LEGAL BRIEFS NEWSLETTER

CASES & COMMENTS ON WORKERS' COMPENSATION

May 2009 **www.McDermott-Clawson.com** **May 2009**

HAVE WE GOT A CASE FOR YOU!

We do our best, whenever major case law is handed down, to keep our readers abreast of the latest judicial holdings that inevitably affect the economic value of your cases and your procedural strategies. Along these lines we have focused past editions on such landmark cases as *Benson v. WCAB et. al.* (see update below), *Sandhagen v WCAB* (2008) 73 CCC 981, and *Almaraz v Environmental Recovery Services* (2009) 74 CCC (advance posting). Lost in the shadows of these giants of Workers' Compensation litigation are a host of other cases of interest. Here is a sampling of those that recently caught our attention.

Can You Apportion PD To Arthritis When Surgery Removes The Arthritis?

Apparently, you can. In *Gunter v WCAB* (2008) 73 CCC 1699 (writ denied) the WCAB specifically refused to follow an earlier decision in *City of Concord v WCAB* (Steinkamp) (2006) 71 CCC 1203 (significant panel decision) which ruled that a total knee replacement removed the non-industrial arthritis that, together with an industrial injury, necessitated a total knee replacement. No more arthritis, no apportionment said the *Steinkamp* panel. On an identical fact pattern, the WCAB issued an opposite opinion in *Gunter* where it ruled that there was substantial evidence to support apportionment to the arthritis even though it was effectively removed with the surgery. It was, after all, a combination of causes that necessitated the surgery and the resulting impairment from the knee replacement should therefore be apportionable. Similar reasoning upheld the doctor's apportionment in *Malcolm v WCAB* (2008) 73 CCC 1710 (writ denied). In this case there was an industrial injury combined with non-industrial hip necrosis resulting in hip replacement surgery. The doctor agreed that the surgery corrected or removed the necrosis, but apportionment to the non-industrial cause resulting in the surgery was still proper.

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Defendants Still Have the Burden of Proof on Apportionment

This is not a new concept. What we are learning however, is that when the cases straddle the "AMA Rating Date Line", the burden of proving that the prior disability overlaps part of the new one is extremely difficult. When a prior rating and award has issued under the 1973 PDRS and a new rating is to issue on a similar disability under the post 2005 system, the Labor Code 4664 presumption can only apply if the defendant can prove overlap between the prior disability and the current one. Not very easy to do when the entire definition of PD has changed.

This was exactly the problem in *Minvielle vs County of Contra Costa* (2008), a WCAB panel decision reported at 36 CWCR 199. The applicant had a back injury rated under the prior PD schedule and a new injury under the current schedule. The AME attempted to reassess the old rating using current methodology, but noted the applicant had fully recovered from that injury. The trial judge used the subtraction method to apportion, but the WCAB panel ruled that since the old evaluation was done under a different methodology for the award, the subtraction method could not be used under LC 4664 and, under LC 4663 the applicant was "rehabilitated", so no apportionment could apply.

The problem of meeting the burden of proof even applies, it seems, where the defendant is defrauded into believing there was no prior case. In *E.J. Gallo Winery vs. WCAB* (Rubio) (2008) (not published) the Court of Appeal held that it is the defendant's duty to present the prior award, which the applicant failed to disclose. It is not clear how such a decision squares with LC §4663(d) which mandates an applicant disclose, upon request, all previous permanent disabilities or physical impairments. While there was an AME in this case, nothing in his report discussed overlap between the old and new disabilities, and therefore defendant failed to meet its' burden of proof.

Benson: The Final Curtain

On April 29th, the State Supreme Court denied a petition for writ of review from the First Appellate District Division 2 opinion upholding the Court of Appeal and the WCAB *en banc* holdings in *Diane Benson v WCAB and The Permanente Medical Group* (2009) 74 CCC 113 and 72 CCC 1620 (2007) . This means there is no more doubt that the holding, very beneficial for defendants, is and will remain the law absent some legislative action to the contrary. The case holds that where disability is caused by two or more injuries which become permanent and stationary (or MMI) at the same time, the disability may still be divided into multiple awards based on legally supportable opinions of physicians pursuant to Labor Code 4663.

Since permanent disability payments increase on a graduated scale, dividing the disability results in less monetary liability overall. The practice of filing for multiple dates of injury, usually including at least one continuous trauma as well as a specific injury, has now come back to haunt the applicant's bar. To read more about the *Benson* decision, go to www.McDermott-Clawson.com , click on "recent events" and open the newsletter for 12/07 entitled "Recalculate Your Multiple Injury Cases!"

Doctors Also Have a Burden of Proof

In *Teichert & Sons vWCAB* (Barron) (2008) 73 CCC 1621 (not published) the Court of Appeal considered the case of a cement mason who literally blew a gasket following an argument with his supervisor, unfortunately dying of a ruptured anyeurism. The QME opined that he could not be more certain regarding industial

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causation than to state that industrial causation (from the argument) was a "medical possibility." That, said the court, is not sufficient pursuant to LC §3202: The doctor must be able to state the opinion within "reasonable medical *probability.*" Thus, the burden of proving injury arising out of employment was not met.

