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California -- 1st DCA Affirms Appeals Board's Benson Decision: WEST [02/11/09]

Courts must separately rate successive injuries to the same body part that simultaneously become permanent and stationary, according to an highly anticipated published decision from the 1st District Court of Appeal decrying the longstanding Wilkinson rule in favor of Senate Bill 899.

The appellate court affirmed a Workers' Compensation Appeals Board's (WCAB) en banc decision in *Benson v. WCAB* on Tuesday afternoon, which had overturned a doctrine that applicants' attorneys had relied upon for more than three decades. In the 27-page opinion, the appellate court explained that it agreed with the WCAB commissioners' holding that Senate Bill 899 overturned the Wilkinson doctrine.

The decision could cause lower permanent disability awards in the majority of cases where an injured worker experiences successive injuries to the same body part that becomes permanent and stationary at the same time.

However, some stakeholders have predicted that the 2nd District Court of Appeal might rule differently in two cases with the same issue: *Vilkitis v. WCAB* and *Forzetting v. WCAB*. A contradictory decision from the 2nd DCA would create conflicting opinions at the intermediate appellate courts, which might lead to the state Supreme Court to consider the issue.

"We cannot conceive that the Legislature would intend to 'replace' or 'repeal and recast' the rules of apportionment but still retain the Wilkinson doctrine," Justice Paul Haerle, the author of the opinion, wrote.

The Wilkinson doctrine arose from a 1977 California Supreme Court decision in *Wilkinson v. WCAB*, which stated, "whenever a worker ... sustains successive injuries to the same part of his body and these injuries become permanent at the same time, the worker is entitled to an award based on the combined disability."

Diane Benson, the injured worker in the case, suffered two successive neck injuries while working as a file clerk for Permanente Medical Group that became permanent and stationary at the same time. Her two injuries mandated two 31% impairment ratings, which are worth \$24,605 each. Under the Wilkinson doctrine, the court would combine those ratings into one rating of 62%, which is worth \$67,016. Therefore, if the appellate court's decision stands, Benson will receive \$17,806 less than she would have before Senate Bill 899 became effective.

Despite issuing a general ruling against the Wilkinson doctrine, the justices identified an exception where the Wilkinson doctrine might still apply.

"We also agree that there may be limited circumstances, not present here, when the evaluating physician cannot parcel out, with reasonable medical probability, the approximate percentages to which each distinct industrial injury causally contributed to the employee's overall permanent disability," Haerle wrote. "In such limited circumstances, when the employer has failed to meet its burden of proof, a combined award of permanent disability may still be justified."

Benson argued that her case is analogous to another well-known workers' compensation decision from the state Supreme Court, *Brodie v. WCAB*. In *Brodie*, the high court held that Senate Bill 899 did not overthrow a method to calculate permanent disability awards that courts used since 1979.

However, Benson's arguments did not persuade the appellate justices, who concluded: "We disagree and conclude that the plain language of the new statutory scheme requires apportionment to each cause of a permanent disability, including each distinct industrial injury. This conclusion is

compelled by:

- the plain language of current sections 4663 and 4664;
- the repeal of former section 4750;
- the legislative history; and
- the deference we owe the Board's interpretation of workers' compensation statutes."

The justices determined that language in sections 4664(a) and 4663(a) specifically compel apportionment.

For example, the court highlighted section 4664(a), which states, "The employer shall only be liable for the percentage of permanent disability directly caused by the injury arising out of and occurring in the course of employment."

The justices determined that the Legislature's choice of the phrase, "the injury," implies that each different industrial injury must be separately compensated.

"Adopting Benson's interpretation would ignore the Legislature's use of the singular form of 'injury,' rather than the plural," Haerle wrote. "Although all 62% of Benson's permanent disability was directly caused by injuries arising out of and occurring in the course of Benson's employment with Permanente, each distinct industrial injury directly caused only half of that permanent disability."

The court also cited section 4663(a), which states that "apportionment of permanent disability shall be based on causation." The justices interpreted this as meaning that the court should focus upon the causes of permanent disability.

"'Apportionment ... based on causation' is not naturally limited to apportionment to non-industrial causes and previous permanent disability awards," Haerle wrote. "Rather, 'apportionment ... based on causation' must mean apportionment to all causes, including each distinct industrial injury. Had the Legislature intended to insulate certain causes from apportionment, it would have said so."

The court also examined the legislative history of Senate Bill 899, and concluded that the Legislature intended to change the Wilkinson doctrine, despite not mentioning the specific case by name.

The justices explained:

"In enacting Senate Bill No. 899, the Legislature made approximately 45 revisions to the workers' compensation statutes. It is little wonder that the Legislature did not mention Wilkinson by name in the midst of such extensive reform. Furthermore, it is undisputed that sections 4663 and 4664 abrogated the rehabilitation rule and the bar against apportionment to pathology. Yet, the Legislature did not refer to the judicial decisions that had established those long-standing rules. If the Legislature can abrogate those lines of authority without explicit reference, then surely it can do the same regarding Wilkinson."

The court also determined that although Labor Code section 3202 provides that workers'

compensation laws "shall be liberally construed by the courts with the purpose of extending their benefits for the protection of persons injured in the course of employment," this section is merely "a tool for resolving statutory ambiguity ..."

The justices explained that section 3202 cannot supplant legislative intent. The court determined that the Legislature's intent was ascertainable, that there was no "statutory ambiguity," and therefore section 3202 could not defeat the legislative intent to overturn the Wilkinson doctrine.

Source: WorkCompCentral
