Fifteen Cases Every QME Should Know

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Escobedo v Marshalls, (2005) 70 Cal Comp Cases 604, WCAB *en banc* decision

- Applicant suffered a bilateral knee injury on 10/28/2002. The evaluating physician apportioned 50% of the disability to the industrial event and 50% to largely asymptomatic but substantial pre-existing degenerative arthritis. Applicant argued that there was not substantial evidence to support the apportionment determination. The WCAB affirmed the apportionment under section 4663.

Escobedo

- Whether addressing causation of injury, causation of disability, or any other issue requiring expert medical opinion a comprehensive medical evaluation must constitute substantial medical evidence.

Escobedo

* To be substantial medical evidence on either issue the report must:
* 1.be framed in terms of reasonable medical probability
* 2. not be based on speculation.
* 3. must be based upon pertinent facts
* 4. must be based upon an adequate examination and history
* 5. must set forth the reasoning in support of its conclusions.
* **(*Escobedo*, at pg 621)**

Escobedo

* The WCAB, in *Escobedo*, refers to the last element as describing the "how and why" for the conclusion.
* "Section 4663(a)'s statement that the apportionment of permanent disability shall be based upon "causation" refers to the causation of the permanent disability not the causation of the injury and the analysis of the causal factors of permanent disability for the purpose of apportionment may be different from the analysis of the causal factors of the injury.""

Escobedo

* It is not uncommon to see a discussion of apportionment in a comprehensive medical report even where the physician has determined that the individual has not yet reached maximum medical improvement. Any such assessment is susceptible to attack by either party who finds the assessment not to their likely. In such circumstances the better course of action is to defer any discussion of causation of permanent disability (apportionment) until the physician has determined the worker to be permanent and stationary with residual impairment.

South Coast Framing v WCAB (Clark) 61 Cal. 4th 291, 80 Cal Comp Cases 489.

- The Court holds:
- "In general, for the purpose of the causation requirement in workers compensation, it is sufficient if the connection between work and the injury be a contributing cause of the injury." **(at 80 Cal Comp Cases pg 494)**

South Coast

* The industrial component need only be a contributing cause whether substantial or not. The medical evidence need not identify the percentage contribution the work contribution. The standard applies in cases of acceleration, aggravation or lighting up of a pre-existing condition.

South Coast

* Causation of injury is a question of fact and must be supported by substantial evidence. Thus the question is whether there is reasonable medical probability that the work played some role in the injury.

South Coast

* For most situation this is the end of the causation of injury analysis. As the Supreme Court noted, even the inability to quantify the extent of the contribution would not defeat the claim. In reaching this conclusion the Court looks to the underlying purpose of the Workers’ Compensation system (sometimes referred to as the Grand Bargain)

South Coast

* “It seeks (1) to ensure that the cost of industrial injuries will be part of the cost of goods rather than a burden upon society, (2) to guarantee prompt limited compensation for an employee’s work injuries, regardless of fault, as an inevitable cost of production, (3) to spur increased industrial safety, and (4) in return, to insulate the employer from tort liability for his employees’ injuries.” **(at pg 494 citing to S.G. Borello)**

Brodie v. WCAB (2007) 72 CCC 565 California Supreme Court

* These were a group of five consolidated cases in which there were conflicting lower court decisions regarding the proper application of the newly adopted apportionment rules under the SB899 amendment of Labor Code section 4663 and the newly adopted section 4664. The Court used these cases to set forth the proper interpretation of the new apportionment process in light of the newly enacted provisions and the repeal of Labor Code section 4750.

Brodie

* Apportionment under SB 89 shall be based upon causation. 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.

Brodie

* The employer shall only be liable for the percentage of disability directly caused by the industrial injury. Labor Code 4663 authorizes the apportionment by causation assessment and Labor Code section 4664 confined the employer's liability to that portion directly caused by the industrial injury. The plain language of sections 4663 and 4664 demonstrates the Legislature's intent to reverse the long line of prior cases which severely limited assigning apportionment percentages to other factors.

Benson v The Permanente Medical Group and Athens Administrators

* **WCAB en Banc decision**
* Applicant suffered both a specific injury to her neck as well as a cumulative trauma injury to the neck ending on the same date as the specific injury. The combined value of the permanent disability arising out of the two injuries was 62%.

Benson

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* The WCAB determined that the disability, under the fact presented, must be apportioned separately as to each injury instead of awarding a single combined award. The prior approach under the *Wilkinson* doctrine of awarding a combined value where two injuries began permanent and stationary simultaneous was no longer applicable in light of the legislative changes adopted under SB 899.

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Benson

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* The Board identified a limited single exception where the physician cannot parcel out, with reasonable medical probability, the approximate percentages to which each injury causally contributed to the overall disability. In such a case, a combined disability may be justified.

