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THE DEFENSE PERSPECTIVE

AND OBSERVATIONS OF THE

CALIFORNIA APPLICANTS'

ATTORNEYS ASSOCIATION

CASTING "PEARLS OF THE AMA GUIDES" BEFORE THE SWINE

SUMMER CONVENTION, 2008

MONTEREY, CALIFORNIA

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2008 SUMMER CONVENTION OF THE CALIFORNIA APPLICANTS ATTORNEY'S ASSOCIATION CASTING "PEARLS OF THE AMA GUIDES" BEFORE THE SWINE MONTEREY, CALIFORNIA JUNE 26, 2008 - JUNE 29, 2008

A. INTRODUCTION

TO OUR CLIENTS:

As is our custom, we are reporting to our client's from the Summer Convention of the CAAA in Monterey, CA from June 26, 2008 through June 29, 2008 at the Portolo. This session was remarkable for the CAAA tradition of "turning lemons into lemonade." You may recall in the 1993 reforms, that what was, at the time, perceived as a defense gain with the presumption of the primary treating physician, was later turned into an applicant's gain when control was taken over by applicant's attorneys so early in the process that it was nearly impossible to overcome the presumption of the primary treating physician. We note that the CAAA is primed to do the same thing by use of some of the provisions of the AMA Guides as a basis for increasing Permanent Disability ratings with respect to their client's work injuries.

The theme of this session was to not only try to overcome the limitations on permanent disability set forth in the AMA Guides as a provision of SB 899 from April 2004, but also to reverse or diminish the effect of the Benson decision. Examples from practicing applicant's attorneys in the form of deposition transcripts were abundant in the course materials at this convention as examples of how to show a physician that he or she really has had a poor understanding of the AMA Guides and that the CAAA perspective of the guides is far more convincing.

To some degree, the clever work of these attorneys has proven to show that disability evaluation can be sort of the same as selecting entree items from a Chinese menu; something from Column A and something from Column B. We were treated to disability evaluations from both sides of the mouth here. First, that disability is not to be taken as a literal rating of a Whole Person

Impairment, but rather a reflection of the applicant's diminished earning capacity. Next, the applicant's permanent disability is not a measurement of diminished earning capacity, but rather impairment upon his activities of daily living.

While trying to defeat a Benson apportionment claim, utilization of the diminished earning capacity seems to be the champion of the day. The diminished earning capacity is beyond a physicians expertise in his or her medical training, according to the to applicant's attorneys. Therefore, the physician is incapable of making apportionment decisions as to which of the two (or more) injuries actually led to the decrease of the applicant's capacity to earn. The reasoning is that the final injury was the actual cause of the diminished earning capacity and therefore, the physician can only apportion cause to "disability", which is defined by the holding in Welcher-Brody as the measurement of the applicant's decreased capacity to earn.

On the other hand, a physician is encouraged to dismiss the AMA Guides as "merely a 'guide' and not definitive" as to measure of impairment when the objective findings fail to constitute an accurate measurement of the applicant's disability. Disability is further defined as a combination of the applicant's Whole Person Impairment, his age, occupation and diminished future earning capacity. There will be a push to marginalize the AMA Whole Person Impairment as being non-reflective of the applicant's permanent disability.

The CAAA seems to be awakening a sleeping giant in the application of the Subsequent Injuries Fund. This under-utilized provision of the Labor Code provides for an injured work to receive the additional compensation from the State of California that he or she would have normally received, but for a pre-existing condition or pathology. In a case where an injured worker is 70% or more disabled, and that his new injury has caused disability before adjustment for age or occupation of more than 35%, the SIF is obligated to compensate the injured worker for the difference between the industrial Award and the actual level of permanent disability. This will

certainly motivate applicant's attorneys to find some body part that provides 35% or more disability in order to jump into the SIF pool. There is one caveat in this arena; if the pre-existing condition is in the opposite and opposing number, then there only needs to be a 5% Award with respect to the industrial injury. Body parts galore and minimal levels of impairments have been spread out for the applicant's attorneys to feed upon.

It should be expected that more and more depositions of doctors are taken where they are led down the primrose path to abandon their rating impairment under the AMA Guides in favor of either application of the loss of earning capacity or to increase the Whole Person Impairment as an accurate reflection upon effect on the activities of daily living. This is based upon a new book "Master the AMA Guides, 5th" by Dr. Linda Cocciarella. She is the co-author of the "AMA Guides to the Evaluation of Permanent Impairment, 5th". She is quoted in the "Master" book as stating, "[T]he concept of the ADL is important, since the ability to perform ADL is historically and currently a major determinant in the numeric percentage impairment rating..."

