Raising the "Scales" of Justice and Knocking Apportionment of Permanent Disability Out Like Mrs. Palsgraf

Chapter 4, Statutes of 2004 (SB 899) repealed and readopted Labor Code Section 4663 and adopted Labor Code Section 4664 provide that apportionment of permanent disability is now based on causation, and the employer is only liable for the percentage of permanent disability "directly caused" by the injury arising out of and occurring in the course of employment. [§ 4663(a) and (b); § 4664(a).]

Are Direct Cause and Proximate Cause Synonymous?

Neither section 4663 nor section 4664 defines direct causation; thus, it is presumed the Legislature used the term in the precise and technical sense which had been placed upon it by the courts. (*City of Long Beach v. Marshall* (1938) 11 Cal.2d 609, 620; *Cooley v. Superior Court* (2002) 29 Cal.4th 228, 251.)

In *Hinton v. State* (1954) 124 Cal.App.2d 622, the court of appeal defined "direct cause." The case was a personal injury action involving a statute making a state officer liable for injury caused by a dangerous condition of public property only if the injury was the direct and proximate result of the condition. The court rejected the idea that the terms "direct cause" and "proximate cause" were synonymous due to the Legislature's use of both terms in the statute, and cited authority for the proposition that a "direct cause" requirement increased the plaintiff's burden of proof. (*Id.* at p. 626.)

No other reported California cases has subsequently analyzed the meaning of the term "direct cause;" however, the court in *Malo v. Willis* (1981) 126 Cal.App.3d 543, did state, without discussion, that the term has no special significance and should be understood as synonymous with "proximate cause." (*Id.* at p. 548.) Additionally, in his dissent in *Babbitt v. Sweet Home Chapter of Communities, Or.* (1995) 515 U.S. 687, 733, United State Supreme Court Justice Scalia opined that "'proximate' causation merely means 'direct causation.'"

Nevertheless, given that Labor Code section 3600(a)(3) uses the term "proximately caused" when discussing an employer's liability for compensation, and given the California Supreme Court's relatively recent opinion in *Brodie v. Workers' Comp. Appeals Bd.* (2007) 40 Cal.4th 1313, it seems unlikely the Legislature and/or the courts will

construe the two terms to be synonymous. Discussing the former apportionment statutes pre-SB 899, the Court in *Brodie* stated in obiter that "so long as the industrial cause was a but-for proximate cause of the disability, the employer would be liable for the entire disability, without apportionment;" whereas, the "new approach to apportionment is to ... decide the amount directly caused by the current industrial source." (*Id.* at pp. 1327-1328.)

Direct Cause: The Active, Efficient Cause that Sets in Motion a Train of Events

The court of appeal's definition of "direct cause" in *Hinton* is therefore helpful in determining the direct cause of disability under the new apportionment statutes. *Hinton* defined "direct cause" as "the active, efficient cause that sets in motion a train of events which brings about a result without the intervention of any force started and working actively from a new and independent source." (*Hinton v. State, supra,* 124 Cal.App.2d at p. 626.) The court also noted that, "[t]he direct cause of an injury is one without which the injury would not have happened." (*Ibid.*) Citing Prosser's definition of the term, the court noted: "Direct consequences are those which follow in sequence from the effect of the defendant's act upon conditions existing and forces already in operation at the time, without the intervention of any external forces which come into active operation later." (*Id.* at p. 627.)

Hinton involved an action against a state officer that had a duty to maintain electric crossing signals brought by a pedestrian for personal injuries after being struck by an automobile. Following a trial in San Francisco County Superior Court, judgment was entered in favor of the plaintiff, and the defendant appealed. At trial the plaintiff had contended that the lack of a customary instruction sign at a push-button electric crossing signal, which defendant had the duty of maintaining, caused plaintiff to cross on a green light without pushing the button. Pushing the button would have given her a longer period for crossing.

On appeal, the defendant in *Hinton* contended his failure to maintain the signal was not the "direct cause" of the plaintiff's injuries, and that the automobile striking her was the direct cause. The court of appeal disagreed, holding the failure to post the instruction sign was the "direct cause" of plaintiff's injuries as well as the proximate cause in that it was the active, efficient cause that set in motion the "train" of events

which resulted in the injury, without intervention of any force started and working actively from a new and independent source. (*Hinton, supra,* 124 Cal.App.2d at p. 630.)

Applying the foregoing definitions of "direct cause" to the facts of the case in *Hinton,* the court observed that the purpose of the push-button signal was to protect a pedestrian crossing the busy street from the traffic which would be on him before he could cross under the time permitted by the traffic-actuated signal. Unless he knew of the purpose of the push-button signal he would naturally assume that the traffic-actuated green light would allow him sufficient time to safely cross. Without that knowledge and without an instruction sign he would be justified in disregarding the push-button, and acting on the invitation to cross held out to him by the traffic-actuated signal. The failure to give the necessary instruction then would be the direct cause of sending a pedestrian into a dangerous stream of traffic which could reasonably be expected to start across the crosswalk before the pedestrian could clear the stream. Where the pedestrian is then struck by a car in that stream, the lack of the instruction sign is a cause "without which the injury would not have happened." (*Hinton, supra,* 124 Cal.App.2d at p. 627.)

