Significant Decision

Apportionment of permanent disability under SB 899.

Marlene Escobedo v. Marshalls; and CNA Insurance Co.,
WCAB En Banc Decision
WCAB Nos. GRO 0029816,GRO 0029817
Filed April 19, 2005
2005 Cal. Wrk. Comp. LEXIS 71; 70 Cal.Comp.Cases **

Significance: The Board provided guidance on apportionment of permanent disability ("PD") under amended Labor Code § 4663, and new Labor Code § 4664.

Facts On October 28, 2002, applicant injured her left knee at work, and as a consequence developed right knee problems. On February 12, 2003, applicant's primary treating physician ("PTP") performed arthroscopic surgery on the left knee. On June 5, 2003, the PTP declared applicant's bilateral knee condition permanent and stationary, limited applicant to semi-sedentary work, and found no reason to apportion to other causes, because applicant did not have a history of knee problems prior to her work injury.

A different opinion was expressed by defendant's qualified medical evaluator ("QME"), Daniel Ovadia, M.D., who evaluated the applicant on March 15, 2004, and stated on the issue of apportionment:

> In my opinion, there is a medically reasonable basis for apportionment given the trivial nature of the injury that occurred on October 28, 2002 and the almost immediate onset of right knee symptoms that occurred shortly after the left knee injury. The Applicant has obvious, significant degenerative arthritis in both knees and essentially worked in a fairly congenial environment. Although denying any prior problems with her knees, it is medically probable that she would have had fifty percent of her current level of knee disability at the time of today's evaluation even in the absence of her employment at Marshalls.

The workers' compensation administrative law judge ("WCJ") agreed with the QME, and apportioned 50% of applicant's PD to her arthritic condition. Hence, the WCJ found applicant's bilateral knee disability of 53% entitled her to a 27% PD award.

Applicant petitioned for reconsideration, and challenged the WCJ's application of Labor Code § 4663, and the finding on apportionment.

Discussion Apportionment under SB 899 is prescribed by Labor Code § 4663 and § 4664.

Labor Code § 4663, in essence, provides: 1) apportionment of PD shall be based on causation, 2) medical reports that address the issue of PD must also address the issue of causation of PD, and 3) to be considered complete on the issue of PD, a physician's report must include a determination of the approximate percentage of PD that was caused by the industrial injury, and the approximate percentage of the PD caused by other factors before and after the injury.

Labor Code § 4664, in relevant part, provides "the employer shall only be liable for the percentage of permanent disability directly caused by the [industrial] injury . . . ."

The Board began the discussion by addressing applicant's contention that new section 4663 does not apply to dates of injury before SB 899's April 19, 2004 effective date. The Board advised that this issue has been resolved by *Kleeman v Workers' Comp. Appeals Bd.* (2005) 127 Cal.App.4th 274 [70 Cal.Comp.Cases 133] which implicitly overruled the Board's en banc decision in *Scheftner v. Rio Linda School Dist.* (2004) 69 Cal.Comp.Cases 1281. *Kleeman* provides that new section 4663 applies to all cases that were pending as of April 19, 2004.

Next, the Board interpreted Labor Code § 4663 and § 4664, and provided the following guidance:

- A finding on apportionment of PD must be based on a medical opinion addressing causation of PD, not causation of the injury.
- A reporting physician, and the Board must make determinations of what percentage of the PD "was directly caused by the industrial injury, and what percentage was caused by other factors."
- "The applicant has the burden of establishing the percentage of permanent disability directly caused by the industrial injury."
- "The defendant has the burden of establishing the percentage of disability caused by other factors.
- The other factors to which apportionment of PD may be made include disability that formerly could not have been apportioned (e.g., pathology, asymptomatic prior conditions, and retroactive prophylactic work preclusions), provided they are supported by substantial evidence.[1]

[1] Since it was not raised, the Board did not address the continued validity of the principle that the employer takes the employee as it find him or her.

- To be substantial evidence on the issue of apportionment, "a medical report must be framed in terms of reasonable medical probability, it must not be speculative, it must be based on pertinent facts and on an adequate examination and history, and must set forth reasoning in support of its conclusions." [The Board found the specific language quoted *ante* from the report of Dr. Ovadia satisfied these requirements.]

Note: The WCJ's finding that applicant was entitled to 27% PD after apportioning half of applicant's 53% bilateral knee disability to a non-industrial cause appears to follow the PD formula set by *Fuentes v. WCAB* (1976) 16 Cal.1 [128 Cal.Rptr. 73; 41 Cal.Comp.Cases 42]. That case applied former Labor Code § 4750, and awarded the difference between the new disability and the pre-existing disability as if no previous disability existed.

The Board's opinion can be found at the following web address: http://www.dir.ca.gov/WCAB/wcab_enbanc.htm