Significant Decision

New Apportionment Rules Apply to the Increased PD Alleged in any Petition to Reopen Still Pending When SB 899 Was Enacted (4/19/2004)

Vargas v. Atascadero State Hospital
Workers' Compensation Appeals Board (En Banc)
WCAB No. GRO 0016640
Filed 4/11/2006
71 Cal. Comp. Cases 500

Significance: Here is yet another WCAB "en banc" decision contending with the fallout from SB 899 and the changes it made to the apportionment statutes. Such en banc decisions are done to address important legal issues and ensure uniform decisions among the judges staffing local WCAB offices.

Facts: Myrtle Vargas suffered an admitted injury to her left arm and neck on 3/22/1995. In a 1/21/1998 F&A, the WCJ found that Vargas had also sustained injury to her left ear. According to that award, Vargas's various injuries resulted in 67% PD without apportionment. This was determined by the so-called "baseball arbitration" under former Labor Code § 4065. Each party would submit a proposed rating and the WCJ would have to choose one of them. In Vargas's case, the WCJ chose the employer's rating of 67% because it was closest to a recommended rating of 71% that the WCJ had obtained.

Over time, Vargas came to believe that her condition had worsened resulting in new and further disability. So, she petitioned to reopen her 1998 award. Vargas later amended this petition to include a psychiatric injury. Eventually, the parties stipulated that Vargas had suffered compensable consequence injuries to her psyche and also to her jaw in the form of TMJ syndrome.

Vargas's petition to reopen came to hearing on 3/2/2004. On 4/8/2004, the WCJ served rating instructions and a recommended rating of 91.5%. The instructions for Vargas's neck and left arm were identical to the 1998 recommended rating obtained by the WCJ. So, the increased disability between 1998 and 2004 was due, primarily, to her new compensable consequence injuries to the psyche and jaw. (Vargas also had a slight increase in disability associated with her left ear injury.)

On 4/12/2004, Vargas filed a DOR requesting cross-examination of the rater. By notice dated 4/15/2004, the cross-examination hearing was scheduled for 5/20/2004. But, then, SB 899 was enacted on 4/19/2004. On 4/23/2004, the WCJ informed the parties he would apply the new law of apportionment under SB 899 and that further development of the record would be addressed at the May 20th hearing. At that hearing, the WCJ granted the employer's request to leave the

record open to obtain supplemental reports regarding the 4/19/2004 change to the apportionment statutes.

Vargas petitioned the WCAB for removal. According to Vargas, the new apportionment statutes could not be applied retroactively to medical reports prepared before enactment of SB 899 and that allowing further development of the record violated her right to an expeditious and unencumbered hearing under the California Constitution.

Holding and Rationale: The WCAB made three related holdings: 1) The new apportionment statutes apply to *increased* PD alleged in any petition to reopen still pending on 4/19/2004; 2) The new apportionment statutes *cannot* be used to revisit or recalculate PD—or the presence or absence of apportionment—determined under a final order, decision, or award *before* 4/19/2004; and 3) The issue of *increased* PD and potential apportionment must be determined without reference to how or if apportionment was determined in the original award.

The WCAB's holdings are certainly not surprising. They are consistent with various appellate level decisions that have issued since SB 899 was enacted applying the new apportionment statutes to all claims not yet reduced to a final judgment before 4/19/2004.

The potential sticking point is Section 47 of SB 899—an uncodified portion of the bill—that says the changes wrought by SB 899 "shall not constitute good cause to reopen or rescind, alter, or amend any existing order, decision or award of the [WCAB]." But the quoted language means only that the new statutes cannot be used *as the basis* for reopening the original existing award. This concern is obviously not implicated where a petition to reopen was *already pending* when SB 899 was enacted.

We can tell from both the majority opinion and the concurring opinion by Commissioner Rabine that the WCAB felt itself bound at this point by the Court of Appeal opinion in *Marsh v. Workers' Comp. Appeals Bd.* (2005) 130 Cal. App. 4th 906. As Commissioner Rabine noted, there is no doubt the *Marsh* court held that the new apportionment statutes must be applied to all cases where a petition to reopen is pending and that were not yet final at the time SB 899 was enacted. Still, if Commissioner Rabine "were writing on a clean slate," he would forbid application of the new apportionment statutes to all awards issued before 4/19/2004, even where petitions to reopen had already been filed. But, as Commissioner Rabine wryly observed, "that train has already left the station."

Note: The full opinion is available on Lexis at the citation shown above and on the WCAB's website: www.dir.ca.gov/wcab/. Click on "Decisions." Then click on "En banc decisions."