Look for future challenges to the "constitutionality" of the implementation of SB 899. The question is raised by the applicant's bar as to whether or not the application of limitations of benefits will meet with those provisions of Article XIV, Section 4 of the California Constitution. This provision states that the legislature is vested with plenary powers to create "a complete system" for the "adequate" provision of workers compensation benefits. Constitutional challenges may include the constitutionality of the limitation of temporary disability benefits to 104 weeks; the application of the ACOEM Guidelines to medical treatment; limitation of 24 visits for chiropractic and physical therapy treatments; the breaking of the "compensation bargain" among others.

In discussion of recent cases, the case of Broughner v. Comp USA (2007) was discussed again as it is going through the appeal process. Please recall that this case involved a San Francisco Superior Court judge who held that the 2005 permanent disability rating schedule (PDRS) was

invalid because the schedule used a future earning capacity modifier that was inconsistent with the authorizing statute that required the use of empirical evidence. The WCAB ruled that they held exclusive jurisdiction to determine the validity of the PDRS and that the applicant failed to meet his burden of proof that the 2007 PDRS is invalid. The applicant is thought to be filing a Petition for Writ of Review before the District Court of Appeal.

Other cases found that sending pleadings with accusatory or harsh language to the workers' compensation commissioners can result in sanctions. The two year temporary disability indemnity payments are thought to run concurrently with multiple injuries; that IDL pay for police officers is considered the same as temporary disability; but that the salary continuation paid by a school district is different in kind than temporary disability. The Court also found that an applicant is not entitled to compensation for a psychiatric injury where it was her own fault that the work conditions represented a stressful work environment. Grip strength is allowable in making determinations about loss of function with respect to upper extremity measurements. Applicant's attorneys are entitled to obtain expert witness opinions from vocational rehabilitation counselors and are entitled to reimbursement under Labor Code Section 5811. And finally, a physician's determination with respect to apportionment must be substantial medical evidence in order to be admissible.

There may be an increase in challenges to the 2005 PDRS. The DFEC is under attack. Former vocational counselors have offered to provide expert witness testimony with respect to the application of extrinsic evidence to defeat the application of the diminished future earnings capacity set forth by the Rand study. Despite the fact that the Courts have upheld DFEC determination, there was still an opening left by virtue of the fact the court held in the Costa case that the DFEC was prima facia evidence and was rebuttable.

As you many of you aware, EAMS will become active during August 2008. This means that appearances at the WCAB for Mandatory Settlement Conferences will require that documents

submitted as evidence for Trial will need to be presented at the time of the Mandatory Settlement Conference so that scanning can be performed prior to the date of the Trial.

Finally, applicant's attorneys seem to be pushing to avoid entering into a Medicare Set Aside. Course materials provide methods for avoiding Medicare Set Asides such as disavowing that the applicant is eligible or is receiving Social Security or Medicare for claims less than $250,000.00 and by preparing a self-imposed allocation of 15% of an Award as an adequate Set Aside.

B.

APPORTIONMENT UNDER BENSON

CAAA's attempt to wiggle off the hook background:

For decades, the Worker's Compensation Appeals Board labored under the holding in Wilkenson v. WCAB(1978). This was a Supreme Court holding that the permanent disability rating of an injured worker who sustained different dates of injury for the same employer that became permanent and stationary on the same date, would, instead of separate Awards, become a combined Award of permanent disability.

New case:

The WCAB in a five to four panel en banc, determined in Benson v. WCAB(2008) that the provisions of Labor Code Section 4663 and 4664 were different by virtue of the changes enacted by SB 899, than the old provisions of Labor Code Section 4770 and 4663, that were in effect in 1978 when the Wilkenson decision was handed down by the Supreme Court. Therefore, the WCAB felt that the apportionment standard set forth in the new Labor Code Section 4663 did not make a provision for a combining of different dates of injury into one overall permanent disability level. The cases of Welcher-Brody also helped to determine that apportionment under Labor Code Section 4663 would follow the Fuentes rule. Method A for calculation of apportionment to pre-existing

injuries under the Fuentes rule is that separate injuries for the same body part could take a credit for the previous permanent disability found. The permanent disability credit was determined to be that percentage of permanent disability for the present injury subtracted by the previous permanent disability from a prior injury. Based upon that logic, the WCAB held that multiple dates of injury would require multiple disability determinations.