Benson

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* “… a physician’s apportionment determination with the meaning of section 4663 will depend significantly on the facts presented. However, given the reporting requirements of section 4663 (b) and (c), we anticipate that in many, if not most instances, physicians will arrive at *some* apportionment determination in successive injury cases. “

Benson

* “…any effort to medically separate the causative effects of each discrete injury may be frustrated by the fact that the second injury may prevent the first from healing properly, converting that which would have been temporary disability into a permanent disability or the first injury may render the injured part of the body unusually weak or sensitive and thus contribute to the damage caused by the second. Under such circumstances, am allocation of the causation of the combined disability between the multiple injuries may be impossible or inequitable or may be no more than speculation and guesswork.”

Benson

* "… Medicine is not an exact science. Of necessity every medical opinion must be in a sense speculative but this does not destroy the probative value of such an opinion. Candor and intellectual integrity often compel an honest physician to state that his opinion does not rest upon scientific certainty."

Minvielle vs. County of Contra Costa 36 CWCR 199

* An award under the 1950 PDRS may not be deducted from an award under the 2005 PDRS under section 4664. The defendant has the burden of establishing overlap where there is a prior award.

Minvielle

* Although the trial judge deducted the prior larger award from the more recent injury resulting in a 0 pd award, the WCAB reversed finding the defendant failed in its burden to establish overlap of the two disabilities

Lopez v WCAB (Jan 2011) 76 Cal. Comp. Cases 180 writ denied

- Where a physician fails to indicate that an applicant's grip loss was not adequately considered in his range of motion testing, the WPI for the range of motion loss will be considered adequate, even where the evaluator describes a separate WPI for grip loss.

Lopez

* The WCAB noted that the AMA Guides generally does not provide for determinations based on grip strength. They note that, in rare cases, such tests may be used where "an impairing factor that has not been considered adequately by other methods" impacts on the loss of strength. The Board noted that the QME did not indicate that the range of motion method did not adequately consider the grip loss.

City of Los Angeles v WCAB (Montenegro) 81 Cal Comp Cases 611 Writ denied

* Labor Code section 4660.1(c)(1) does not prohibit the award of permanent disability for sexual dysfunction where that condition arises directly out of the injury as opposed to the consequence of some other physical injury

Montenegro

* The parties employed an AME who found the cancer to be industrial and provided an impairment rating for sexual dysfunction on the basis that the condition was the direct result of the "radical prostatectomy necessitate by the industrially related cancer. The matter went to trial on the sole issue of whether Labor Code section 4660.1(c)(1) prohibited the award of disability for the sexual dysfunction. After trial, the judge awarded 78% disability which represented an inclusion of 4% for the sexual dysfunction.

Montenegro

* In affirming the WCJ, the Board agreed with the judge's analysis that this was not the sort of circumstance the Legislature contemplated when prohibiting "add on" ratings for sexual dysfunctions arising as a psychiatric component of physical injury to some other body part. Here there was direct damage to the nerves as a result of the surgery for the industrial cancer resulting in erectile dysfunction.

Dollemore v. Wayne Perry Inc./Starr Show Plus Lines, 47 CWCR 10 [Decision After Removal].

* An ex parte communication to the PQME is impermissible, and the judge should determine whether the defendant had objected within a reasonable time or had engaged in conduct inconsistent with an election to disregard the evaluation following discovery of the communication.

Dollemore

* The panel observed that § 4062.3(e) provides that a communication with a PQME must be in writing and served on the opposing party 20 days in advance of the evaluation. The e-mail sent in this case was clearly an ex parte communication. It was therefore unnecessary for the defense to show or demonstrate prejudice

Bass v State of California
82 Cal Comp Cases 1034

* Where there is a single period of cumulative injury affecting multiple body parts over an injured worker's work life there is a single injury even where defendant alleges the body parts were impacted by separate processes.

Bass

* The WCJ concluded that since the evidence demonstrated that the cardiac and orthopedic conditions represented separate impacts upon the worker’s ability to participate in the labor force they should be added rather than combined.

Bass

* The Board found that the issue of whether to add or combine is “a medical question.” Since the medical reports were silent on the issue, there was no substantial evidence to support the finding. The Board noted the WCJ’s duty to develop the record where there is an absence of evidence addressing an issue and remanded the matter back to the trial level to augment the record.
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Riolo v Aidells Sausage/Zenith Ins. Co. (March 2019) 47 CWCR 32 .

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* A divided panel ruled that under L.C. §5701, in order to utilize a physician in a different medical specialty, pain management, from that of the existing orthopedic Panel Qualified Medical Examiner (PQME) is an appropriate exercise of a discretion pursuant to §5701.

Blackledge v Bank of America and Ace American (2010) WCAB en banc decision

* The WCAB, en banc, issued a decision discussing the appropriate roles of the evaluating physician, the judge and the rater.

Blackledge

* In identifying the role of the physician the WCAB noted:
* “The physician’s role is to assess the injured employee’s whole person impairment percentages by a report that sets forth facts and reasoning to support its conclusions and that comports with the AMA Guides and case law.

