

INTER-OFFICE MEMORANDUM

TO: Attorneys & Clients
FROM: W. Joseph Truce
DATE: April 18, 2006
RE: **If The Applicant's Injury Date Is Prior To January 1, 2005, How can I Establish that the AMA Guides Apply to My Case?**

From the lobby bar at the Hyatt...

I was explaining to George the bartender the other night that by courtesy of SB 899 and the Guides to the Evaluation of Permanent Impairment - 5th Ed. (AMA Guides), an applicant must now establish actual disability in order to get benefits. George wanted to know whether or not the AMA Guides apply to an injury prior to January 1, 2005 and I gave George a very lawyer like answer: "it depends."

LC Section 4660(d) provides that "for compensable injuries...before January 1, 2005, the schedule as revised...shall apply to the determination of permanent disabilities when there has been either no comprehensive medical legal report or no report by a treating physician indicating the existence of permanent disability, or when the employer is not required to provide the notice which is required by LC Section 4661 to the injured worker." Therefore, in order to prove disability with an injury date prior to January 1, 2005 and rate it pursuant to the AMA Guides, we need to meet two criteria as follows:

- (1) Show that there is no indication of permanent disability or impairment prior to January 1, 2005; and
- (2) Show that we never had a requirement to send a LC Section 4661 Notice. A LC Section 4661 Notice is required any time or for any reason that we terminate temporary disability.

Therefore, if we provided temporary disability, even for one day, and said temporary disability was terminated for any reason (such as the applicant going back to work) prior to January 1, 2005, the case would be rated under the old schedule.

In most cases, applicant's attorneys will attempt to argue that injuries before January 1, 2005 injuries should be rated under the old schedule, and we will take the opposite position. Therefore, LC Section 4660(d) will produce major litigation and the WCAB has already issued its first panel decision in Vera v. State Comp Insurance Fund, December 1, 2005 (34 CWCR 49).

In Vera the date of injury was March 14, 2003 and as the defendant paid temporary disability

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through February 1, 2005, the defendant never had an obligation to issue a LC 4661 Notice advising the applicant that temporary disability was being terminated prior to January 1, 2005.

In order to avoid the AMA Guides, the applicant's treating physician, Dr. Tami Aurerbac, D.C., issued a report on April 26, 2004, and although she did not find the applicant permanent and stationary she still described the factors of permanent disability. In addition, an MRI scan showed that the applicant had a "bulging disc" touching a nerve root. At trial the parties stipulated that the applicant's condition became permanent and stationary on February 1, 2005 and would rate at 59% under the old schedule but only 26% on the 2005 schedule. The workers' compensation judge (WCJ) found that the applicant had permanent disability prior to January 1, 2005 as said permanent disability was described by the treating physician even though the applicant was not permanent and stationary.

In a two to one decision (Commissioner Rabin dissenting) the Board reversed the WCJ holding that the medical opinion of the applicant's primary treating physician finding that the applicant had permanent disability but was not yet permanent and stationary was internally inconsistent and was deemed not substantial evidence. Accordingly, the Board found that the applicant's permanent impairment and/or disability must be rated under the AMA Guides.

As most of you probably know by now, a WCJ out of the San Francisco Board has held that LC Section 4660, as amended by SB 899, is internally inconsistent and has held that only injuries occurring on or after January 1, 2005 are eligible to be rated under the AMA Guides.

This case is currently on appeal. Please stand by.

Make mine a double, George ...

WJT:ib