The consequence of that is that at a prior permanent disability, even taking into account the Multiple Disabilities Table and/or the AMA Guides additives of disabilities, would significantly reduce an Award. For example, an applicant who, under the Wilkenson determination, had a 75% permanent disability based upon two dates of injury for 40% each, would receive the higher disability rate at 75%. Combining the two injuries both significantly increased number of weeks of permanent disability and also allowed an injured worker with two separate injuries to receive the hight PD rate in most cases as well as the life pension awarded to injured workers with a 70% or higher award. Alternatively, if both injuries constituted 40% permanent disability on their own, an injured worker under the Benson doctrine would receive two separate Awards of 40%. The applicant would not be entitled to a life pension, would receive benefits at a reduced rate and would receive fewer weeks of permanent disability, thus significantly reducing the value of his Award.

Our clever friends on the applicant's bar, have attempted to overcome this holding from the WCAB. Based upon Mr. Rondeau's cross-examination of an Agreed Medical Examiner in one case provided in the case materials, the Agreed Medical Examiner admitted that he was unable to make a medical opinion with respect to diminished earnings capacity. Mr. Rondeau's argument was that a permanent disability rating or an impairment rating was actually a reflection of the applicant's decreased future earnings capacity. Since the doctor in this particular case was not a vocational expert, he indicated that he was unable to apportion as between the injuries as to which of the two injuries in that particular case caused the applicant to have a decreased future earning capacity. It

logically follows that Mr. Rondeau would argue at the time of Trial that only one of the two injuries, the injury that disabled the applicant from employment, was the injury to apportion the permanent disability to.

Please recall that after the WCAB made their findings in the Escobedo case in 2004, that apportionment to non-symptomatic, pre-existing, degenerative changes was permissible. In response to that holding many applicant's attorneys decided that in order to overcome that provision, cumulative trauma injuries would be filed concurrently with specific injuries so as to obviate the pathology determination. Their argument would be that the natural progression of the applicant's degenerative changes was a function of the applicant's employment as opposed to any other factor. Certainly many cases have come out that demonstrate that this technique was unsuccessful. However, the technique adding a second date of injury has proven to be more fatal than previously thought with this holding and Benson. Now with two injuries to apportion between, the savings in terms of pre-existing degenerative changes will serve to diminish the value of these cases due to separate awards for each date of injury.

It will be interesting to see how the Supreme Court or the District Court of Appeals rule given the fact that the Benson case essentially holds SB 899 changed statutory law to such extent that Wilkenson no longer applies. In the interim, the Benson case still remains good law as it was a WCAB en banc decision and all workers compensation judges are compelled to following that ruling. (Subsequent to the Convention, the Court of Appeal did issue a Writ, so Benson is going to be re-examined.)

C.

CONSTITUTIONAL CHALLENGES TO IMPLEMENTATION OF SB 899

As has been anticipated, the applicant's bar has undertaken to challenge the provisions of SB 899 as it relates to California Constitution Article 14, Section 4 wherein the applicant, in a workers

compensation claim, is entitled to compensation for injury or disability and to the dependents of the applicant for death occurred or sustained by the said workers in the course of their employment irrespective of the fault of any party. A complete system of workers compensation includes adequate provisions for the comfort, health, safety and general welfare of any and all workers and those dependent upon them for support to the extent of relieving them from the consequences of any injury or death incurred or sustained by workers in the course of their employment, irrespective of the fault of any party.

Recently, District 4 of the California Court of Appeals held in Guerrero v. WCAB(2008) that the provisions for limiting the chiropractic treatment to 24 visits did fall within the provisions set forth in the California Constitution. The court held that the Legislature holds plenary powers to enact statutes as part of the provision to make a complete system. By virtue of the fact that the Legislature limits the provision of benefits does not exceed these plenay powers. The California Court of Appeals referred to the Mathews v. WCAB(1972)Cal.3d 719, that the legislature had been provided with unfettered authority to legislate in the area of workers compensation as it saw fit. Thus, the intent of Section 21 of the Constitution was intended to safeguard the legislature's plenary powers. Those plenary powers included the power to limit benefits as set forth in SB 899, limiting the extent of chiropractic treatment to 24 visits.

Despite this set-back in the Guerrero case and the apparent set back in the case of Boughner v. Comp USA, the applicant's bar appears to be set to challenge the constitutionality of the limitation of 104 weeks of benefits as set forth in Labor Code Section 4650, the application of the ACOEM or other medical guidelines, and the Appeals Board's ability to interpret the constitutionality of the Statutes enacted by the California Legislature.

D.

APPORTIONMENT

District 3 of the California Court of Appeal held in Seabright Insurance Company v. WCAB(Fitzpatrick) (2008), that the examining physician, in order for his opinion to constitute substantial evidence, must set forth in his report his rationale for making apportionment determinations. Failure to do so does not reach the standards set forth in Escobedo. Simply referring to Esobedo does not satisfy this provision. The physician must actually provide a basis for his apportionment.