Lien Claimants Also Have a Burden

We know it often doesn't seem like it, but in actuality lien claimants have a heavy burden of proof when it comes to getting paid. So says the WCAB in an *en banc* opinion in *Tapia v Skill Master Staffing* (2008) 73 CCC 1339. In this case, the lien claimant sought to collect over $23,500 for services for which the defendant, after review, paid $1,667.66. The question of liability for the balance (based on reasonableness of the charges) went to trial. The lien claimant submitted its lien and supporting bills. The defendant submitted no evidence.

The WCAB ruled that without more, the mere submission of a lien and bill does not meet the lien claimant's burden of proving the charges are reasonable. The first burden of presenting evidence is not on the defendant to prove the charges unreasonable. Either party may offer evidence on reasonabless of the charges, but if the lien claimant does not provide evidence, the claim fails.

Who Pays For Self-Procured Treatment Outside The MPN?

We've mentioned this WCAB panel decision before, but it bears repeating. If (and this is a big "if") the defendant has done everything correctly regarding the esablishment of the MPN, availability of a minimum number of appropriate doctors in a reasnable geographic area and notices to the injured worker, then while the WCAB cannot force the injured worker to treat within the MPN, the treatment outside will be at the applicant's expense if the decision in *Lane v Zurich American Ins. Co.* (2008) 36 CWCR 254 holds up to further scrutiny. We suspect, however, that when tested, the question of the admissability of the doctor's reports will be resolved in favor of the injured worker. Stay tuned on these issues. We know there is more to come.

Penalties Clarified

While we know none of our regular readers are ever involved in potential penalty assessments, we mention this case out of pure academic interest. In an *en banc* decision, the WCAB pointed out that penalties under LC 5814 were discretionary with the judge and can vary from 0% to 25% and are capped at $25,000. In other words, the amount of the penalty for an unreasonable delay is by no means automatic.

The WCAB enumerated 9 factors which a WCAB judge must consider in assessing a penalty. Among these are considerations of the amount delayed and the length of the delay, and the realities of the claims business as well as the effect of the delay on the injured worker. The case is *Ramirez vs Drive Fiancial Services, et. al.* (2008) 73 CCC 1324.

Darned If You Do, and Dinged if You Don't

In a puzzling decision after reconsideration, a WCAB panel addressed the problem of the injured worker who is entitled to permanent disability, but who has lost no compensable time from work. What happens with the 15% PD payment reduction? Is the defendant still entitled to it? Does the return to work offer still need to be sent?

In *Hisato Tsuchiya vs. Los Angeles County Sheriff's Department* (2009) ADJ 2508984, a

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Van Nuys judge opined that LC §4658(d) is inapplicable to people who return to work prior to reaching Maximum Medical Improvement. Therefore, if the employer fails to send the form offering regular or modified work, the employee is still not entitled to the 15% increase in PD benefits. However, the WCAB panel also ruled that, since the terms of LC §4658(d) do not apply to employees who are working, the employer is not entitled to the 15% decrease in PD benefits under the statute either. Thus, employers who refuse to take employees back on the job prior to reaching MMI are potentially rewarded and employers who manage to keep employees on the job at full pay (usually in temporary alternate or modified positions) are penalized. We suspect this issue is not done yet.

And Finally, One For Our School Districts

Education Code §44043 provides that a school district pay full salary during a period of temporary total disability by supplementing the regular Temporary Total Disability payment under the Labor Code. These supplemental payments are made out of the employee's accrued leave time. A trial judge ruled that when such benefits are paid, the two year cap on TTD payments does not apply because such payments are not TTD benefits. A WCAB panel agreed, stating the cap does not start to run until the §44043 benefits have stopped. The Court of Appeals reversed, holding that the payment of Education Code benefits commenced the clock on the running of the two year TTD limit pursuant to Labor Code 4656 (c)(1).

Article by Howard Stevens, Orange Office

*Editor's note: We normally do not have access to trial level opinions unless they involve cases within our own firm; therefore, our reporting of these cases is limited to information received via reliable sources. Decisions of trial level judges do not bind other judges, even at the same Board. However, they do give some indication of what judges may do at trial on cases with similar issues. The same is true of WCAB panel decisions. Reports concerning writ denied cases are published in the California Compensation Cases and may be cited at trial level but are not binding authority on a trial judge. WCAB *en banc* decisions as well as published opinions of the Court of Appeal and the Supreme Court are controlling case law on the issues addressed in the opinion.

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McDermott & Clawson, LLP is happy to assist with the training needs of your organization. Our education committee has extensive experience in providing seminars and discussions on Workers' Compensation topics of concern to adjusters and employers. We have worked with numerous carriers, third party administrators, and brokers to provide educational assistance, and would be happy to discuss your needs. Call or email Howard Stevens at (714) 288- 1700 or feel free to speak with any of our attorneys for further information.

Legal Briefs is a publication of McDermott & Clawson, LLP Howard Stevens (Orange office), Editor

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