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WORKERS' COMPENSATION NEWSLETTER

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VOLUME 21, NO. 2 AUGUST 2017

APPORTIONMENT, A PRIMER:

What It Is, Why Defendants Want It,
And How To Keep It Once They Have It

By: Michael J. Brady, LFLM Fresno and Trevor Simonson, LFLM Fresno

Please note that this article is meant to provide the general basics of apportionment and how it is applied today. Apportionment is "inextricably intertwined" to most issues in most California Workers' Compensation cases and to delve into every aspect would require hundreds of pages of content. Thus, please consider this article your basic refresher, or starting point, to furthering your knowledge of apportionment in California Workers' Compensation law.

What is Apportionment?

California Labor Code Section 4663(c) clarifies apportionment by asserting:

> In order for a physician's report to be considered complete on the issue of permanent disability, the report must include an apportionment determination. A physician shall make an apportionment determination by finding what approximate percentage of the permanent disability was caused by the direct result of injury arising out of and occurring in the course of employment and **what approximate percentage of the permanent disability was caused by other factors both before and subsequent to the industrial injury, including prior industrial injuries.** (Emphasis added.)

Furthermore, California Labor Section 4664(a) states: "The employer shall only be liable for the percentage of permanent disability directly caused by the injury arising out of and occurring in the course of employment."

In short, apportionment is a physician deciding within "reasonable medical probability" what part or portions of the applicant's injury are due to the industrial injury and which are due to factors that have nothing to do with the work injury. Some of the factors considered for apportionment to non-work injury include pre-existing conditions, hereditary issues, degeneration, and prior injuries.

The evaluating physician's responsibility is to provide the amount of whole person impairment caused by the industrial injury. The evaluating physician does not need to make a determination of what whole person impairment would be or should have been if the non-work factors never existed. This means the evaluating physician will evaluate the applicant as they are following the work injury rather than focus on hypothetical situations where the applicant sustained different or less severe injuries.

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A GENUINELY MODEST PROPOSAL FOR ADDRESSING CT CLAIMS IN CALIFORNIA

By: Ian Frazer, LFLM Redding

Within the California workers' compensation community, there is much discussion of Cumulative Trauma (CT) claims. Unsurprisingly, studies have shown that CT claims are expensive to litigate and increase defendants' exposure for benefits. Many have sensibly lamented the dilemma, and recognized the difficulty of differentiating between legitimate and illegitimate claims. California Applicants' Attorneys Association (CAAA) even joined the insurance industry in supporting creative legislation addressing medical treatment liens that would have affected settlements of CT claims. If the proposed legislation passed, it would have left injured workers on the hook for medical treatment liens if they made the error of settling a CT claim by compromise and release for less than $25,000 exclusive of the cost of past or future medical treatment. (Interestingly, it appears that this legislation was a genuine effort to combat lien fraud and not in fact designed to prevent settlements for less than $25,000.) This writer respectfully suggests that no change in the law is necessary to protect employers from CT claims. All that is required is for the law as it currently stands to be applied.

A fact sometimes ignored, if not forgotten, is that the injured worker bears the burden of proving that they were in fact injured at work. While there are a few statutory presumptions that shift the burden of proof for certain conditions, such as the presumption of injury for certain safety officers respecting certain medical conditions, the general rule remains that the injured workers pursuing benefits must prove that their injury/disability arose out of and in the course of employment (AOE/COE). This rule is even codified. Labor Code Section 3202.5 states that:

> All parties and lien claimants shall meet the evidentiary burden of proof on all issues by a preponderance of the evidence in order that all parties are considered equal before the law.

Preponderance of the evidence simply means the evidence that is more convincing and more likely true. (*Zipton v. WCAB* (1990) 218 Cal.App.3d 980, 990-991.) It is often described as a 51% standard or what is more likely than not.

