

CAAA Convenes: A Report From the Front

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At the recent January convention of the California Applicant's Attorneys Association ("CAAA"), several themes predominated. In addition to the expected jubilation over the *Almaraz-Guzman* and *Ogilvie* decisions, CAAA is aggressively encouraging its members to attack apportionment, MPNs, PQMEs and overpayment credit claims.

With respect to apportionment, challenges may be expected on both legal and medical grounds. Legal grounds include differentiating between the causation of the injury (illegal) and the causation of the impairment/permanent disability (legal). Since apportionment is the defense's burden to prove, CAAA will be questioning what proof there is beyond a preponderance of the evidence and within reasonable medical probability, for example, that preexisting degenerative changes caused any impairment in applicant's earning capacity or ability to perform his or her job prior to an industrial injury. CAAA also argues that the standard of direct causation enacted in SB899 is actually a higher and more difficult standard for the defense to establish than proximate cause.

Other apportionment issues CAAA continues to question are whether the basis of claimed apportionment is a form of gender, race or national origin discrimination which CAAA argues is contrary to provisions of the Government Code and therefore illegal.

As for medical grounds for challenging apportionment, CAAA argues that apportionment to "risk factors" is not sustainable since risk factors are only statistical probabilities of injury causation. Also CAAA has compiled a database of medical studies which it believes can be used at cross-examination to effectively cast doubt that preexisting degenerative findings are at all correlative with post-injury disability.

Since CAAA perceives a trend among defendants to utilize MPNs and PQMEs, it spent considerable time laying out the regulatory requirements which the defendant must show strict compliance in order to prevail. CAAA believes defendants will not be able to show strict compliance and will thus not prevail at trial. CAAA will also be very aggressive in litigating entitlement to temporary disability for non-MPN treatment. Speakers claimed that there is no regulation and no case law supporting the non-payment of temporary disability benefits while treating outside an MPN (although conceding if the MPN could be proved, the non-MPN treatment would not be paid).

CAAA was also quite pleased with the decision in the Felix case which they contend places the PQME on no greater footing than the PTP.

CAAA also is encouraging its members to challenge defense claims for overpaid temporary disability benefits as credit against permanent disability, arguing such is inequitable if the overpayment was not based on any wrongdoing by the applicant or if it was occasioned by a retrospective P+S/MMI finding by an AME or PQME.

All in all, CAAA members seem to believe that judicial decisions and regulations are now beginning to erode some of the effects of SB899.