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APPLYING THE SB 899 REFORMS

Recent Critical Case Decisions

Retroactivity of New Apportionment Rule

A number of recent critical decisions have come down dealing with the application of the new apportionment rules, and whether the new apportionment to causation can be applied to existing open cases. The most important of these to date has just been issued as we go to press for this edition of *Legal Briefs*.

In *Rio Linda Union School District v. Workers' Compensation Appeals Board*, (Sheftner) (official cite not yet available, certified for publication from the Third Appellate District July 2005) the Court of Appeal has overruled the WCAB, holding that the new apportionment rules apply to all open cases which have not gone to a final award. The WCAB had originally held that the new provisions of LC 4663 and LC 4664 would not apply to cases which, for example, had discovery cut-off orders or other interim orders and awards. The Court of Appeal has broadened the retroactive application of the new rules, holding that they will apply to any case where the WCAB had not yet issued a final Award such that the only continuing jurisdiction would be under the right to reopen for good cause. The Court stated: "The language chosen by the Legislature, read as a complete phrase, indicates the Legislature did not want the changes of law made by SB 899 to be the basis for reopening cases otherwise concluded

under the workers' compensation procedures for decision (Lab. Code, § 5313), reconsideration (Lab. Code, § 5900), and judicial review (Lab. Code, § 5950). Thus, we hold the repeal of former section 4663 was effective immediately on enactment of SB 899 on April 19, 2004, and new section 4663 and section 4664 are applicable to any case still pending, except those cases that are finally concluded subject only to the WCAB's continuing jurisdiction under sections 5803 and 5804."

PD Apportionment to Be Based on Percentages, not Weeks or Dollars.

Danny Nabors, Applicant v. Piedmont Lumber & Mill Company; and State Compensation Insurance Fund, Defendants;; 70 Cal.Comp.Cases *** (advanced posting; subject to change), Opinion Filed June 9, 2005, W.C.A.B. No. SRO 0122159, SRO 0113249; WCAB *En Banc*.

The WCAB held that when applying apportionment from a prior award to a new finding of Permanent Disability, the percentage of the prior award shall be subtracted from the new award.

This is a reaffirmation of the approach laid out in the Fuentes case (*16 Cal.3d 1, 41 CCC 42*) that required the subtraction of the PD Percentage of the prior award from the current award. It is still not clear, however, what the proper procedure will be to address the subtraction of a pre-2005 disability from a post 1/1/2005 disability, since the definitions of PD are entirely different in such cases.

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New Apportionment Rules Apply to Issues of New and Further Disability

Stanley Marsh, Petitioner v. Workers' Compensation Appeals Board, Stanley Bostitch, Constitution State Service Company, Respondents, 70 CCC 787; June 28, 2005.

Stanley Marsh was originally injured in August 1999 and received an Award of 46% PD. He later timely petitioned to reopen that Award for alleged New and Further Disability. At trial Marsh was awarded additional PD, now at the 70% level. Although the AME found that a significant part of the additional disability was being caused by non-industrial osteopenia, the WCJ opined that the defendant had not met its burden of proof under the then-existing provisions of LC 4663 and 4664.

Ten days after the judge issued his decision awarding the 70%, SB899 went into effect. Since the WCJ decision was not yet "final" the defendant filed a Petition for Reconsideration, and on Reconsideration the WCAB applied the newly enacted law, reversing the WCJ and apportioning the additional PD between industrial and non-industrial causes. The Applicant filed an unsuccessful appeal, with the 5th Appellate District publishing their opinion that the new apportionment rules applied to every case that had not yet gone to final award.