Proving legal causation requires demonstrating two elements: cause in fact and proximate cause. (*South Coast Framing, Inc. v. WCAB* (2015) (*Clark*) 61 Cal. 4th 291, 298.) These elements are modified in the workers' compensation arena; both are often subsumed within the AOE/COE analysis. However, in California workers' compensation, a "cause" is a cause-in-fact if it is a substantial factor causing injury. (*Id.*) Proximate cause is satisfied if the work is a contributing cause of the injury. (*Id.*)

The California Supreme Court in *Clark* did not explain how the standard of legal causation in workers' compensation had changed over time from the traditional two element substantial factor / 'but for' test to simply a reasonable probability of contributing cause, but it did note why with the remarkably understated citation, "see also Section 3202". (*Id.* at p. 299.)

The often-cited Rule of Liberal Construction, found in Labor Code Section 3202, should be a limited rule of statutory construction. It should be applied only when a statute is ambiguous and susceptible to more than one interpretation. That is how it started; however, it is remarkably expanded. [1]

Given the expanded nature of Section 3202 and the broad concept of contributing cause found in *Clark*, it

[1] See *Liptak v. IAC* (1926) 200 Cal. 39 (holding that the predecessor of Labor Code Section 3202 applied only to statutory construction); See also *Brodie v. WCAB* (2007) 40 Cal. 4th 1313, 1323 (holding that Section 3202 does not apply where the Legislature's intent is clear). Over the years Section 3202 has been expanded to include factual findings. (See generally *Employers' Liability Assurance Corp. v. IAC* (1940) 37 Cal. App. 2d 567, 573 – 574; *California Shipbuilding Corp. v. IAC* (1947) 31 Cal. 2d 278, 288-289 (J. Carter dissenting, arguing that Section 3202 should apply to factual determination); *Garzoli v. WCAB* (1970) 2 Cal. 3d 502, 505 (holding that Section 3202 applied to expand legal doctrine based on case specific facts); *Southern California Rapid Transit Dist., Inc. v. WCAB* (1979) 23 Cal. 3d 158, 165 (holding that Section 3202 applied to factually distinguish prior precedent); *Arriaga v. County of Alameda* (1995) 9 Cal. 4th 1055, 1065 (holding that Section 3202 applies to factual as well as statutory construction).)

CT CLAIMS Cont.

seems that those despairing of the ability to defend against CT claims have very good reason to be despondent. But the **burden of proof remains on the applicant** claiming benefits.

The *Clark* decision cited extensively to an earlier decision, *McAllister*, in which a case of lung cancer was found industrial, based on probability. (*McAllister v. WCAB* (1968) 69 C2d 408, 413 – 416.) The applicant did not need to prove that his work "actually" caused his injury, but he did have to show that the risk of contracting the disease was materially greater than that of the general public by virtue of his employment. (*Id*. at p. 418.) That is a low standard, but it is still a standard.

To summarize, in order to prove that they have suffered a compensable CT injury, an injured worker must show by a preponderance of the evidence that their work put them at a materially greater risk of injury than the general population, and that the work was a contributory cause of the injury they actually suffered. Incidence is key to proving heightened risk, and it cannot be proven without scientific evidence.

Scientific Evidence Standards

Decisions of the WCAB must be supported by substantial medical evidence. A medical opinion is not substantial medical evidence if it is based on incorrect theories, surmise, speculation, conjecture, or guess. (*Escobedo v. Marshalls* (2005) 70 CCC 604, 620 (WCAB *en banc*).) However, it is sometimes unclear what rules apply. But the *Escobedo* standard is regularly applied with something approaching rigor. Unfortunately, the bases of medical opinions are still often lacking, an issue that should be identified and contested.

The legal standard for determining what evidence is speculative has changed. California courts now follow a modified *Daubert* method to decide the admissibility of scientific evidence. (*Sargon Enters., Inc. v. University of S. Cal.* (2012) 55 Cal. 4th 747; *Daubert v. Merrell Dow Pharmaceuticals Inc.* (1993) 509 U.S. 579.) In *Sargon*, the California Supreme Court made clear that the trial court must assess the basis of an expert's opinion and exclude speculative or unreliable testimony. These standards have a long contentious history in federal court, but *Daubert* rejected admitting evidence based simply on what was generally accepted by experts in the field, otherwise known as the *Frye* test. [2] *Daubert* required more scrutiny. Under *Daubert* and its multi-factor test, an expert's opinion should be excluded, unless it is based on scientific knowledge, meaning that it is demonstrably the product of sound scientific methodology.

