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Breaking News!!!

Benson Decision Upheld in a Published Opinion of the First District Court of Appeal.

In a published opinion filed February 10, 2009, the First District Court of Appeal upheld the WCAB en banc opinion in *Benson v. WCAB*.

In *Benson*, the WCAB had previously issued an en banc opinion holding that in cases with two or more dates of injury, each injury is to be apportioned to separately and, in turn, to receive its own distinct permanent disability rating. This is in contrast to the longstanding Wilkinson doctrine which previously held that where multiple injuries become permanent and stationary simultaneously, the permanent disability from each of the injuries are combined for a final rating, rather than separately rated for multiple, smaller, separate awards.

In holding that each of multiple dates of injury must be separately apportioned to for purposes of permanent disability determination, the Court looked to four primary factors.

First, the Court looked to the plain language of newly enacted (via SB 899) Labor Code sections 4663 and 4664. After analyzing and discussing the language of these sections, the Court held that there was no ambiguity. The Court noted that the sections 4663 and 4664 discuss the percentage of disability directly caused by the injury, in contrast to prior language discussing apportionment to prior permanent disability. The Court further took note of the fact that the language of the sections refers to "injury", making clear that each separate injury must be separately apportioned to.

Second, the Court noted that the repeal of Labor Code section 4750, under which the Wilkinson case was decided, also supports the decision. The Court noted that under Labor Code section 4750, apportionment was to permanent disability, not to causation. The repeal of section 4750, according to the Court, was another clear indication from the legislature that the Wilkinson doctrine was no longer applicable. When considered in light of the addition of the language in sections 4663 and 4664, the Court held that the "Legislature rejected the combination of distinct industrial injuries when it repealed former section 4750 and enacted sections 4663 and 4664."

As to the third and fourth primary areas of discussion, the Court, quoting extensively from various legislative documents surrounding the enactment of SB 899, noted that the legislative intent was clearly to

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provide a new standard of apportionment to causation, rather than disability. The Court concluded by noting the deference that must be given to the interpretation of the Labor Code by the WCAB.

In sum, under this holding, each date of injury must be separately apportioned to, based upon causation, for separate impairment or disability rating.

Editor's Note: Readers should be aware that, though Benson is the first published case on this issue, there are other cases under the same facts as Benson v. WCAB currently moving through the Second District Court of Appeal. As such, the Benson case may still be only one of several conflicting decisions requiring ultimate determination before the California State Supreme Court.

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