

Permanent Disability and Apportionment

Who's on First and Which Base Do We Run to Now?

This is a discussion about the current status of permanent disability and apportionment. We will cover up-to-date case law and offer practical suggestions on how to maneuver through these confusing issues.

SPEAKERS

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PERMANENT DISABILITY

WHICH SCHEDULE APPLIES?

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PERMANENT DISABILITY

- The existence of medical findings prior to 1/1/05 indicating permanent disability exists
- The payment of temporary disability prior to January 1, 2005.

PERMANENT DISABILITY

Medical Findings

Joseph Baglione vs Hertz Car Sales and AIG,
Adjusted by Cambridge Integrated Services,
(2007) 72 CCC 86, *en banc*

The existence of a comprehensive medical-legal report prior to 1/1/05, results in the 1997 Permanent Disability Rating applying, even if the report does not “indicate the existence of permanent disability”.

Trial decision...

New schedule applied as there was no report from a treating physician or a comprehensive medical/legal report, prior to 1/1/05, indicating permanent disability existed.

Commissioners decided...

The existence of a comprehensive medical-legal report prior to 1/1/05, results in the 1997 Permanent Disability Rating applying, even if the report does not “indicate the existence of permanent disability”.

Commissioners distinguished...

“...For compensable claims arising before 1/1/05, the schedule as revised....shall apply to the determination of permanent disabilities when there has been either no comprehensive medical legal report or no report by a treating physician indicating the existence of permanent disability,...”

Labor Code Section 4660(d)

Commissioners distinguished...

For compensable claims arising before April 30, 2004, the schedule provided in this subdivision shall not apply to the determination of permanent disabilities when there has been either a comprehensive medical-legal report or a report by a treating physician, indicating the existence of permanent disability..."

Labor Code Section 4658(d)(4)

The Dreaded Comma!

;

What rule?

“Simply stated, the last antecedent rule means that ‘qualifying words, phrases and clauses are to be applied to the words of phrases immediately preceding and are not to be construed as extending to or others more remote.’ ”

Back to High School English

**“...no comprehensive medical-legal report
or no report by a treating physician”**

(this is the immediately preceding antecedent to the
qualifying phrase)

**indicating the existence of permanent
disability,...”**

PERMANENT DISABILITY

Medical Findings

State Compensation Insurance Fund v. WCAB
(Jose Echeverria), (2007) 72 CCC 33 Certified
for Publication

The existence of a treating physician's report prior to 1/1/05, which merely states there a reasonable medical probability that permanent disability will exist, is insufficient to the exceptions of Labor Code Section 4660(d) to apply.

Most helpful doctor letter...

“I believe permanent disability is within reasonable medical probability emanating from this injury.”

Name of Doctor

Date (before 1/1/05)

Lack of Substantial Evidence

- There was no reasoning by the treating physician to support his finding of permanent disability;
- There was no physical examination of applicant;
- There was no prognosis;
- Just a declaration, which is not enough

PERMANENT DISABILITY

Medical Findings

If you have a one line report, challenge it. It is not substantial evidence to support the existence of permanent disability.

PERMANENT DISABILITY

Notice Requirements

Josh Pendergrass vs. Duggan Plumbing and
State Compensation Insurance Fund, (2007)
72 CCC 95, *en banc*

If temporary disability commences prior to 1/1/05, the
1997 Permanent Disability Rating Schedule applies.

The History of Notice Requirements

Aldi

Which is the first case to reveal to us that if no notices were issued as to temporary disability or permanent disability prior to 1/1/05, the new schedule applies.

Followed by . . .

Shuyestah and Roman

High School English Lesson...Again

“Past perfect tense”

vs.

“Present tense”

English 101

“...For compensable claims arising before 1/1/05, the schedule as revised....shall apply to the determination of permanent disabilities when there has been either no comprehensive medical legal report or no report by a treating physician indicating the existence of permanent disability, or when the employer is not required to provide the notice required by Section 4061 to the injured worker.”

