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PEARLMAN, BROWN & WAX, LLP

THE ART AND SCIENCE OF APPORTIONMENT

FROM CASE LAW TO QME REPORT 11/4/2023 WEBINAR

Presenters: Raymond F. Correio, retired Workers' Compensation Judge and Perry J. Carpenter, DC; QME

Mastering Apportionment: Insights for medical and legal professionals on cutting edge apportionment issues and writing medical-legal reports

Apportionment: Overview of Key Principles, Concepts and History

- What are all the contributing causal factors of applicant's permanent disability both industrial and non-industrial?

- Only approximate percentages, not specific or precise percentages, of industrial and nonindustrial causal factors are required for a medical report to constitute substantial evidence. (Labor Code §4663(c)). (p, 4 of case outline).

- Historical perspective is essential to understanding the evolution of the key legal principles and standards related to apportionment as well as the evolution of case law.

- Apportionment is the only area of workers' compensation law where the Court of Appeal has "annulled" as many WCAB decisions. Why?

The Critical Issues in Determining Whether a Medical Report Constitutes Substantial Medical Evidence on Apportionment

- The WCAB and many WCJ's have been impermissibly raising the legal standards as to what constitutes substantial medical evidence for a defendant to prove/establish nonindustrial apportionment.

- In many cases, the WCAB and WCJ's are applying an analysis that is inconsistent with the WCAB's en banc decision in *Escobedo*. (see p. 7 of Apportionment Case Outline, 2nd paragraph).

- This is happening even in cases where there is indisputable and uncontroverted diagnostic testing supporting a valid basis for valid legal apportionment under Labor Code §§ 4663 and 4664 and *Escobedo*.

- Example: *Brophy v. WCAB* (2021) 86 Cal.Comp.Cases 706 (writ denied). Pp. 130-132 of the Apportionment Case Law Outline).

Causation of Injury and Causation of Permanent Disability: A Contentious and Continuing Issue

- The WCAB's continued resistance to the Court of Appeals Decision in *City of Petaluma et al., v. WCAB (Lindh)* (2018) 29 Cal.App.5th 1175, 83 CCC 1869, which is the definitive controlling case on the issue of causation of injury and causation of permanent disability. (p. 29 of the Apportionment Case Outline).

- The WCAB continues to struggle with this issue and has issued inconsistent decisions, especially in cases where there is pre-existing diabetes that is contributing causal factor of permanent disability to involved body parts and conditions. If an applicant's pre-existing diabetes is a contributing causal factor of permanent disability, apportionment is required under *Lindh* if supported by substantial medical evidence. The same would apply if an applicant's underlying diabetes was aggravated, accelerated, or lit up by an industrial injury.

- Example: *Wiest v. California Department of Corrections, Centinela State Prison* (2021) 80 Cal.Comp.Cases 856 (WCAB panel decision) (Pp. 132-136 of the Apportionment Case Law Outline).

The Interaction of Medical Evidence of Apportionment with Vocational Evidence. Rebutting a Scheduled Rating after *Nunes:* Use of "Vocational Apportionment" prohibited

➢*Nunes v. State of California, Dept. of Motor Vehicles* (2023) 2023 Cal.Wrk.Comp. LEXIS 30 (WCAB en banc); pp. 93-100 Case Law Outline. Contrast *Nunes* with *County of Sonoma Health Services v. WCAB* (writ denied) on page 103 of the Case Outline decided 6 months before *Nunes.*

➢ Medical apportionment and an applicant's inability to compete in the open labor market and to participate in vocational training.

➢ The issue of medical apportionment being "considered" as well as "applied" in determining whether applicant's inability to compete in the open labor market and to participate in vocational training is attributable to both industrial and non-industrial contributing causal factors.

➢The significance of the *Acme* case in the equation: *Acme Steel v. WCAB (Borman)* (2013) 218 Cal.App.4th 1137, 78 Cal.Comp.Cases 751.

➢Recent cases: *Walsh v. Skyline Steel Erectors*, 2021 Cal.Wrk.Comp. P.D. LEXIS 84, (pp. 103-107 Case Law Outline). *Orr v. Unified School District, PSI*, 2021 Cal.Wrk.Comp. P.D. LEXIS 117, (pp. 107-109 Case Law Outline). 2022 Case: *Gonzales v. Northrop Grumman Systems Corp*., pp. 100-103 of the outline

The WCAB's Questionable Unanimity Requirement in *Benson* Apportionment Cases

- Ever since *Alea North American Ins. Co., v. WCAB (Herrera)* (2018) 84 Cal.Comp.Cases 17 (writ denied) (p. 58 case outline) was decided, the WCAB and WCJ's in *Benson* apportionment cases are requiring that all reporting doctors in a case must unanimously agree that there is a basis to apportion an applicant's permanent disability among and between separate and successive injuries. (See pages 58-62 in the Apportionment Case Outline for cases dealing with *Benson*.)

- For example, if there are four AME's in different specialties reporting in a case, and three of the four agree there is a valid basis to apportion the applicant's PD among multiple and successive dates of injury but there is one holdout AME who cannot apply *Benson* apportionment, this would serve to negate and nullify the opinions of the other three AME's. The result is that the defendant would be unable to prove valid *Benson* apportionment and applicant would get an unapportioned award of permanent disability.

- Several recent *Benson* Decisions: (p.p. 56-58 of Apportionment Case Outline).

Medical Treatment and Apportionment: Understanding and Reconciling the *Hikida* and *Justice* Decisions from the Court of Appeal

- Apportionment Case Law Outline, pp. 78-92.

- Brief overview of the *Hikida (*p.88 Case Outline) and *Justice* (p. 79 Case Outline).

- Recent case developments after *Justice* and the inherent limited applicability of *Hikida*. *Fuller*, p. 86 case outline; *Ryan*, p.78 case outline.

- *Hikida* properly applied. *Hirsch v. Physicians for Healthy Hospitals* 2023 Cal. Wrk. Comp. P.D. LEXIS 54 (WCAB panel dec.). Admitted injury to right thumb. Medical treatment consisted of antibiotic Bactrim to injury. Applicant has severe allergic reaction including development of CRPS resulting in permanent total disability. Additional disability solely caused by medical treatment. No apportionment.

Labor Code § 4664(b): Credit for a Prior Award or Awards – Recent Cases

- Brief overview of Labor Code § 4664(b) "If the applicant has received a prior award of permanent disability, it shall be conclusively presumed that the prior permanent disability exists at the time of any subsequent industrial injury. This presumption is a presumption affecting the burden of proof." In the Apportionment Case Outline, §4664 is covered from pages 146 to 162.

- Leading case is a decision from the Court of Appeal, *Kopping v. WCAB* (2006) 142 Cal.App.4th 1099, 71 Cal.Comp.Cases 1229. Under *Kopping,* a defendant must prove two things in order to obtain a credit against a prior award or awards.
    1. The existence of a prior award or awards.
    2. The disability related to the prior award overlaps with the disability related to the current injury ie., the involved body part, condition, or system.

- Recent Cases dealing with Labor Code § 4664(b): *Richmond v. Santa Rosa Tile Supply*, (2023) p. 147-148; *Lee v. Xchanging, Granite State Insurance Co., p. 146;* (2021) Cal.Wrk.Comp. P.D. LEXIS 200 (WCAB panel dec.); *Ortiz v. South Coast Packing, Inc.*, p. 148; *Cowles v. Bimbo Bakeries*, p. 147).

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THANK YOU!