A is for Apportionment: How It Can Make or Break Your Case

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It's been a full decade since the 2004 enactment of SB899 turned California Labor Code §§ 4663 and 4664 on their respective heads (and almost as long since the California Supreme Court in *Brodie v. WCAB* (2007) 40 Cal. 4th 1313, 72 Cal. Comp. Cases 565 overturned 36 years of case law). But even though this diametrically changed era of apportionment doesn't really qualify as 'new' any longer, it was nevertheless standing room only during the presentation that Raymond F. Correio, Senior Associate with Pearlman, Borska & Wax, and Mark L. Kahn, of Altman, Lunche & Blitstein, PC, gave on the topic at the recent Division of Workers' Compensation's 22nd Annual Educational Conference in Los Angeles.

Retired WCJ Correio wasn't really fazed by the size of his audience. In fact, he began one of the conference's most insightful learning opportunities by telling the crowd:

> "The room is packed today because of the subject. This is a complicated area of law where you can reduce your case dramatically, or have dire consequences. If you're here from the defense—and the applicant's bar—you need to know this better than your opposing counsel for depositions, trial briefs and appeals. And most of all you have to understand apportionment better than the doctors. And if you don't know these concepts and key cases, you will lose your case big time."

Correio also made some hard-hitting comments about the workers' comp community's failure to comprehend the true nature of apportionment. After first warning that "the doctors will get upset," Correio exclaimed:

> "Even after 10 years of reading all these cases—the best cases—which exemplify where the trends are, there is still a lack of key understanding of core legal concepts and principles by doctors, attorneys and judges. It's especially egregious with doctors because there is no remedy. What can you do if the panel QME doesn't understand apportionment? If they don't know it, they don't know it."

Continuing in the same vein, Correio also lamented:

> "There is another problem with the doctors. Many try to keep up on the law and follow apportionment trends, but many don't understand and don't care that they don't understand. And others do a process of nullification. They know it, but they refuse to apply it correctly."

Admitting that "no one could have dreamed of apportionment would evolve like this," Correio and Kahn then brought the crowd on a deep dive into a sea of California crazy. Sharing with attendees Correio's January 2015 Supplement to his seminal

apportionment compendium,[fn1] our panelists focused on apportionment issues relating to:

- Overlap
- Vocational Evidence/Medical Evidence under Labor Code § 4663
- Conclusive Presumptions under Labor Code § 4662
- *Benson* issues
- Failure of Proof/Development of the Record
- Petitions to Reopen and *Vargas*
- General Issues under Labor Code § 4663
- Psychiatric Cases

Supplementing the readily accessible case law summaries in the above-mentioned apportionment outline with their in-person expertise, Correio and Kahn shared a number of valuable comments and pointers about the newest cases illuminating these listed items.

Kahn discussed *Van Allen v. City of Los Angeles/Registrar-Recorder*, 2013 Cal. Wrk. Comp. P.D. LEXIS 633 (Appeals Board noteworthy panel decision) as one of the better cases containing an excellent discussion of overlap, noting that physicians must determine the factors of disability and then decide, based on overlap, whether any of those factors are duplicative or different. Based on the WCAB's determination that a treating psychologist's opinion did not constitute substantial medical evidence because she did not base her reporting on a review of the medical records in the case, Kahn cautioned that to make an accurate overlap analysis, one must look at the factors of disability described in medical reports to determine if any of those factors are the same or duplicative.

The panelists also paid particular attention to the failure of proof/development of the record issues at play in *Caires v. Sharp Healthcare*, 2014 Cal. Wrk. Comp. P.D. LEXIS 145 (Appeals Board noteworthy panel decision). This case demonstrates the evidentiary necessity of requiring physicians with an area of specialization—especially in a psychiatric discipline—to make their own individualized evaluation based on industrial and non-industrial factors.

Additional discussion about *Caires* occurred around the concept of whether development of the record is warranted when all three of the physicians reporting in a case fail to have an accurate understanding of apportionment, thereby preventing the defendant from meeting its burden of proving up apportionment. According to Correio, "from a due process standpoint, it would seem defendant is entitled to have a reporting physician be familiar with the core principles and concepts of applying apportionment correctly under Labor Code § 4663."[fn2] In a case that gives defendants a much-needed second bite at the apportionment apple, the key lessons to take away from *Caires* are the evidentiary requirements that a defendant must meet in order to successfully satisfy its apportionment burden if none of the physicians in the case manage to understand and correctly apply apportionment concepts.

The panelists also commented on *Enriquez v. County of Santa Barbara*, 2014 Cal. Wrk. Comp. P.D. LEXIS 375 (Appeals Board noteworthy panel decision) and *Valenzuela v. State of California—Department of Corrections*, 2013 Cal. Wrk. Comp. P.D. LEXIS 401 (Appeals Board noteworthy panel decision) as reflecting the current trend that the "all other cases" language in the last sentence of Labor Code § 4662 has nothing to do with the statute's conclusive presumption. Kahn explained the WCAB's holding in *Enriquez* that apportionment is not precluded when PTD under § 4662(d) is determined "in accordance with the fact," as well as the similar ruling in *Valenzuela* that the last sentence in Labor Code § 4662 that in "all other cases" permanent disability will be determined in accordance with the fact, did not operate to establish a conclusive presumption of 100 percent PTD.