WCAB Clarifies Steps for Applying Apportionment Under SB 899

Marlene Escobedo, Applicant v. Marshall's, and CNA Insurance Company, Defendants 70 C.C.C. 604, Opinion filed April 19, 2005, W.C.A.B. No. GRO 0029816, GRO 0029817; WCAB *En Banc*

The W.C.A.B. clarified the requirements to properly implement the new apportionment provisions contained in SB 899:

The requirement that apportionment be based on causation refers to the causation of the permanent disability, not the causation of the injury. Judges and the Appeals Board must make apportionments in the same manner as prescribed for evaluating physicians in Labor Code section 4663(c), by percentages according to causation. A physician's opinion on apportionment will not justify a finding of apportionment unless it constitutes substantial evidence.

The injured worker has the burden of establishing the percentage of permanent disability directly caused by the injury, and the claims administrator has the burden of establishing the percentage of disability caused by other factors.

The other "factors both before and subsequent to the industrial injury" that may be found to cause permanent disability may include pathology, asymptomatic prior conditions and retroactive prophylactic work restrictions.

Court of Appeal Changes Its Mind in *Remedy Temp*, holds CIGA Must Pay

General Casualty Ins. v. WCAB, No. B167017, 07/25/2005 (Official cite not yet available).

In another hot-off-the-presses opinion, the California 2nd District reversed its earlier position on the issue of whether CIGA, as successor to a defunct carrier, had to pay Workers' Compensation benefits if the injured employee was working for a "special employer" at the time of injury. The question has affected numerous pending cases involving employees of temporary employment agencies, where the carrier for the employment agency (the General Employer) had gone bankrupt. The California Insurance Guarantee Association, stepping in for the defunct carrier, alleged that in these situations liability for injuries was joint and several with the special employer, and therefore under Ins. Code 11663 the carrier for the special employer should pay the liability even though such coverage was never contemplated and no premium had been collected for the risk.

Although originally finding that CIGA should be dismissed the court later held that section 11663 was enacted to prevent disputes between insurers, and "was not intended to change joint and several liability of general and special employers to their employees for workers' compensation." Given the past history of this complex and hard-fought litigation, we anticipate an attempt to get the state Supreme Court to intervene.

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5 THINGS TO REMEMBER IN 2005

- 1) **Medical Provider Network:** Effective 1/1/05 – on accepted cases employer only has 30 days medical control unless they have MPN – the MPN deals with initial treatment, diagnosis, treatment issues and change of doctors. Employee can obtain “second opinions” regarding diagnosis and treatment up to 3 times within network (LC 4616)
- 2) **Independent Medical Review:** Effective 1/1/05 - if the treatment or diagnosis remains disputed after third doctor’s opinion, then IMR is requested from AD (Administrative Director) (LC 4616)
- 3) **Panel OME Unrepresented AOE/COE Disputed Cases:** Effective 4/19/04 for all DOI – on delayed cases, either party may request a medical evaluation only by LC 4062.1 procedures: once notified, employee has 10 days to submit panel request form or employer may do it; once issued, employee has 10 days to select physician from panel, or employer may do it (LC 4060, 4062.1)
- 4) **Panel OME Unrepresented Accepted Cases:** Effective 4/19/04 for all DOI - on accepted cases with issues of PD, other medical issues and UR decisions, either party may object, shall notify the other in writing within 30 days (or 20 days after UR decision), obtain medical evaluation only by LC 4062.1 procedures: once notified, employee has 10 days to submit panel request form or employer may do it; once issued, employee has 10 days to select physician from panel, or employer may do it (LC 4061, 4062, 4062.1), [note: if spinal surgery issue 10 days to object and AD selects doctor - LC 4062 (b)]
- 5) **Panel OME/AME Represented AOE/COE Disputed Cases:** Effective for DOI on or after 1/1/05 – on delayed cases, either party may request a medical evaluation only by LC 4062.2 procedures: can use AME, and if not, either party may request QME panel; once issued, 10 days to agree to panel QME, if not, then 3 working days to strike one name and use remaining QME or other party chooses (LC 4060, 4062.2)

Excerpted from “Ten Things to Remember in 2005”, by Susan Hutchings, Technical Supervisor, Orange. Text of full article available upon request.

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Legal Briefs is a publication of McDermott & Clawson, LLP
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