LAUGHLIN, FALBO LEVY & MORESI LLP

LINDH UPENDS STATUS QUO:

Legitimizes Apportionment to Underlying Asymptomatic Conditions

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The First District Court of Appeal has given employers and carriers an unexpected but deeply appreciated Christmas present a few days early with its published opinion in *City of Petaluma v. WCAB* (*Lindh*), No. A153811, which issued on December 10, 2018. The case reinforces and reinvigorates the notion that legally valid apportionment can come from underlying pathology or an asymptomatic pre-existing condition or disease.

Though **SB 899** was supposed to create a sea change in how the compensation system worked for carriers and employers (and likely it has in some instances), when it came to apportionment law interpreting amended **Labor Code §4663** and new **Labor Code §4664**, all defendants got was a small and muddy puddle, instead of a tsunami of change. By and large, the Board adjudication system and the applicants' bar has done a very effective job in neutralizing the impact of the new apportionment statutes. The mantra since 2004 has been that any effort to apportion to pre-existing, asymptomatic, degenerative or congenital conditions was really a fool's pursuit. Any doctor who had the audacity to try to make such an apportionment was met with the mantra that he or she was "conflating" (whatever that might be) the causation of injury with the causation of disability. All the risk factors and underlying conditions that evaluating doctors may have used as grounds for disability apportionment were misguided and only related to the cause of the injury and not to the cause of the resulting disability.

Early cases like *Brodie v. WCAB* (2007) 40 C4th 1313, 35 CWCR 117, 72 CCC 565, which accurately reflected the initial sea change thought process to broaden apportionment for defendants, slowly faded from memory and were conveniently ignored. However, that applicant-friendly trend may now be reversing itself. The case of *City of Jackson v. WCAB* (*Rice*) (2017) 11 CA5th 109, 45 CWCR 89, 82 CCC 435, allowing for an apportionment to hereditary factors, seems to have started the momentum in the opposite direction. *Lindh* now adds a great deal more legitimacy to allowing apportionment to pre-existing, asymptomatic physical conditions. The case is a very sympathetic one for the applicant, a police officer who took several blows to his left eye area while doing canine training and a few weeks later lost vision in that eye. It turns out that he had a blood circulation defect in the left eye. The QME in the case, a neuro-ophthalmologist, gave applicant a 40% rating for his loss of vision but said that 85% of the disability was a result of the underlying asymptomatic condition. The trial judge and the Board predictably rejected any apportionment since there was no evidence that applicant would have lost his vision without the blows to his head at the time of his industrial injury. (The poor doctor was, of course, confusing causation of the injury with causation of disability, according to applicant, the trial judge and the Board panel.)

However, the Court of Appeal took a fresh look at the situation and how apportionment was supposed to change after the 2004 reforms. Industrial permanent disability should only be the percentage caused as a **direct** result of an injury. Here the underlying vascular condition was not merely a "risk factor," but rather was an **actual** cause of a portion of applicant's permanent disability when he suffered his industrial injury. The doctor's opinion was that the serious underlying condition was by far the major cause of the disability, though a portion of it resulted from the dog training accident.

Lindh gives current apportionment deniers something very serious to contend with, from here on out. Given the potential financial hit to the applicants' bar, it is likely that this case is going to be appealed to the Supreme Court.

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