Served up as the specialty entrée in this apportionment smorgasbord was Correio's discussion about vocational/medical evidence under Labor Code § 4663, which he called "the most significant area in apportionment law today." Telling the crowd that "If there is anything to take away from this session today, take away this line of cases," Correio engaged in a detailed analysis of *Acme Steel v. WCAB (Borman)* (2013) 218 Cal. App. 4th 1137, 78 Cal. Comp. Cases 751, and a series of subsequent decisions to demonstrate the developing trend that is resulting in vocational cases getting two trials.

Significant for being certified for publication from the Court of Appeal, *Acme Steel* stands for the proposition that even in a case where an applicant successfully presents vocational evidence that establishes 100 percent PTD and rebuts the DFEC, the WCAB must consider any substantial evidence that apportionment is established pursuant to Labor Code § 4663 because such evidence cannot be simply ignored.

Next in line during Correio's vocational evidence discussion came *Duplessis v. Network Appliance Inc.*, 2014 Cal Wrk. Comp P.D. LEXIS 316 (Appeals Board noteworthy panel decision), a case with medical evidence and a LOT of apportionment, which demonstrates that the way to get around apportionment and still get 100 percent cases is through a separate vocational determination, which results in a 100 percent case while simultaneously negating apportionment.

Following was *Williams v. WCAB (Berkley Unified School District)* (2013) 78 Cal. Comp. Cases 811 (writ denied), which held that vocational evidence that does not adequately consider medical evidence of apportionment to non-industrial factors does not constitute substantial evidence. According to Correio, this is another case that "reflects the WCAB's evolving view that vocational experts are mandated to consider medical evidence especially medical evidence of apportionment related to non-industrial factors in determining feasibility or non-feasibility in the open labor market and in determining any loss of future earning capacity."

The last item in this slow build was *Lentz v. WCAB* (2013) 78 Cal. Comp. Cases 1003 (writ denied), which Correio highlighted as significant—even though it is a writ denied case—because it establishes that vocational experts must, pursuant to Labor Code §§

4663 and 4664, consider whether there are any non-industrial contributing factors to the applicant's vocational non-feasibility.

Correio also noted the 13-page panel decision in *Brewer v. California Department of Corrections*, 2014 Cal. Wrk. Comp. P.D. LEXIS 218 (Appeals Board noteworthy panel decision)—as well as *Dahl v. Contra Costa County*, 2014 Cal. Wrk. Comp. P.D. LEXIS 2 (Appeals Board noteworthy panel decision), in which writ was issued by the First District Court of Appeal on 1/8/2015 (Civ. No. A141046, sub nom. *Contra Costa County v. WCAB*)—as being cases to watch on the issue of vocational evidence and how to prove it up.

Summing up this developing line of case law, Correio told his listeners:

> "These cases are your bread and butter, whether you are an applicant's attorney or not. I recommend that you get supplemental reports and send them to a vocational expert, or you will lose."

The panelists' characterizations of the current regime of Labor Code § 4663 in terms of its impact and change on pre-existing apportionment law as "radical" and "a diametrical change"[fn3] were clearly not exaggerations intended to wow the attentions of the conference crowd. The expanding body of law relating to apportionment promises to become more complex as the issues continue to play out across the State.
As Correio stated in an email after the conference:

> "For 2015, I see intense and significant focused litigation with resulting decisions from the WCAB and Court of Appeal on the critical intersection of medical evidence of apportionment and vocational evidence. Most of these cases involve high value cases in the 100 PTD range. Vocational experts, while not charged with "determining" apportionment, will have to render opinions and reports that take into consideration and apply medical apportionment on their assessment of vocational feasibility and rebutting the DFEC under *Ogilvie*. I also think litigation related to separate and successive injuries related to *Benson* and the inextricably intertwined 'exception' to separate awards being required will continue to evolve."

I highly recommend that you all attend DWC's Educational Conference in 2016. By that time Correio's clairvoyant predictions will certainly have turned into recent developments and these go-to thought leaders can explain and clarify their shared expertise on the latest in California apportionment.

Footnotes:
1. "Apportionment: Case law update focusing on themes, trends, and problem areas," by Raymond F. Correio, Senior Associate, Pearlman, Borska & Wax; Workers' Compensation Judge (retired); (revised/updated January 5, 2015), with prior supplements and primary outline dated January 2011 (120 pages) to be found at: PBW-law.com under the "news" tab and the "Seminars" sub-tab.

2. Apportionment Case Law Update, 2015 supplement, at page 35.
3. *See* Correio, R.F., "California: A Radical/Diametrical Change in the Law of Apportionment" at http://www.lexisnexis.com/legalnewsroom/workers-compensation/b/recent-cases-news-trends-developments/archive/2013/09/13/california-a-radical-diametrical-change-in-the-law-of-apportionment.aspx.