Labor Code Section 4660(d)

English 101

- Past perfect tense = “when there has been”
- Present tense = “is not required”

The New Math!

“is not required” = “is required”

Commissioners on Dissent

- “the plain language” of the code section
- The Legislative Intent

Commissioners on Dissent

“rendered an entire subdivision meaningless, in violation of the basic rule that interpretations are to be avoided that render some words surplusage, defy common sense, or lead to mischief or absurdity.”

SURPLUSAGE

Extraneous, impertinent, superfluous, or unnecessary matter.

(Black's Law Dictionary)

Effect on Claims Handling

- Denied Claim
- Dispute over retroactive temporary disability

SO WHAT!

Compromise



COMPROMISE

LET'S AGREE TO RESPECT EACH OTHER'S VIEWS,
NO MATTER HOW WRONG YOURS MAY BE.

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PERMANENT DISABILITY

Future Earning Capacity

Costa v Hardy Diagnostic and State
Compensation Insurance Fund (2006) 71 CCC
1797, en banc

The future earning capacity of the rating schedule may be challenged with rebuttal evidence. Costs to be considered on a case by case basis.

Rebuttal Evidence

- The deposition of an expert from another unrelated case is not admissible.
- Expert testimony can be used
- Costs for experts are to be considered on a case by case basis.

Plan of Action

- Do not agree to pay applicant's expert costs up front.
- Place the cost of expert testimony at issue

CONSEQUENCES

- Applicant may schedule a hearing on that issue alone.
- This will provide defendant with an opportunity to discredit the witness.
- Defendant will have an opportunity to demonstrate how ridiculous the requested fees are.



STRIFE

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APPORTIONMENT

WHAT DO WE DO NOW?

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*“What does the cannibal
get if he’s late for dinner?”*

“The Cold Shoulder.”

Labor Code §4663

- III. A physician must address apportionment per LC §4663 or utilize the services of another physician, via consult or referral, so that apportionment can be addressed.
- A. LC §4663 and Escobedo.
 - B. Burden of establishing permanent disability is on applicant.
 - C. The burden of establishing apportionment is on the defendant. However, the physician must still address apportionment.

Labor Code §4663

C. The legislature really meant it! Yeager Construction Co. v. WCAB (Gatten) 71 CCC ____ (11/27/06) Ct. of Appeals Unpub., 4th Appellate District. Don't need to use the "old standard" of assessing level of disability that would have existed absent the industrial injury.

“Now they fight tooth and nail.”

Labor Code §4664

- II. The conclusive presumption is not affected by the body parts or regions involved in the prior award or the subsequent injury.
(Strong)

Labor Code §4664

V. Once defendant establishes the prior award, how is the prior award to be deducted?

The Chronology

E. Welcher v WCAB, Strong v WCAB, Lopez v WCAB, Williams v WCAB (2006)

Was: 71 C.C.C. 1087, 2006 Cal.Wrk.Comp.Lexis 284, Court of Appeal, 3rd Appellate District (filed 8/31/06).

Now: Granted review by California Supreme Court S147030, (11/15/06).

Holds that it was not the intent of the legislature, in enacting LC 4663 and LC 4664, to dispose of “longstanding” apportionment principles under Fuentes v WCAB (1976) 16 Cal.3rd 1. Therefore, deduct by percentages.

The Chronology

Dykes

70% = \$111,562.50 +LP
Less prior
20% Award = \$10,434.00
Total:
To I.M Hurt - \$101,128.50 +LP

Brodie

70% = \$111,562.50 +LP
Less prior
20% Award = \$18,050.00
Total:
To I.M Hurt - \$93,512.50 + LP

The Chronology

Welcher

Overall PD percentage 70%

Prior Award percentage (20%)*

Net PD percentage 50% = \$57,200 to I.M. Hurt

(* subject to possible adjustment for subsequent-injury
age and occupation)

“Before you judge a man, walk a mile in his shoes. After that, who cares? He’s a mile away. And you have his shoes.”

- Billy Connolly

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