

This Firm Means Business (SM)

Dear Subscriber,

It has been a particularly busy month for the Workers' Compensation industry in California. The Appellate Courts and the WCAB have issued at least three key opinions that could greatly change the industry for years to come. However, it is essential that these cases be taken in their current context. Specifically, the reader must note that each of these opinions still has a mechanism for further appeal and it is fully expected that the appeals will be taken. Please continue to monitor future newsletters for the status on the cases of Benson, Ogilvie, and Almarez/Guzman.

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 4663, the Court held that the

**Online This
Spring - 2009!**

WorkCompAcademy.com

- An online accredited learning experience for attorneys, medical and claim professionals taught by industry leaders.

JudgeOBrien.com

- An online, up-to-date searchable version of Judge O'Brien's time honored text, California Workers' Compensation Claims and Benefits.

Links

California Courts
<http://courinfo.ca.gov>

California Law Online
<http://www.leginfo.ca.gov>

"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 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.

WCAB Issues En Banc decision in Ogilvie v. City and County of San Francisco Explaining How the Diminished Future Earnings Capacity (DFEC) aspect of the 2005 PDRS Can be Rebutted.

In Ogilvie v. City and County of San Francisco, the WCAB re-affirmed that the DFEC aspect of the 2005 rating schedule can be rebutted. In doing so, the WCAB provided practitioners with the method by which a rebuttal can be approached.

The Commissioners, with Commissioner Caplane dissenting in favor of a more simplistic approach, began by holding that the DFEC can not be rebutted with simply attempting to prove the percentage by which an applicant's future earnings were diminished by use of vocational rehabilitation experts.

The WCAB held, in short, that to rebut the DFEC aspect of the 2005 rating schedule a four step process is employed:

1. Obtain two sets of wage data (one for the injured employee and one for similarly situated employees), generally through the Employment Development Department (EDD);
2. Perform some mathematical calculations with that wage data to determine the injured employee's individualized proportional earnings loss;
3. Divide the employee's whole person impairment by the proportional earnings loss to obtain a ratio;
4. See if the ratio falls within certain ranges of ratios in Table A of the 2005 Schedule. If it does, the determination of the employee's DFEC adjustment factor relates back to the Schedule. If it does not, then a formula is used to perform additional calculations to determine an individualized DFEC adjustment factor.

In sum, the WCAB provided the calculation and formulas that are to be used in attempting to rebut the DFEC. In scenarios where the calculations result in a significantly different adjustment factor, the DFEC included with the 2005 PDRS has been rebutted and the ending

factor is to be used in place of the presumptively correct DFEC modifier.

To read this case, and the detailed explanation of the calculations as provided by the WCAB, click here:

[WCAB EnBanc OgilvieW.pdf](#)

In the Consolidated Cases of Almaraz/Guzman, WCAB holds, En Banc, That the American Medical Association (AMA) Guides Can be Rebutted With Medical Evidence Showing That the AMA Guides Would Give a Result That Was "Inequitable, Disproportionate, and Not a Fair and Accurate Measure of the Employee's Permanent Disability".

In the Consolidation Cases of Almaraz/Guzman, the WCAB held, en banc, that a party may challenge the presumptively correct whole person impairment findings of the AMA guides, such a challenge should be mounted by way of medical evidence and that the evidence should be such that it shows a finding based solely upon the AMA guides would be 'inequitable, disproportionate, and not a fair and accurate measure of the Employee's Permanent Disability.

In so holding, the WCAB first noted that the authors of the AMA guides acknowledge within the publication that there are instances where the AMA guides do not adequately address the disability for various reasons.

The WCAB further noted that the AMA guides consider activities of daily living, but not work impairment or other such factors. The Guides go further and also note that they are but a beginning point to making a determination and, in many instances, the physician should have the flexibility to look outside of the Guides in making a full and complete impairment decision.

The WCAB continued, stating that if a party does not believe that the AMA Guides rating is appropriate, it could be rebutted by other medical evidence and a showing that the AMA rating alone would be 'inequitable, disproportionate, and not a fair and accurate measure of the Employee's Permanent Disability'.

If the AMA guides have been rebutted, then the manner by which a rating is assigned is to be based upon the physician's experience, skill and judgment. The WCAB did not provide any specific benchmark or standard the physician is to use in making a determination outside of the AMA guides. However, the WCAB did clearly state that the old system for rating permanent disability was not to be used.

Editor's note: It is not clear at this time what evidence will be sufficient or proper in reaching a determination of permanent impairment where the AMA guides are found inequitable.

To read the entire case, click here:

[WCAB EnBanc AlmarazMGuzmanJ.pdf](#)

IMPORTANT REMINDER!

In all matters wherein the Agreed Medical Evaluator or Panel Qualified

