's discretion in allowing costs against a party which is a euphemism for the defendant. Make mine a double George.

Disclaimer: George the Bartender and Kim, the breathtakingly beautiful cocktail waitress, are real people and pour and serve me martinis at the lobby bar at the Hyatt Regency in Long Beach. However all conversations with George, Kim and others at the bar are fictitious and are a product of my rather warped imagination. As for the names of George's attorney, doctors and friends these names are made up and any similarity to persons living or dead is certainly deliberate. My drink of choice is a Beefeaters Martini, straight up, with two olives.--joe truce