Labor Code Section 5709 allows the Board discretion when applying rules of evidence and procedure. *Sargon* and its ongoing progeny are not a legal bar on what evidence the WCAB considers. (Labor Code Section 5709.) But these principles should still be applied to the weight and reliability of evidence, if not admissibility.

A major problem with CT claims is that Qualified Medical Evaluators (QME) are still allowed to apply a Frye type analysis. If it is generally accepted that office workers develop carpal tunnel syndrome from typing, then a QME may feel entirely justified in finding industrial injury, notwithstanding the growing body of scientific evidence that carpal tunnel syndrome is unrelated to such work activities. [3]

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The Workers' Compensation Newsletter is published by Laughlin, Falbo, Levy & Moresi LLP. Contributors to this issue include Michael Brady (Fresno), Jake Falbo (San Francisco), Ian Frazer (Redding) and Trevor Simonson (Fresno).

Should you have any questions or comments regarding the Laughlin, Falbo, Levy & Moresi newsletter, or would like to suggest a topic or recent case you think would be of interest, please contact:

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[2] *Frye v. United States*, (1923) 293 F. 1013

[3] See AMA Guides to the Evaluation of Disease and Injury Causation 2d Ed. Melhorn M.D.; Talmage M.D, Ackerman M.D., Hyman M.D. pp. 278 – 301.

MICHAEL LAUGHLIN AND THE FORMATION OF A LEGACY

By: Jake Falbo, LFLM San Francisco

On June 19, 2017, we at Laughlin, Falbo, Levy and Moresi announced with profound sadness the sudden passing of founding partner Michael William Laughlin. Mike was 78 years old and with his family when he peacefully passed away.

That his funeral at the large St. Isabella's Church was filled to capacity is a surprise to no one. That friends and family came from all over California and well beyond to attend also surprises no one. Mike's devotion to his family with four children and thirteen grandchildren, his faith, love of golf and Notre Dame and his good works outside of his life at LFLM are well chronicled.

Although LFLM was officially formed in 1985, the "partnership" actually began years before as the workers' compensation department at the now international trial firm Sedgwick, Detert, Moran, and Arnold. Originally founded in 1933, Mike joined the Sedgwick firm in the 1960's followed by fellow LFLM founding partners Gerald A. Falbo, Roger Levy & Alfonso Moresi, among others.

LFLM started with fourteen attorneys in San Francisco as a "family first" firm. No one exemplified this more than Mike Laughlin who raised four children as a single father after the loss of his first wife, and managed to attend most, if not all of their sporting events and activities. Mike was the center of his family and at least once a year the center of the community hosting an annual St. Patrick's Day Party that began in 1967, and this year celebrated its 50th anniversary.

In the early years the firm held an annual picnic, and at each one Mike and his fellow founders would stand over the barbecue and cook for the entire law firm staff. They never took for granted the hard work of the many people it took to make LFLM successful. That their loyalty was returned was made all the more evident by the many former employees who attended Mike's funeral.

To those of us who had the great fortune to know Mike and work side by side with him, his loss is felt every day. This remains true even though he had retired from active practice quite some time ago. While his career was born long before the age of voice mails, emails and smartphones, it was not uncommon to receive his opinion regarding the quality of an evaluator or a legal issue in response to a "global" query presented by an LFLM attorney right up until his passing. When he weighed in on a topic, you can be sure we all paid attention to what he had to say.

Thirty plus years later, the firm has grown to eleven offices and over 160 attorneys statewide. While becoming the largest workers' compensation firm has its challenges, the current partnership strives to maintain the sense of family and loyalty instilled by Mike and the founding partners. Equally important is maintaining the highest standards of ethics, professional and top quality legal work exemplified by Mike Laughlin.

