

# INTER-OFFICE MEMORANDUM

**TO:** Attorneys & Clients  
**FROM:** Joe Truce  
**DATE:** July 10, 2006  
**RE:** Applicant's attorney threatens "Fiery Pits of Hell" for using  
AMA Guides

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From the lobby bar at the Hyatt:

After my first drink George the Bartender complained that his low back injury sustained this year while bending down to get the olives for my martinis did not net him as much money as his prior workers compensation injury in 2003. "It's the Guides to the Evaluation of Permanent Impairment" I explained. The AMA Guides require actual disability/impairment before you can get benefits. I am enclosing an e-mail from the managing partner of our San Diego office, D'Arcy Swartz, regarding his Petition for Reconsideration contending that both the Workers' Compensation Judge and the applicant's doctor incorrectly applied the AMA Guides regarding the applicant's low back injury and placed the applicant in category 3 of the Diagnosis Related Estimate scale (DRE). D'Arcy argued that the applicant's impairment was a category 2 and that since the medical record conclusively demonstrated that the applicant did not have radiculopathy a category 3 impairment under the DRE scale was inappropriate. Simply because an applicant complains of radiating pain does not mean that the applicant has true radicular pain as defined by the Guides as follows: "a significant alteration in the function of a nerve root or nerve roots and is usually caused by pressure on one or several nerve roots...The diagnosis of herniated disc must be substantiated by an appropriate finding on an imaging study. The presence of findings of an imaging study in and of itself does not make the diagnosis of radiculopathy. There must be clinical evidence as described above...."This certainly appears to be a reasonable argument but as you can see by the enclosed e-mail from D'Arcy – the applicant's attorney wants D'Arcy's arguments "consigned to the fiery pits of hell from when the they cam." Yes, D'Arcy, you did strike a nerve.

Make mine a double, George

Joe Truce

Here is D'Arcy's e mail. Happy reading!

Last week Joe Truce sent around a petition for reconsideration I prepared  
>in a case called Cheryl Mansfield. I just got applicant's attorney's  
>response, from a lawyer named Linda Atcherley, whom I consider to be one  
>of the better applicant's attorneys before the San Diego WCAB.  
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>I think my recon touched a nerve. If I had a scanner I'd send around the  
>whole thing. But these excerpts will have to suffice:

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>"Defendant's Petition for Reconsideration is a sterling example of the  
>vicious and miserly mind set behind the use of the AMA Guides to determine  
>disability and revisions in the apportionment statutes in an attempt to  
>allow a reduction in permanent disability for pathology due to the natural  
>ageing process which was NOT disabling or even symptomatic prior to the  
>industrial injury to avoid paying for permanent consequences of an  
>admitted injury."

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>AA also made a very novel argument that the new apportionment constitutes  
>prohibited age discrimination:

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>"Applicant further argues that apportionment to pathology as found by the  
>defense doctor and under 4663 . . . constitutes an invidious  
>discrimination against older workers against whom the apportionment  
>statutes provide a disparate impact for the same or similar injury  
>suffered by younger workers."

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>Invidious? is she using that word correctly?

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>But my favorite part is where she quoted James Carville (Greg Marsey will  
>appreciate this):

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>"James Carville once asked an assembly 'Which do you want to live in; a  
>society or an economy?' It is clear from the defendant's brief that they  
>>wish us to live in an economy, one in which injured workers are a dime a  
>dozen, and tossed to the refuse heap once they are no longer useful to the  
>employer. It is, (sic) no longer important to properly compensate the  
>injured worker for his or her reduced capacity to earn due to his or her  
>work injury, rather it is necessary to artificially and capriciously  
>reduce the benefits to which he is entitled on account of permanent injury  
>or death. In a society, we would look always to equitably compensate the  
>injured workers and to ensure a continued relevance to the work place, we  
>look to the entirety of the evidence and the law to ensure that the Labor  
>Code is liberally construed to provide benefits and that the Legislative  
>intent expressed in Government Code section 12940 and 12941 to prohibit  
>age discrimination is enforced. ... The Workers ' Compensation Judge in  
>this matter carefully considered the totality of the evidence and the  
>credible testimony of the applicant in coming to her findings of  
>fact... The arguments in defendant's Petition for Reconsideration should  
>be consigned to the fiery pits of hell from whence they came, and the  
>decision of the WCJ upheld in its entirety."

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>I'm not kidding--that's really what the response says.

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>I have to confess, I consider it my daily mission to construe the Labor  
>Code conservatively, to deny benefits to which workers may arguably be  
>entitled. But does that mean that my beautifully-crafted petition should  
>be thrown into the "fiery pits of hell?" Judge Rebeck would probably have  
>just torn it up in my presence and thrown it in the waste basket.

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>D'Arcy.