Again, the WCAB in the panel decision of Gibson v. Mendocino Solid Waste Management Authority (2007), held that the rationale set forth in a Qualified Medical Evaluation did not constitute substantial evidence by referring to the normal degenerative aging process as a factor in making determinations with respect to apportionment. In this particular case, 50% of the applicant's permanent disability was apportioned to a cumulative trauma and 50% to "normal" degenerative aging. Based upon the language set forth in the report, the workers compensation judge disapproved a Stipulation With Request for Award and disallowed the apportionment. The judge also did not allow the defense to obtain additional medical evidence to justify the apportionment in the case and awarded the entire permanent disability amount of the Award to the applicant.

What the cases teach us is that in order for there to be substantial medical evidence that is allowable through the process of Stipulation With Request for Award or Trial with a Findings & Award, we must ensure that the Qualified Medical Examiner or Agreed Medical Examiner adequately addresses the issue of apportionment in accordance with the holding in Escobedo. A simple conclusion with respect to apportionment to factors apart from the industrial injury will not meet the test of substantial evidence. A judge, in his or her discretion, can throw out the apportionment and award the full value of the permanent disability in a case if the apportionment

language in the doctors report is not considered to be substantial evidence. Therefore, as defense attorneys, we must ensure that apportionment discussions are adequate with respect to factors of disability that are non-industrial in nature. We must recall and assume that at the time of an MSC we will be foreclosed from obtaining a medical opinion that constitutes substantial evidence. Many judges will be inclined to simply throw out an apportionment analysis and use the unapportioned Permanent Disability found by the evaluating physician when apportionment does not appear to adequately supported.

This begs the question that if the Physician fails to adequately address the Whole Person Impairment, can the report then be accepted as substantial evidence? Can a report with no valid Permanant Disability be accepted for all other purposes and result in a 0% award? The WCAB is directed through Tyler and McClune to develop the record in the event that the medical reports inadequately address the aspects of disability. But in these circumstances, in the Gibson opinion, failed to address the application of Tyler or McClune and they certainly should be argued in this circumstance. The better lesson, however, is to thoroughly review medical reports and obtain supplemental reports or cross-examinations as appropriate.

E.

EVADING THE "OBJECTIVE" PORTION OF THE AMA GUIDES

Emboldened by the holding in Cortez v. Zurich North America (2007), the applicant's bar, bolstered by Dr. Cocciarella, is attempting to eliminate the requirement that objective factors must be found in order to find permanent disability. The Cortez case found that the provisions set forth in the AMA Guides could be circumvented if there is a measurable amount of grip loss that is not adequately addressed by an AMA Guide determination, despite the fact that Jamar grip loss is basically a subjective measurement. Therefore, the WCAB in Cortez has basically stated that a grip

loss measurement taken from a "credible" applicant (does such a thing exist?) can be used to replace the objective findings of an electromyelogram/nerve conduction study normally required to establish an upper extremity injury. The AMA Guides specifically address nerve injury as the basis for a Whole Person Impairment. The Cortez case finds that a credible grip loss measurement can be used in place of the typical nerve conduction study or EMG to make determinations about the level of permanent disability in a particular case.

Based upon the holding in Costa, the permanent disability rating schedule is only *prima facie* evidence and can be rebutted by appropriate presentation by rebuttal evidence. Therefore, any aspect of the rating can be rebutted independently or the rating schedule can be rebutted as a whole. This of course will call into question the future earning capacity adjustment, which may be overcome by testimony from a vocational expert and the adequacy of a Whole Person Impairment rating when compared to the impact upon the activities of daily living set forth in the AMA Guides.

Finally, there seems to be an uprising among the applicant's bar with respect to the language set forth in the AMA Guides. The offending language addresses activities of daily living as activities "other than work." Since a permanent disability rating is supposed to be reflective of an individual's decreased capacity to compete in the open labor market, the ADL may constitute a reversal of the actual measurement of an individual's permanent disability.

In comparison, many recent Applications for Adjudication of Claim include such novel and non-work related "body parts" as sexual dysfunction. Although this is clearly an activity of daily living, it would be difficult to argue that an impairment to sexual function would be, for most occupations, irrelevant in terms of impact upon the labor market. This can also be argued with respect to sleep disturbance or sleep disorder, which is another activity of daily living that is being widely plead by many applicant's attorneys in response to the comparatively large amount of Whole Person Impairment available through inclusion of these "disabilities."

F.

