



Significant Decision

No. 17-03

April 26, 2017

CITY OF JACKSON V. WCAB (RICE)

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
THIRD APPELLATE DISTRICT
C078706

FILED: APRIL 26, 2017

Apportionment to causation may properly include apportionment to genetic causes, including pre-existing conditions or inherited predispositions.

Significance: In a published decision, the Court of Appeal has concluded that there is no relevant distinction between allowing apportionment based on a preexisting congenital or pathological condition under *Escobedo*, and allowing apportionment based on a preexisting degenerative condition caused by heredity or genetics.

Facts: Christopher Rice was employed as a police officer when he sustained cumulative injury to his neck at age 29; he was evaluated by QME Dr. Sloane Blair. Applicant's documented history included previous construction work; medical treatment for the cervical spine in 2003; a roll-over motor vehicle accident and two foot fractures; a family history including his father's hip replacement and significant back problems, indicating familial degenerative issues; and his own history of smoking. The QME concluded that the employee's disability was caused by cervical degenerative disc disease (DDD), and that the disease was caused in large part by heredity or genetics. In making this determination, Dr. Blair referenced multiple studies indicating that heredity and genetics are significant causes of DDD. The QME assigned causation 49% to the employee's personal history (including but not limited to genetic causes of DDD). Over the course of six separate reports, including two physical examinations, Dr. Blair provided a consistent account of her apportionment findings based on her evaluations and on the medical records, and included extensive references to various medical literature to support her conclusions. Following trial, the WCJ found that the City had met its burden to demonstrate apportionment of 49% attributable to genetic factors. Applicant appealed to the WCAB, who reversed the apportionment award apparently based on a speculative fear that apportionment to genetic factors "opens the door to apportionment of disability to impermissible immutable factors."

Holding: Apportionment may be properly based on genetics and heritability. Precluding apportionment based on “impermissible immutable factors” would preclude apportionment based on the very factors that the legislation now permits, *i.e.*, apportionment based on pathology and asymptomatic prior conditions for which the worker has an inherited predisposition.

Discussion: In light of the extensive medical evidence, and based largely on the WCAB’s own en banc decision in *Escobedo*, the Court of Appeal came to the correct conclusion. By upholding the apportionment determination in this case, the Court of Appeal has complied with Labor Code section 4664(a), requiring that the employer only be held liable for the percentage of permanent disability directly caused by the industrial injury. While both the Appeals Board and applicant denounced Dr. Blair’s apportionment to “genetic risk factors” (using inflammatory and objectionable terms), the fact remains that a reduction in permanent disability benefits based on a pre-existing condition that is a contributory factor of disability is not discrimination.

The Court flatly rejected the Appeals Board’s conclusion that Dr. Blair had improperly apportioned to causation of *injury* rather than causation of *disability*. In this case, the industrial injury was cumulative in nature. Contrary to the Appeals Board’s conclusion, Dr. Blair did not conclude that the repetitive motion (the injury) was caused by genetics; rather, Dr. Blair properly concluded that applicant’s disability (the debilitating pain preventing him from performing his job) was caused in large part by his genetics.

In a footnote, the Court declined to address CAAA’s argument that apportionment to genetics constitutes an unlawful invidious discrimination pursuant to Government Code section 11135, for the sole reason that the argument was not raised by applicant himself. This leaves open the potential that all of the arguments made in this case could be raised again in conjunction with the “unlawful discrimination” argument suggested by CAAA, provided that such argument is first raised on Reconsideration.

But until then, employers can rest assured that an evaluating physician may determine that a pre-existing condition and/or an inherited disease process have caused a percentage of a current disability, and may apportion accordingly. Such apportionment is not discrimination based on disability or objectionable risk factors, but simply constitutes valid apportionment as required by law.

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