LEGAL BRIEFS NEWSLETTER

CASES & COMMENTS ON WORKERS' COMPENSATION

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RECALCULATE YOUR MULTIPLE INJURY CASES!

Wilkinson Has Left the Building!

In a case of startling significance, the WCAB issued an *en banc* decision in *Diane Benson* v. *Permanente Medical Group* (Athens Administrators) (12/13/2007), OAK 0297895 and OAK 0326228, As discussed below, this case overturns the long-standing rule that, when two or more injuries become permanent and stationary (or MMI for post 1/1/05 dates of injury) at the same time, the applicant is entitled to a permanent disability rating based on the combined result of all injuries without apportionment of the disability.

Based on this new decision which binds all trial judges throughout the state, when a doctor renders an opinion which includes apportionment to causation, and the causation includes multiple injuries from as yet unresolved cases, the applicant will be entitled to multiple awards (one from each injury) rather than one award of the overall

Permanent Disability. Since permanent disability payments are made on a graduated scale (50% PD is worth a lot more than the dollar value of two 25% awards) the economic impact of such cases on the defendants is significantly reduced.

The Old Rule

In *Wilkinson v WCAB* (1977) 142 CCC 406, an injured worker sustained two successive specific injuries to his knees which became permanent and stationary at the same time. The trial judge issued two separate awards (one for each injury) based on a doctor's apportionment of 50% of the overall disability to each. The case went to the Supreme Court.

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On appeal, the Supreme Court relied on an earlier case, *Bauer v. County of Los Angeles* (1969) , 34 CCC 594, and the language of the then existing LC 4750 which mandated that apportionment could only be made when the employee was suffering the effects of a previous permanent disability. Under this concept, when multiple injuries become Permanent and Stationary at the same time, by definition there cannot be a "previous" permanent disability from any one of those injuries and therefore the award may not be split up.

Apportionment Redefined

Everyone is now familiar with the redefinition of apportionment under the provisions of SB 899, effective April 19th, 2004. Labor Code 4750 was repealed, and doctors were mandated to include in their reports a discussion of apportionment to causation rather than to pre-existing disability (LC 4663).

Almost immediately, conversations began in offices of defense attorneys that the new definition, and the repeal of LC 4750, meant that the *Wilkinson* approach to issuing awards in multiple injury cases was no longer applicable. Predictably, these discussions began to mature into formal arguments in select cases. After all, we would argue, prior to SB 899 no defendant could establish a pre-existing level of disability from a co-defendant's injury unless there was a P&S report on that injury and a later P&S date for the next successive injury. Now, however, such argument seemed unnecessary, since all we should have to do is establish that each injury is a separate cause of the whole, and which came first is of no consequence under the new rule.

One Step Forward, One Back

Despite the seeming advantage of the redefinition of apportionment under LC 4663, it seemed as though it was business as usual for awards of permanent disability following successive injuries. Between April 19th, 2004 and December 13th, 2007, there were 230 cases reported in *California Compensation Cases* dealing with apportionment and, primarily, the effects of SB 899 on apportionment issues. In applicable cases, *Wilkinson* remained the rule of the day.

In a petition for reconsideration drafted by this writer on a 100% PD case which, according the AME, was the product of two distinct injuries and subject to apportionment, we argued in an extensive brief that *Wilkinson* could no longer be applied, and that the trial judge was bound by LC 4663 to issue two separate awards in lesser amounts than the overall 100%. The WCAB granted our petition, but sidestepped the *Wilkinson* argument in favor of other issues raised in the petition.

As recently as this past October, the WCAB was continuing to follow the *Wilkinson* precept. In *Interim Technologies, et. al. vs. W.C.A.B.*, (October 17t, 2007) 72 CCC 1547 (writ denied) the WCAB held that the applicant sustained three industrial injuries while working as senior consultant for the same employer, while the employer was insured by three different carriers, and made one joint and several award against the employer's three insurers without considering the possibility issuing three separate awards, one for each of the three injuries.

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In fact, we began to suspect the WCAB would find its way out of the issue all together when the decision was published in *Brodie vs. WCAB,* (2007), 72 CCC 565, dealing with the proper way to calculate the monetary value of an apportioned award. While it did not address the question of how awards should be apportioned, the case did hold that, despite the repeal of LC 4750, the longstanding *Fuentes* rule that the subtraction method of calculation (favored by defendants) would still be applicable. Applicant attorneys had argued that the repeal of LC 4750 meant that, in a successive injury case, the injured worker was entitled to a higher dollar payout on the resulting disability. If the repeal of LC 4750 did not change how the dollar value was to be calculated, then presumably it did not change the *Wilkinson* rule either.

WCAB To The Rescue

To our surprise, it was the *Brodie* case itself that gave the WCAB the argument to support the downfall of *Wilkinson.* The *Brodie* decision included language that SB 899 created a "new regime" for apportionment. The *Brodie* court noted the principle that there is no presumption of legislative intent to overthrow long established principles of law unless such intention is clearly expressed and SB 899 seemed silent as to the mathematics of apportioned awards.

The WCAB in *Benson,* however, found such expression of legislative intent, noting that SB 899 was expressly enacted to avert a crisis in skyrocketing compensation costs, and further noted that the revision of LC 4663 was an expression of intent to handle apportionment of awards on an entirely new basis.

What to Expect

Wilkinson is dead, but much like in "The Princess Bride," there is "completely dead" and "mostly dead." Like our hero, *Wilkinson* is "mostly dead." Given the impact of this decision we fully expect an attempt will be made to take this up on appeal, and we do expect CAAA and defense associations to weigh in on the fray. However, unless and until the *Benson* decision is expressly overturned, it remains the law even while such an appeal is pending.

In addition, the *Benson* decision leaves a major potential opening to prevent splitting awards up where the medical opinion cannot apportion without engaging in speculation or conjecture. True, the law mandates that a doctor refer the case to another doctor when it becomes too hard to draw the lines between injuries, but there is discussion in *Benson* which anticipates situations where even the second opinion cannot make the division with reasonable medical probability. It even suggests scenarios raised in *Wilkinson* where each injury effects the other, making the distinction between them more difficult or impossible. Then, says the Board, the applicant still gets one award of the whole overall PD. Anticipate more cross-examinations by applicant attorneys in your cases where apportionment of PD is an issue.

What to Do

As previously noted, since *Benson* is a WCAB *en banc* decision, it applies to all your open cases, and any case involving apportionment to more than one industrial injury should be re-evaluated. The argument should be maintained that separate awards must be issued as to each injury based on causation. Remember, though, that

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defendants still have the burden of proof on the issue, and medical opinions must be substantial evidence to support that burden.

Article by Howard Stevens, Orange Office

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