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Case Law Update

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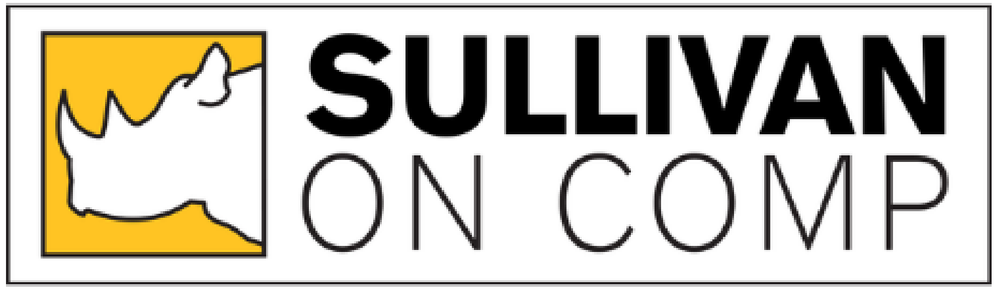

About Michael Sullivan & Associates, LLP

- The firm provides high-quality litigation in defense of workers' compensation claims, employment issues and insurance litigation.

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Plan For This Session

- Discuss the most relevant cases that have been published in the last month or so.
- Discuss the practical impact of the cases.
- Understand that *en banc* cases from the WCAB are binding on panels of the appeals board and WCJs.
- Understand that three-member panel decisions from the WCAB are not binding but are citable as an indication of contemporaneous interpretation and application of workers' compensation laws.

Cases Reviewed This Month

- *Nunes v. State of California, Dept. of Motor Vehicles,* 2023 Cal. Wrk. Comp. LEXIS 30
- *Gibson v. Apex Envirotech, Inc.*, 2023 Cal. Wrk. Comp. P.D. LEXIS 116
- *Yanez v. Valley Children's Hospital*, 2023 Cal. Wrk. Comp. P.D. LEXIS 138
- *Rico v. Starcrest Products of California, Inc.,* 2023 Cal. Wrk. Comp. P.D. LEXIS 107
- *White v. City and County of San Francisco,* 2023 Cal. Wrk. Comp. P.D. LEXIS 129

Nunes v. State of California, Dept. of Motor Vehicles, 2023 Cal. Wrk. Comp. LEXIS 30

Facts of the Case:

- Applicant sustained injuries to her neck and upper extremities.
- The QME apportioned disability for the left shoulder entirely to industrial factors. But she apportioned 40% of the cervical spine disability to pre-existing degenerative factors, and 60% of the carpal tunnel disability to nonindustrial diabetes.
- The QME also reported that she did not believe applicant would be employable in the open labor market.
- Applicant's vocational expert also reported that she sustained a 100% loss of access to the open labor market.

Nunes v. State of California, Dept. of Motor Vehicles, 2023 Cal. Wrk. Comp. LEXIS 30

Facts of the Case (continued):

- Applicant's vocational expert reported that "Vocational apportionment is not the same as medical apportionment."
- He concluded that because applicant was capable of performing her usual and customary work with zero impediment until the specific injury, her loss of future earning capacity and nonamenability to vocational rehabilitation was industrial in nature.
- Defendant's vocational expert agreed that applicant was not employable in the competitive labor market, but reported 10% vocational apportionment.
- The WCJ concluded that applicant was entitled to an unapportioned award of 100% industrial injury because "[T]here is no evidence of previous loss of earnings capacity."

Nunes v. State of California, Dept. of Motor Vehicles, 2023 Cal. Wrk. Comp. LEXIS 30

The WCAB *en banc* rescinded the WCJ's decision and held that*:*

1. LC 4663 requires a reporting physician to make an apportionment determination, and prescribes the standard for apportionment. The Labor Code makes no statutory provision for "vocational apportionment."

2. Vocational evidence can be used to address issues relevant to the determination of permanent disability.

3. Vocational evidence must address apportionment, and may not substitute impermissible "vocational apportionment" in place of otherwise valid medical apportionment.

Nunes v. State of California, Dept. of Motor Vehicles, 2023 Cal. Wrk. Comp. LEXIS 30

- LC 4663(c) authorizes and requires the reporting physician to make an apportionment determination, and further prescribes the standards the physician must use.
- Apportionment must account for "other factors both before and subsequent to the industrial injury," and may include disability that formerly could not have been apportioned, including apportionment to pathology, asymptomatic prior conditions and retroactive prophylactic work restrictions.
- Vocational apportionment offered by a nonphysician is not a statutorily authorized form of apportionment.
- Vocational evidence can be offered to rebut a scheduled rating by establishing that it's not feasible for an injured worker to engage in vocational retraining.