Author's note – *I knew Mike Laughlin and his family quite literally my entire life. When I was born our families shared a duplex and later moved to the same street in Marinwood. I knew Mike Laughlin the "dad" long before I had any understanding of Mike Laughlin the "lawyer". I have read the wonderful obituaries and comments from friends, colleagues and family members and I can assure the reader that those comments and his accomplishments and deeds do not amount to hyperbole in any sense of the word.*

Although in hindsight it may have seemed inevitable, but when I went to law school I did not go with dreams of practicing workers' compensation law. Nor did I assume I would end up at LFLM. But it was 1992 and the economic realties of the time being what they were, I ended up as a new attorney in the Redding office. It was then that I began to get a real sense of the reputation of Mike and the other founding partners often by seeing cases they argued reported in the case books. I can recall wondering at the time how in the world I ended up there.

Twelve years later our firm presented the first in a series of statewide seminars regarding the latest major workers' compensation reform. I found myself seated next to Mike at a podium in front of five hundred or so clients. I very distinctly recall thinking to myself that one of us

MIKE LAUGHLIN Cont.

didn't belong there. Of course Mike was absolutely gracious and gave me the easiest topic to discuss and did what he could to help me look and feel like I belonged up there with him.

Fast forward to Mike's retirement from every day practice and the San Francisco managing partner at the time, Phil Klein, told me I would be moving into Mike's office. Once again I wondered how in the world I ended up there. Mike took with him most of his personal belongings but left behind a golf painting, on the wall which hangs to this day, and his 1976 Baseball Encyclopedia which resides on the book shelf behind HIS desk among the many years of Labor Codes and other treatises designed to make us all better lawyers.

It was a tremendous honor to be asked to write this testimonial and add my words to the many well written memorials to Mike. There is obviously much more that can be said and I'm sure will be said as we remember Mike through the coming years. Many of us have and will continue to raise a glass of Jameson's and toast to his memory. And not just on St. Patrick's Day. ♦

APPORTIONMENT

(Continued from page 1)

Why Do Defendants Want Apportionment?

- Defendants want apportionment because it reduces the employer/carrier's liability of permanent disability indemnity.

- If a body part is apportioned completely to non-industrial factors, Defendants are not liable for the future medical care associated with that injured body part. However, keep in mind that if at least 1% of that injury is determined to be due to the applicant's work injury, then Defendants will be responsible for the future medical care associated with that injured body part.

- On a denied claim, when medical treatment to the alleged injured body part occurs throughout the course of the claim, and that body part is later found to be apportioned completely to non-industrial factors, then there is a strong basis to challenge payment of those liens. The success of challenging those liens will depend on the strength of the evaluators report and whether it constitutes substantial medical evidence.

How do Defendants Keep Apportionment?
Application of *Escobedo* Decision

In *Escobedo v. Marshalls* (2005) 10 CCC 604 (*en banc*), the appeals board found that the applicant continues to have the initial burden of establishing an industrial injury. The applicant must also prove by a preponderance of the evidence the overall level of permanent disability and that a portion of the permanent disability was industrially caused.

The employer must prove that non-industrial factors are attributable to the permanent disability provided for the industrial injury. Since the employer is the beneficiary of apportionment to non-industrial factors, they have the burden of proving the validity of the apportionment provided. (*Escobedo* at 613-614).

As referenced above, Labor Code Section 4663 specifies that a physician's report must not only discuss apportionment but also provide approximate percentages of permanent disability caused by the industrial injury as well as outside factors. If the physician cannot make a determination regarding apportionment, they are to provide specific reasons why they are unable to do so. They must then consult with outside physicians or refer the applicant to another physician so a determination regarding apportionment can be made.

A physician evaluating the applicant is not the lone arbiter in determining the amount of apportionment provided to the applicant. Both the appeals board and the reporting physician(s) are to make decisions regarding the applicable percentage of permanent disability

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caused by the industrial injury and the percentage caused by non-industrial factors. (*Escobedo* at 607.)