The lack of the sign was a direct cause of the accident because it was "the active, efficient cause that sets in motion a 'train' of events which ... [brought] about a result without the intervention of any force started and working actively from a new and independent source." The force which actually struck plaintiff was one into which defendant's neglect precipitated plaintiff. (*Hinton, supra,* 124 Cal.App.2d at p. 628.)

A Normal Intervening Force is a Direct Cause

With regard to civil personal injury matters and direct causation, where the defendant's negligent conduct is the stimulus for some other act or force that then causes the harm, there is no break in the chain of causation. The intervening force that is the normal reaction to the defendant's negligent conduct is characterized by Rest. 2d Torts, § 443 as a "normal intervening force" and it is not a superseding cause. (*Werkman v. Howard Zink Corp.* (1950) 97 Cal.App.2d 418, 425; *Brewer v. Teano* (1995) 40 Cal.App.4th 1024, 1037.)

A common example of a normal intervening force is acts of persons frightened by the defendant's negligence. In *Champagne v. A. Hamburger & Sons* (1915) 169 Cal. 683, the defendant's crowded elevator fell due to negligent maintenance. The plaintiff, a

passenger, was thrown to the floor and trampled by other frightened passengers. The court held the intervening act of the passengers was the natural and probable result of the original negligence, thus the defendant was liable. (*Id.* at p. 689.)

Where subsequent to a civil defendant's negligent act, an independent intervening force actively operates to produce the injury; the chain of causation may be broken. If the risk of injury might have been reasonably foreseen, the defendant is liable, but if the independent intervening act is highly unusual or extraordinary, or not reasonably likely to happen and thus not foreseeable, it is a superseding cause and the defendant is not liable. (*Stasulat v. Pac. Gas & Elec. Co.* (1937) 8 Cal.2d 631, 637; *Vasquez v. Residential Investments, Inc.* (2004) 118 Cal.App.4th 269, 285.)

Since Labor Code section 4663(c) specifically permits apportionment to factors occurring subsequent to the industrial injury, the aforementioned civil cases may be useful to the practitioner and the physician in determining what percentage of the current permanent disability was "directly caused" by the injury.

What About Pre-Injury Factors?

With regard to apportionment to factors occurring before the industrial injury, the practitioner should keep in mind that *Escobedo v. Marshalls* (2005) 70 Cal.Comp.Cases 604 (en banc) recognized the principle that the employer takes the employee as it finds him or her, and that a person suffering from a preexisting disease or condition who is disabled by an industrial injury is entitled to compensation, even though the injury would not have adversely affected a normal person. (*Lamb v. Workmen's Comp. Appeals Bd.* (1974) 11 Cal.3d 274, 282; *Escobedo, supra,* 70 C.C.C. at p. 617, fn. 9.) There was no assertion by the applicant in *Escobedo* that her preexisting arthritis was exacerbated or accelerated by her industrial injury. The Appeals Board, therefore, did not address the continuing validity of this principle in light of new sections 4663 and 4664(a). (*Escobedo, supra,* 70 C.C.C. at p. 617, fn. 9.)

The workers' compensation **defendant** has the **burden** of establishing the approximate percentage of permanent disability caused by factors other than the industrial injury. (Lab. Code §§ 4663(c), 5705, and Evid. Code § 500; *Escobedo, supra,* 70 C.C.C. at p. 613.) Any decision of the Board must be supported by substantial evidence. (Lab. Code § 5952(d); *Garza v. Workmen's Comp. App. Bd.* (1970) 3 Cal.3d

312, 317, 35 C.C.C. 500; *E. L. Yeager Construction v. Workers' Comp. App. Bd.* (2006) 145 Cal.App.4th 922, 71 C.C.C. 1687, 1691.)

A medical opinion is not substantial evidence if it is based on facts "no longer germane, on inadequate medical histories or examination, on incorrect legal theories, or on surmise, speculation, conjecture, or guess." (*Hegglin v. Workmen's Comp. App. Bd.* (1971) 4 Cal.3d 162, 169, 36 C.C.C. 93; *E.L. Yeager, supra,* 71 CCC at p. 1691.) The physician must also set forth the reasoning behind her opinion, not merely her conclusions. (*Granado v. Workmen's Comp. App. Bd.* (1968) 69 Cal.2d 399, 407, 33 C.C.C. 647; *E.L. Yeager, supra,* 71 CCC at p. 1691.)

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