



Significant Decision

No. 18-08

December 11, 2018

CITY OF PETALUMA V. WCAB (LINDH)

**IN THE FIRST DISTRICT COURT OF APPEAL
(A153811)**

FILED: DECEMBER 10, 2018

The salient question in workers' compensation apportionment is whether the disability resulted from both non-industrial and industrial causes. If so, apportionment is *required*.

Significance: The Court of Appeal held the new rules of apportionment do not require medical evidence that an asymptomatic pre-existing condition, in and of itself, would have become symptomatic or disabling. "Whether or not an asymptomatic pre-existing condition that contributed to the disability would, alone, have inevitably become manifest and resulted in disability, is immaterial."

Facts: While engaged in a canine training course, a police officer with a history of migraine headaches sustained 3-6 blows to the head by the muzzled dogs. Six weeks later, he lost all vision in his left eye. His treating physicians originally found no basis for industrial causation. The QME diagnosed an underlying condition (vascular spasticity) resulting in poor blood circulation to his left eye. At deposition, the QME agreed that applicant did not have any disability prior to receiving the blows to the head and that he might have gone his entire life without losing vision; he also testified that it was "unlikely" that applicant would have suffered vision loss absent the underlying condition. Ultimately, the QME apportioned 85% of the permanent disability to the pre-existing condition, and 15% to the industrial injury. The WCJ declined to award the apportionment, concluding that it was not supported by substantial evidence. On reconsideration, the Appeals Board upheld the WCJ's decision, finding that the QME had confused causation of injury with causation of disability. The Appeals Board further opined that applicant's pre-existing asymptomatic conditions were "mere risk factors" and that the actual disability was caused entirely by industrial factors. Defendant appealed.

Holding: In a published opinion, the First District Court of Appeal confirmed that the 2004 reform legislation (SB 899) overhauled the rules of apportionment, and now *requires* apportionment where the disability resulted from both nonindustrial and industrial causes. The case was remanded with instructions to award 85% apportionment to non-industrial factors.

Discussion: On whole, this opinion does not provide any new rules of law. Indeed, the 22-page opinion consists almost entirely of a surprisingly extensive discussion of prior case law applying the amended apportionment statutes (*Escobedo*, *Brodie*, *Yeager*, *Acme Steel*, and especially *City of Jackson*). The Court of Appeal in this case found that each of applicant's arguments here was merely echoing the contentions made and rejected in those cases:

Risk Factors

The Court of Appeal disapproved of the argument that applicant's underlying condition was a "mere risk factor," pointing to the Board's own prior rulings that a claim of improper apportionment to a risk factor ignores the medical opinion that applicant's pre-existing congenital condition went beyond being a risk factor to being an actual cause of the residual permanent disability: "That [the QME] also referred to this underlying condition as putting [applicant] at 'higher risk' of suffering the disability, does not change the fact that [applicant] had an underlying condition...that was, along with the work-place injury, a cause of his impaired vision."

And contrary to applicant's assertion that his migraine headaches were only a "risk factor," the Court of Appeal correctly recognized that the medical evidence showed that the migraine headaches were actually a symptom of and reflective of the underlying condition, not just a risk factor.

Degenerative Disease

The Court of Appeal seemed positively puzzled by applicant's (and CAAA's) insistence that an asymptomatic pre-existing condition must be "degenerative" in order to qualify for apportionment. At oral argument, counsel had argued that apportionment requires evidence that an asymptomatic pre-existing condition will, in and of itself, naturally progress to disability. But the court disagreed, correctly noting that this argument reflects the law *prior* to 2004. Similarly, the Court found "no merit" to applicant's claim that there can be no apportionment to a condition that did not cause disability prior to the DOI. "By definition, an asymptomatic pre-existing condition has not manifested itself and, thus, by definition has not caused prior disability." If prior disability were still a prerequisite to apportionment, there would have been no purpose in changing the law.

Injury vs. Disability

The decision includes a somewhat unsatisfactory discussion of injury versus disability, which had been the basis for the Appeals Board decision. As in the *City of Jackson* case, the Court of Appeal here simply pointed to the holding of *Escobedo* that the "percentage to which an applicant's injury is causally related to his or her employment is *not necessarily* the same as the percentage to which an applicant's permanent disability is causally related to his or her injury." According to this decision, if the QME adequately supports his apportionment opinion, the analysis in *Escobedo* (this Court cites to the *Escobedo* analysis three separate times) can justify a medical determination that the percentage cause of injury and the cause of disability may be the same. But once again, there is no in-depth analysis of the complex issue.

This decision sidesteps the most provocative question presented by the case: *What is the definition of injury?* If an employee falls down the stairs and breaks his left leg, is the "injury" defined as the left leg? Or is that simply the body part? Is the injury the fall? Or is that the mechanism of injury? Perhaps the injury is the fracture? Or is that the impairment/disability? In this case, CWCI and CAJPA argued in our joint amicus brief that the injury was the on-the-job blows to the head, and the disability was the impaired vision. Meanwhile the Appeals Board contended that applicant's "injury" was the optic occlusion, and that the blows to the head were the cause of the injury. But in a footnote, the Court of Appeal held that it need not definitively determine the meaning of "injury" to resolve this case. Too bad, as a more clearly defined definition of "injury" might have advanced the analysis of apportionment to injury versus disability.

But ultimately, even though it does not necessarily establish any new rule of law, this case does represent an important contribution to the growing collection of precedential case law confirming the validity of apportionment to pre-existing underlying conditions.

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