SUBSEQUENT INJURY FUND CASES

The applicant's bar appears to be changing gears with respect to implantation of Subsequent Injuries Fund cases based upon, among other things the Benson holding as well as the Welcher-Brody holdings. Welcher-Brody and Benson restricts an applicant's permanent disability to only that portion of permanent disability actually caused by the employer. Therefore, in order to maximize the applicant's entitlement to benefits, Subsequent Injuries Fund cases are being filed more frequently.

BACKGROUND:

The Subsequent Injuries Fund was established in order to assist injured workers with respect to pre-existing conditions which include both industrial and non-industrial conditions. The purpose of the statute was to encourage employers to hire the handicapped. For example, an injured worker who is totally blind is presumed by statute to be totally, permanently disabled. Therefore, hiring an individual with one bad eye would subject an employer 100% disability should his remaining good eye be damaged to the point of non-use. Therefore, the Subsequent Injuries Fund was established in order to ensure that the employer would only have to pay for the 25% standard set forth in the permanent disability rating schedule for one damaged eye and that the Subsequent Injuries Fund would compensate the applicant for his 100% disability should he sustain injury to both eyes, rendering him blind and presumably totally, permanently disabled.

CURRENT STATUS:

With respect to Welcher-Brody and Benson, injured workers who sustained injuries that placed them into the life pension, absent apportionment, are provided with Awards that are significantly lower than they would have been under the old rating schedule and prior to the implementation of new Labor Code Sections 4663 and 4664.

For example, an injured worker who has 70% disability with 50% attributable to non-industrial causes, would only receive an Award of 35%. In order to obtain the additional benefits set forth in the Labor Code for increased permanent disability, as well as the life pension, an applicant's attorney may file an Application with the Subsequent Injuries Fund to recover the difference between the industrial payment and what the applicant would have been entitled to receive absent any pre-existing condition.

NEFARIOUS APPLICATION

The Subsequent Injuries Fund has a limited amount of resources and typically will settle cases of a questionable value for $10,000.00. However, in order to establish a *prima facie* threshold for receipt of additional benefits, many times injured workers are now encouraged to file claims for conditions that may or may not have pre-existed their employment in order to meet the threshold set forth in the Subsequent Injuries Fund's statute. Applicant's attorneys were provided with typical injuries that would place an injured worker into the Subsequent Injuries Fund. For example, a digestive impairment of class three impairment would reach the threshold set forth in the Labor Code for the 35% permanent disability. Respiratory impairments also would be considered. Skin systems, hematopoietic system conditions, such as anemia, HIV infection, Hepatitis, blood disorders and Leukemia would additionally place the applicant into a situation where he could file for additional benefits under the SIF.

Therefore, I would anticipate that many amended Applications for Adjudication of Claim taking into account an applicant's entire medical history will be forthcoming within the near future.

CONCLUSION

From evasion of the application of the Benson holding to remedies through the SIF to problems with implantation of Medicare Set Asides, the applicant's attorneys' bar has ran the gamet of adding and assisting their membership with respect to methods to overcome the provisions of SB 899. Turning lemons into lemonade has been a notable methodology utilized frequently over the history of the applicant's bar. Although there have been significant and notable defeats since the implantation of SB 899, they do not seem to be deterred.

On the horizon, we look forward to additional challenges from the applicant's bar with respect to the constitutionality of provisions of SB 899, including the application and implantation of ACOEM Guides, limitations in chiropractic and/or physical therapy treatments and the 104 week limitation on temporary disability benefits.

The AMA Guides are under continuous attack by the applicant's bar. Emboldened by the Guerrero decision as well as Cortez, the applicant's bar is attempting to eradicate the implantation of the objective findings mandated by the AMA Guides under the guise of inadequate evaluation of permanent disability. The recent publication, "Master the AMA Guides, 5th" by Dr. Linda Cocciarella, appears to have provided the applicant's bar with a methodology for overcoming the provisions of the AMA Guides which was the basis for elimination of permanent disability ratings based upon subjective factors or prophylactic work restrictions.

We can look forward to litigation with respect to both the AMA Guides and the other provisions of SB 899, including apportionment. At this point, the Benson decision has provided us with a remedy to the applicant's attorneys attempts to overcome the Esbobedo decision (depending on what the OCA does with Benson), reducing especially those Awards which would have otherwise, based upon Wilkenson, taken their client's into life pension.

It was a pleasure for me to attend to the California Applicant's Attorneys Association Summer Conference in Monterey so as to obtain information about the litigation that lies on the horizon.

If you have any questions regarding this booklet or would like us to conduct presentations or seminars with respect to it or any other issue, we would be more than happy to oblige.

Very truly yours,

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