A Substantial Report Must Have:

1. The report must describe, in detail, the precise basis of the applicant's apportionable disability and provide specific reasoning for the opinion so the WCAB can ascertain whether the physician provided apportionment according to applicable law.

2. Specifically, the medical opinion in the report must provide an opinion on apportionment that is based on a "reasonable medical probability" i.e. reasoning and discussion that lead to a supportable conclusion.

3. The opinion must not be speculative.

4. The opinion must be based on relevant facts and factors gleaned from a physical examination of the applicant and the applicant's medical history.

5. Approximations on apportionment can still be substantial medical evidence. A doctor may simply state that their opinions are based on their medical expertise. (See *Andersen v. WCAB* (2007) 72 CCC 389, 398. See *City of Jackson v. WCAB* (*Rice*) (2017) C078706.)

What Happens If Applicant Has An Asymptomatic Pre-Existing Non-Industrial Condition(s)?

In *E.L. Yeager Construction v. WCAB (Gatten)* (2006) 71 CCC 1687) the appeals board found that the applicant's degenerative disc disease could be asymptomatic prior to an industrial injury and still be apportionable. This holding was further solidified by the holding in *Brodie v. WCAB*, (2007) 72 CCC 565, wherein the California Supreme Court found that "[t]he plain language of new section 4663 and 4663 demonstrates they were intended to reverse these features of former sections 4663 and 4750" and "eliminate the bar against apportionment based on pathology and asymptomatic causes." (*Brodie* at 576.)

** Please see our recent E-Flash article on the decision in the *Rice* case for additional information in this area. It can be found on our website:

http://www.lflm.com/wp-content/uploads/2017/04/04272017-CityOfJacksonVRice-Genetic-Disposition.pdf

Conclusion

What we hope you take away from this article is an introduction, or refresher to apportionment and the importance of keeping apportionment when it is available. When defendants obtain substantial amounts of apportionment to non-industrial factors, be prepared for a challenge from applicant's attorney. That being said, keep the following in mind:

APPORTIONMENT Cont.

Practice Pointers:

- When reading a Medical-Legal report, make sure that apportionment is addressed and determine whether it was based on "reasonable medical probability".
- If the physician is unable to make a determination regarding apportionment, he or she must explain in detail specific reasons why they are unable to do so and then consult with outside physicians or refer the applicant to another physician so a determination regarding apportionment can be made.
- Ensure that the factors listed above regarding substantial medical evidence are addressed within the report and, specifically, within the apportionment discussion. If the report is unfavorable, absence of the factors can provide a basis to refute the report or to depose the physician.
- If apportionment to non-industrial factors is favorable, take extra care in analyzing the report to ensure that it is "substantial medical evidence". If not, it would be wise to rehabilitate the report by requesting a Supplemental Report from the physician prior to filing a Declaration of Readiness to Proceed. ♦

CT CLAIMS

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An expert opinion is of no value if its basis is unsound. (*Sargon*, 55 Cal. 4th at 770.) A court, or the Board, should make a limited inquiry into whether the studies and information relied upon by the expert supports the conclusion that the expert's theory or technique is valid. (*Id*. at p. 772.) The court is to act as a gatekeeper, making certain that the studies or personal experience employed by the expert have sufficient intellectual and scientific rigor. (*Id*.) Has the methodology been tested? Was there a peer review? Is there a known rate of error? Are there established and known standards for evaluation? "[T]he gatekeepers focus must be on principles and methodology, not conclusions." (*Id*.)

It is not sufficient for a medical-legal evaluator to state that their opinion is based on their "training, skill, and experience". That touchstone gives the Board no basis on which to determine the reliability of the expert's opinion. Doctors should be challenged to identify the basis of their opinion as to the existence of a cumulative trauma.

The evidence in *McAllister* was uncontested. (*McAllister*, 69 Cal. 2d 408.) The QME in *Clark* was deposed but the basis of his opinion was not challenged. (*Clark*, 61 Cal. 4th at pp. 295 – 296.) These cases serve as examples of missed opportunities in litigation. Doctors must be asked to explain the how and why of their opinion under *Escobedo*. Under *Sargon* they must also demonstrate the scientific reliability of their theories; they cannot simply rely on what they have done in the past or the consensus among experts in their field. That means digging into medical literature and challenging conventional notions. It requires asking questions. If done right, illegitimate claimants will have difficulty proving that their employment caused a materially heightened risk of injury. There will not be reliable scientific evidence demonstrating that the work put the claimant at a materially heightened risk of injury when compared to the general population.

