

GENETIC DISPOSITION: Heredity and the Law of Apportionment The Case of *City of Jackson v. Rice*

April 27, 2017

When Senate Bill 899 (SB 899) was enacted in 2004, it sent shockwaves through the workers' compensation system. As vocational rehabilitation went the way of the dinosaur, so too did a long-standing legal theory regarding causation and apportionment to pre-existing conditions. Prior to SB 899, apportionment could not be based on causation. However, SB 899 changed that forever, opening the door for such decisions as *Escobedo*, the tenets of which are an integral part of the fabric of workers' compensation law.

After SB 899 and the *Escobedo* decision, apportionment had to be based on causation of the applicant's impairment, as distinguished from causation of the injury itself. Courts and evaluators alike have since struggled with precisely where to draw the line on what factors may be considered for apportionment. For many years, that line has been drawn somewhere after "preexisting degenerative changes" but before "underlying genetic conditions." Seeing a potential slippery slope, the WCAB has somewhat inconsistently concluded that apportionment to "impermissible immutable factors," such as genetic makeup, were strictly forbidden. Whether genetics and heredity fell into the class of "impermissible immutable factors" has been hotly contested, and a recent ruling of the Court of Appeal for the Third District of California has once again altered the landscape of workers' compensation law with a landmark decision.

April 26, 2017, the Court of Appeal in *City of Jackson v. Rice* (3rd Dist. C078706; ADJ8701916) has overturned a decision of the WCAB, holding that apportionment to pre-existing genetic factors is permissible. The applicant in the case, a police officer for the City of Jackson, alleged a cumulative trauma injury based on repetitive motion to the neck and head. The applicant had degenerative changes in his cervical spine which were determined to be the result of repetitive twisting and bending of the neck.

The QME assigned apportionment based on causation of the impairment between four factors: the period of cumulative trauma, the applicant's prior work history, the applicant's personal injuries, and the applicant's "heritability and genetics." The QME apportioned precisely 49% of the applicant's disability to his genetics, citing a number of studies showing that, all things being equal, a person's work or activities contribute very little to disc disease, and that heredity is a large cause of the disability.

The WCJ upheld the apportionment to genetics at trial as based on substantial medical evidence. The WCAB overturned, indicating that apportionment to genetics “opens the door” to apportionment based on “impermissible immutable factors.” The apportionment determination was annulled and the matter was remanded for issuance of an award without any apportionment. The City’s Writ was accepted on the issue of apportionment to genetics alone, and the Third District Court of Appeal ruled in favor of Defendants, finding that the apportionment to genetic factors was substantial.

Part and parcel to the Third District’s opinion was the WCAB’s own past opinions in *Kos v. WCAB*, and *Acme Steel v. WCAB*, as well as the *Escobedo* decision. The Court held that in both *Kos* and *Acme*, the WCAB had previously ruled in favor of apportionment based on genetic factors, though they were not stated so explicitly. In *Kos*, the WCAB upheld apportionment to a “pre-existing genetic predisposition,” and in *Acme* upheld apportionment based on “congenital degeneration.” In what may become the most frequently quoted line from the case, the Third District felt there was “no relevant distinction between allowing apportionment based on a preexisting congenital or pathological condition and allowing apportionment based on a preexisting degenerative condition caused by heredity or genetics.” This definitive assertion should have massive implications in workers’ compensation law in the coming years.

Overall, this is an enormously favorable case for the defense community, as the scope of apportionment has been blown wide open. We can expect this decision to see a significant amount of challenge in the coming years. For the time being, it should be mentioned in every case where an applicant alleges cumulative trauma and suffers from a degenerative condition. In cases where a QME does apportion to genetics, it is important to ensure the QME is supporting that apportionment with relevant studies or medical literature so that it is compatible with the *Escobedo* decision and constitutes substantial medical evidence.

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