LINDH – CLARIFICATION OF THE "BUT FOR" TEST FOR APPORTIONMENT OF PD
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On December 10th, the First District Court of Appeal issued a long-awaited decision in *City of Petaluma v WCAB (Lindh)*. In the published ruling, the Court reversed the decision of the WCAB which had held that the QME's opinion on apportionment under Labor Code Section 4663 was not legally valid and did not constitute substantial medical evidence.

Mr. Lindh worked as a peace officer with the City of Petaluma and sustained an industrial injury consisting of several blows to his head. One month after the injurious event, he lost most of the vision in his left eye. The QME in the case noted that the injured worker had an underlying vasospastic personality that affected his left optic nerve vessels. The doctor acknowledged that the injured worker did not have any disability in the eye prior to the industrial injury and likely would have retained a lot of his vision in the eye absent the injury. Nevertheless, the doctor apportioned 85 percent of the cause of his permanent disability to this previously quiescent underlying condition and 15 percent of the cause of the disability to the industrial injury.

Both the trial judge and the Appeals Board rejected the apportionment analysis and issued an un-apportioned award of 40 percent PD. The Board held that the QME impermissibly apportioned 85 percent of his permanent disability in the eye to a mere risk factor that predisposed him to having an eye injury. The Board held that the QME conflated the analysis of causation of injury with causation of permanent disability and found there was no legally valid basis for apportionment under LC Section 4663.

The Court of Appeal went into a lengthy summary of the published Court of Appeal decisions regarding apportionment of permanent disability since the passage of SB 899. The Court briefly discussed the rules regarding apportionment of permanent disability prior to 2004 and then summarized the facts and holdings set forth in decisions such as *Escobedo, Brodie, EL Yeager Construction, Borman,* and *City of Jackson.* The Court recognized that *Escobedo* set forth the requirements of what a medical opinion must entail in order to constitute substantial evidence on apportionment of disability under the new version of LC Sec 4663. It also noted that cases such as *Escobedo* and *EL Yeager* held that "degenerative disease can be asymptomatic and still a basis for apportionment under the new law."

Applying the law on apportionment post-SB 899 to this case, the Court held that the QME's opinion should be followed. The Court focused on the QME's testimony that it was unlikely that he would have suffered a vision loss (in light of his industrial injury) had he not had the underlying condition of vascular spasticity. The Court stated that the QME found that the preexisting congenital condition went beyond being a risk factor to being an actual cause of his increased permanent disability. The Court stated that even if this condition is characterized as a risk factor, he had an underlying condition that was largely the cause of his ultimate loss of vision. Finally, the Court stated that the "new" Section 4663 does not require medical evidence that an asymptomatic preexisting condition in and of itself would eventually have become symptomatic in order for an apportionment opinion to be valid. The ultimate question is whether the permanent disability resulted from both nonindustrial and industrial causes, and if so, apportionment is required.

Accordingly, the Court reversed the Board and ordered that the injured worker be awarded 6 percent PD (after 85 percent non-industrial apportionment).

ANALYSIS-

Notably absent from the Court's opinion is a discussion regarding Defendant's burden of proof with respect to proving apportionment. *Escobedo* held that Defendant has the burden to prove what approximate percentage of the worker's permanent disability was caused by non-industrial factors. In doing so, the physician must describe the exact nature of the non-industrial factor and explain how and why it is causing a percentage of the worker's permanent disability at the time of the examination. Prior to *Escobedo*, the Supreme Court in *Pullman Kellogg* held that proving apportionment of permanent disability was an affirmative defense to be borne by defendant.

Instead of focusing on Defendant's burden in proving non-industrial apportionment, the Court focused largely on all of the proper bases for non-industrial apportionment identified by the Board in *Escobedo.* The Court stated multiple times that one of these bases is "asymptomatic pathology," regardless of whether that pathology is characterized as "degenerative" prior to the industrial injury.

In addition, the Court missed the opportunity to define the concept of "direct causation" for purposes of analyzing apportionment of disability in workers' compensation. It also stated in a footnote that it did not need to parse the precise meaning of the term "injury" in order to reach the ultimate outcome in the case.

The outcome here is similar to that in *EL Yeager* and *City of Jackson* in that the Court gives great deference to the opinion of the doctor on apportionment once he or she has identified a non-industrial medical condition that contributes to the worker's disability (whether it be degenerative pathology, a condition caused by genetics, or a medical risk factor). The Court felt that the QME explained in depth at his deposition that "but for" the underlying medical condition, the worker likely would not have lost his vision in the eye (in light of the mechanics of the industrial injury sustained).

One small positive takeaway for injured workers is that it appears that a doctor identifying a non-industrial risk factor in and of itself likely is not enough to support a basis for apportionment of permanent disability. The doctor is still required to explain how that condition (even if characterized as a risk factor) is causing a portion of the resulting permanent disability.

Finally, as in *City of Jackson*, the Court was not persuaded by the argument that the QME impermissibly conflated the analysis of causation of injury with causation of permanent disability. The Court noted that those two analyses can, in some instances, be one in the same.

WHAT TO EXPECT NOW

Applicant and his attorney are contemplating whether to appeal the decision to the Supreme Court. CAAA (through attorney Mark Gearheart) actively participated in the case via written brief and oral argument as amicus counsel and will continue to lend its support to Applicant's position should he decide to appeal to the Supreme Court.

In the meantime, in terms of application to pending cases, the decision in *Lindh* does not represent any changes to the law on apportionment of disability post-SB 899. It is substantially similar to the analysis from the 3rd District in *City of Jackson* in that, so long as the QME provides some rationale explaining how the non-industrial condition is causing a portion of the permanent disability, the Court is going to uphold that medical opinion. Defendant still has the burden of proving apportionment, but after *City of Jackson* and *Lindh,* that burden may not be as substantial as the Board intended it to be under *Escobedo.*