A benefits delivery system should be concerned about delivering benefits to those who are legitimately entitled. The benefits available to injured workers have been reduced repeatedly because the system does a poor job at discriminating between those who are entitled to benefits and those who are not. Waste, fraud, and abuse can be combated by knowing what the law is and demanding that it be followed. [4] ♦

[4] Ex: Spine J. 2009 Jan-Feb; 9(1) 47-59 **The Twin Spine Study: contributions to changing view of disc degeneration.** A nearly two decade high quality cohort study finding that disc degeneration is not the result of "wear and tear" from physical loading, but primarily caused by genetics.

UPCOMING CONFERENCES

2017 EWC Conference
Executives in Workers' Compensation
August 17, 2017
The Richard Nixon Library & Museum - Yorba Linda, California

LA RIMS Summer Mixer
The Risk Management Society
August 17, 2017
Jonathan Beach Club - Santa Monica, California

2017 California WC & Risk Conference
Kentucky Derby theme - Get your bowties & big hats ready!
Charity Golf Tournament: **September 5, 2017**
Conference & Expo: **September 6 - 8, 2017**
Monarch Beach Resort - Dana Point, California
Pre-Conference: September 5, 2017 (1pm-5pm) - "Leadership, Diversity & Inclusion"
Hosted by: The Alliance of Women in Workers' Compensation
Come visit the LFLM booth!

2017 CAJPA Annual Fall Conference
California Association of Joint Powers Authorities
September 12 - 15, 2017
South Lake Tahoe - Lake Tahoe Resort, Harrah's & Harveys
Come visit the LFLM booth!

2017 DVICA Annual Half Day Seminar
Diablo Valley Industrial Claims Association
"Comp & Order: Trials and the WCAB"
September 21, 2017
Walnut Creek Marriott
12:30 pm - 6:00 pm
The Master of Ceremonies is our very own Jeffrey Lowe of the Oakland LFLM office!
Visit the DVICA website for further details: http://dvica.wildapricot.org/event-2610365

2017 CWCDAA Winter Conference
California Workers' Compensation Defense Attorney's Association
November 3 - 5, 2017
Disney's Grand Californian Hotel & Spa - Anaheim, California

2018 PARMA Annual Conference
Public Agency Risk Managers Association
February 14 - 16, 2018
Monterey Conference Center - Monterey, California
Visit the PARMA website for further details: http://parma.com/

Save The Dates

The holidays are coming and Laughlin, Falbo, Levy & Moresi LLP wants to celebrate the end of another wonderful year with you at our 2017 Holiday parties.

Keep your calendars open for upcoming events at the following locations:

Bay Area - Tarantino's (Fisherman's Wharf, San Francisco) - Thursday, November 30, 2017

Sacramento - Vanguard (1415 L Street) - Friday, December 8, 2017

Southern California - Catal (Downtown Disney) - Friday, December 15, 2017

Invitations will be emailed out in early November. Hope you can join us!

Kids' Chance of California (KCOCA)

Educating Children of Injured Workers

KCOCA is a non-profit organization dedicated to providing need-based scholarships to the children of fatally or seriously injured workers in California. Now in its fifth year since inception, KCOCA has raised more than $480,000 and provided 19 students with scholarships for college and technical school.

The organization maintains exhibit booths and speaking opportunities at the various industry conferences throughout California such as PARMA, DWC Los Angeles and Oakland, as well as CSIA. If you are attending any of these conferences, swing by the KCOCA booth and say hello! Pick up some information on how you can get involved in improving the lives of the children of injured workers. Make a donation, refer a scholarship or volunteer your time.

Visit www.kidschanceca.org or call (415) 561-6275.

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