Blackledge

* The first step in assessing an injured employee's permanent disability has long been a comprehensive medical-legal report prepared by a treating or evaluating physician. The basic elements of an AMA Guides compliant medical report are set forth in the Guides. These elements are substantially the same as those that have long been set forth in WCAB rule 10606

Blackledge

* Under the AMA, Guides, a physician performs an evaluation to determine the WPI(s) for the injured employee's medical condition(s), expressed as a percentage. The impairment evaluation includes a discussion of the employee's history and symptoms, the results of the physician's examination, the results of various tests and diagnostic procedures, the diagnosis, the anticipated clinical course, the need for further medical treatment, and the residual functional capacity and the ability to perform activities of daily living.

Blackledge

* After considering all of these factors, the physician compares the medical findings for each condition with the impairment criteria listed within the Guides and then calculates the approximate impairment rating(s) for the condition(s). The physician's report should include a summary list of the impairments and the impairment ratings by percentage, together with a calculation of the final WPI and a statement of rationale underlying the WPI opinion.

Blackledge

* It is essential for a medical report to state the physician's actual WPI rating for each medical condition because WPI ratings cannot be mechanically assigned merely by reviewing the medical findings contained in the report.
* …

Blackledge

* The expert opinion of a single physician may establish an injured employee's WPI, provided that the opinion constitutes substantial evidence. Among other things, to constitute substantial evidence regarding WPI a physician's opinion must comport with the AMA Guides, including as applied and interpreted in published appellate opinions and en banc decisions. Also a physician's opinion regarding WPI must set forth the physician's reasoning, not merely his or her conclusions.

Blackledge

* Accordingly, when a physician evaluates an injured employee's WPI(s), the physician must explain how he or she arrived at the WPI(s) so that the parties and the WCAB can determine whether the WPI(s) are consistent with the AMA Guides."

Milpitas Unified School District v WCAB (Guzman) 75 Cal Comp Cases 837

- (***Almarez/Guzman II*** (2009)74 Cal Comp Cases 1084)
- (***Almarez/Guzman I*** (2009) 74 Cal Comp Cases 204)
- These are a succession of cases first at the WCAB and then before the Sixth Appellate District Court of Appeal discussing the rebuttal of an AMA "standard" WPI rating. The WCAB consolidated the two cases and issued two separate substantive decisions with the second clarifying and modifying the first decision.

Almarez/Guzman

* The Guzman case was further appealed to the Court of Appeal, which affirmed the WCAB en banc decision

Almarez/Guzman

* The Board affirmed that the WPI element of the rating string is rebuttable where the “standard” rating is not an accurate reflection of the entire impairment arising from the injury. However, using the old PDRS methodology is not a valid approach. The Board concluded that a physician may use any chapter, table or method set forth within the four corners of the Guides.

Almarez/Guzman

* The Court upheld the WCAB but expressed a belief that there may be circumstances where going outside the Guides may be permissible.
* In order to rebut the “standard” rating a physician must first identify the standard rate.

Almarez/Guzman

* Secondly, the physician must set forth the reasoning as to why that assessment is not the most accurate impairment rate. The physician must then identify the more accurate alternative rating and provide an explanation as to why the alternative rating is more accurate.

Vargas v Atascadero State Hospital and SCIF (2006) 71 Cal Comp Cases 500

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* Applicant suffered an injury to her left upper extremity and neck. The case was originally rated both as to disability and apportionment under the pre 2004 law. Applicant filed a petition to reopen and was found to have suffered increased disability based upon the applicant developing TMJ and psychiatric disability as a compensable consequence of the original injury.

Vargas

- While the determination regarding the petition to reopen was pending, the new apportionment standard was enacted. The WCJ vacated the submission of the case and ordered further development of the record in light of the changes in the apportionment law.

Vargas

* The WCAB found that the new apportionment standards were applicable to the issue of the increased disability over and above the original award. The evaluator cannot revisit the apportionment assessment determined by an award issued prior to April 19, 2004. The apportionment assessment of the increased disability must be made independent of the original award.

Sanchez v County of Los Angeles and Tristar 70 Cal Comp Cases 1440

* Where the employee suffers a industrial injury causing permanent disability, and where there is a prior award of permanent disability to the same region of the body, section 4664 requires the apportionment of overlapping disabilities.

Sanchez

* An employee is not entitled to compensation for a new injury to the extent that the permanent disability is overlapped by a prior permanent disability.
* The defendant has the burden to prove the existence of any prior disability award to the same body region.

Sanchez

* When the defendant has established the existence of prior disability to the same body region, the employee may not establish medical rehabilitation from that prior disability. Once the defendant establishes the existence of the prior permanent disability award the prior award will be subtracted from the current disability unless the employee disproves overlap. The applicant must prove that the two disabilities affect different abilities to compete and earn, either in whole or in part.