

Significant Decision

SB 899's new apportionment rules apply to all pending cases except where submission orders or orders closing discovery issued before April 19, 2004.

Scheftner v. Rio Linda School District

(Filed 10/4/2004)

WCAB "En Banc"; WCAB No. SAC 0326274

Significance: This is one of those good news/bad news cases. The good news: In a split decision, the WCAB—sitting "en banc"—held that SB 899's new apportionment rules must be applied to all cases regardless of date of injury. The bad news: The WCAB carved-out a subset of pending cases to which SB 899's new apportionment rules cannot be applied. That subset consists of all pending cases wherein an order closing discovery at an MSC—including closure of discovery by operation of law—or an order of submission issued *before* SB 899's effective date of April 19, 2004.

Facts: Janelle Scheftner sustained an admitted industrial injury to her low back on February 12, 2002. But she had a prior injury to her back in 1997 and continuing low back problems before her industrial injury. Scheftner's case went to an MSC on November 13, 2003, at which time issues were framed and the matter was set for trial. The trial was held on February 18, 2004, at which time the case was submitted for decision. On April 23, 2004—four days after SB 899 was enacted—the WCJ issued a decision awarding Scheftner 34 percent PD without apportionment. Scheftner's employer, Rio Linda School District, sought reconsideration from the WCAB. Among other things, the school district argued that the WCJ erroneously relied on a medical report that did not comply with newly enacted Labor Code § 4663 that provides for apportionment based on causation.

Holding and Rationale: In a five to two decision, the WCAB affirmed the WCJ's findings on PD and apportionment. According to the majority, the new apportionment statutes do *not* apply to Scheftner's case because an MSC was held and a submission order issued *before* SB 899 was enacted on April 19, 2004.

The WCAB majority based its decision on two special sections of SB 899. Section 49 declares that SB 899 "is an urgency statute necessary for the immediate preservation of the public peace, health, or safety...and shall go into immediate effect." Why? Because we have a workers' compensation *crisis* on our hands. Section 49 goes on to state: "In order to provide relief to the state from the effects of the current workers' compensation crisis at the earliest possible time, it is necessary for this act to take effect immediately." Section 47 declares that the changes made by SB 899 "shall apply prospectively from the date of enactment...regardless of the date of injury...." That section also declares that SB 899 "shall not constitute good cause to reopen or rescind, alter, or amend any existing order, decision, or award of the Workers' Compensation Appeals Board."

In light of sections 47 and 49, the WCAB majority held that “the apportionment statutes must be applied after April 19, 2004 to all cases, regardless of date of injury, except for any case in which there was an ‘existing order, decision, or award.’” So far, so good. But then the WCAB majority surprisingly held that an interim order closing discovery or submitting the case for decision is an “existing order” that may not be reopened to apply apportionment under SB 899. This is surprising because such interim orders are not subject to a petition to reopen. They are not even subject to a petition for reconsideration. Rather, such interim orders can be challenged only by petition for removal, an extraordinary remedy that is seldom granted unless irreparable harm will occur.

The WCAB majority acknowledged that its interpretation would result in the new apportionment statutes applying to fewer cases. But it believed its interpretation justified by the Constitutional command that the WCAB “accomplish substantial justice in all cases expeditiously, inexpensively, and without encumbrance of any character.” (Cal. Const., Art. XIV, § 4.) According to the majority, the adverse consequences of delaying a final resolution on apportionment outweighs whatever “relief” might result from applying SB 899 to “the relatively small number of cases” where an order closing discovery or an order of submission issued before April 19, 2004.

Dissenting Commissioners Frank Brass and James Cuneo weren’t buying, however. As Commissioner Cuneo noted in his dissenting opinion, there is absolutely no evidence that the majority’s decision will apply to a relatively small number of cases. “This is speculation. There is no evidence to support their belief. I will not speculate.” Accusing the majority of engaging in legal sophistry rather than legal analysis, Commissioner Cuneo noted that the language of section 47 mirrors that of Labor Code §§ 5803 and 5804 relating to petitions to reopen. A petition to reopen can only be filed when there is a prior *final* existing order, decision, or award; that is, an order that affects the substantive rights of the parties and all appellate rights have been exhausted or abandoned. According to Commissioner Cuneo, the reason Section 47 restricts using SB 899 to reopen an “existing order, decision, or award” is because a change in law is good cause to reopen under Labor Code §§ 5803 and 5804. And the Legislature wanted to prohibit using SB 899’s changes in law from being used to reopen otherwise final decisions. An interim order closing discovery or submitting the matter for decision, however, “is not of sufficient substance to prevent the application of this SB 899.”

Comment: It is State Fund’s position that SB 899’s new apportionment rules apply to all cases not reduced to a final judgment before April 19, 2004. In this light, the WCAB majority’s opinion is about half right. The majority’s decision to exclude from SB 899’s reach those cases where an order closing discovery or an order of submission issued before April 19, 2004 is based on a strained interpretation of Section 47 that runs roughshod over the legislative concerns plainly expressed in Section 49. And the majority’s rationale is quite weak: procedural efficiency. But procedural efficiency is not a basis to ignore the law. How can the WCAB issue a valid PD award when the apportionment statutes it purports to apply no longer exist? There is no legal basis for “locking in” the old apportionment rules when those rules no longer exist by the time the WCJ or WCAB issues the award.

Presumably, Rio Linda School District will seek appellate review. But unless the WCAB majority's opinion is overturned, we can expect the majority's holding to be followed because WCAB en banc decisions are binding precedent on all WCAB panels and WCJs. So, what should we here at State Fund do if we have a case with good potential apportionment that falls within the subset carved out by the majority? We should continue to fight hard for that apportionment. It may be possible to distinguish *Scheftner* from our case, depending on the circumstances. But, even if we lose, we will look to challenge *Scheftner* by seeking judicial review in the proper case (i.e., where the issue was timely raised and argued and where the issue was properly preserved for appellate review on reconsideration).

Note: This decision is available on the WCAB's website: www.dir.ca.gov/wcab/. Click on "Decisions" to see the various categories of available information. Then click on "En banc decisions."