Sullivan on Comp Section 10.19

Nunes v. State of California, Dept. of Motor Vehicles, 2023 Cal. Wrk. Comp. LEXIS 30

- To constitute substantial evidence, vocational reporting must consider “valid medical apportionment."
- A vocational report is not substantial evidence if it relies on facts “that are not germane, marshalled in the service of an incorrect legal theory. “
- Examples of reliance on facts that are not germane often fall under the rubric of “vocational apportionment,” and include assertions that applicant’s disability is solely attributable to the current industrial injury because he/she had no prior work restrictions, or was able to adequately perform the job, or suffered no wage loss prior to the current industrial injury.
- The proper analysis requires an evaluation of *all* factors of apportionment, irrespective of whether they were the result of pathology, asymptomatic prior conditions or whether they manifested in diminished earnings, work restrictions or an inability to perform job duties.

Sullivan on Comp Section 10.19

Nunes v. State of California, Dept. of Motor Vehicles, 2023 Cal. Wrk. Comp. LEXIS 30

What do we think of this decision?

- The *Nunes* decision invalidates the concept of "vocational apportionment.” The WCAB recognized that it was being used by vocational experts to reject apportionment in a manner inconsistent with binding case law.

- But the WCAB also stated that "an unapportioned award may be appropriate where it can be established through competent medical *and/or vocational evidence that the current industrial injury is the sole causative factor for the employee’s residual permanent disability*" (emphasis added).

- The decision does not preclude a vocational expert from finding that an employee is permanently totally disabled if the expert can explain why an industrial injury is the sole cause of his/her inability to compete in the open labor market.

Nunes v. State of California, Dept. of Motor Vehicles, 2023 Cal. Wrk. Comp. LEXIS 30

- Vocational experts no longer may reject a physician's apportionment to nonindustrial factors simply by finding no work restrictions or wage loss prior to the current industrial injury.
- Vocational experts must consider apportionment under the same legal standards as physicians, and the law allows apportionment to pre-existing nonindustrial factors even if they were not labor-disabling before the industrial injury occurred.
- How vocational experts must consider medical apportionment when they are not medical experts remains to be seen.

Gibson v. Apex Envirotech, Inc., 2023 Cal. Wrk. Comp. P.D. LEXIS 116

Facts of the Case:

- Applicant filed a workers' compensation claim after he was laid off from work.
- The injury did not result in any period of temporary disability.
- Applicant also lost no time from work because he retired and was not employed during the pendency of litigation.
- Defendant denied applicant the SJDB voucher pursuant to CCR 10133.31(c), which states, "An employee who has lost no time from work or has returned to the same job for the same employer, is deemed to have been offered and accepted regular work in accordance with the criteria set forth in Labor Code section 4658.7(b)."

Gibson v. Apex Envirotech, Inc., 2023 Cal. Wrk. Comp. P.D. LEXIS 116

The WCAB held that the applicant was entitled to the voucher.

- Defendant's argument was based on a hyper-technical application of the rule that did not comport with the purpose of the rule or its enabling statute. The purpose of the voucher is to assist people who are not working to regain employment.
- It found no exception to providing a voucher in cases in which applicant retired.
- It explained that if a defendant wished to avoid liability for the voucher in such a scenario, it must offer the employee the opportunity to come out of retirement and work again.
- Because this applicant sustained a permanent partial disability, and he was not provided a return-to-work offer, the WCAB concluded that the voucher was due.

Gibson v. Apex Envirotech, Inc., 2023 Cal. Wrk. Comp. P.D. LEXIS 116

What do we think of this decision?

- The WCAB previously held *en banc* that an employer must make a bona fide offer of regular, modified or alternative work to avoid liability for the voucher. (*Dennis v. State of California—Department of Corrections and Rehabilitation Inmate Claims* (2020) 85 CCC 389.)

- So, the fact that applicant in this case was laid off and retired did not protect the employer from making an offer of work.

- If a valid offer was made, and applicant rejected it, the employer would not be liable. But an offer was never made.

Yanes v. Valley Children's Hospital, 2023 Cal. Wrk. Comp. P.D. LEXIS 138

Facts of the Case:

- On Jan. 3, 2022, defendant sent a letter to an unrepresented applicant accepting liability for the left knee, but denied liability for ACL surgery based on a doctor's report of Dec. 15, 2021 finding that the ACL injury and need for surgery did not arise out of the work injury.
- On Jan. 20, 2022, applicant requested a QME panel in orthopedics, and a panel was issued on Jan. 27, 2022.
- On March 3, 2022, applicant retained an attorney. Four days later, the attorney requested a replacement panel in chiropractic.
- The WCJ invalidated the chiropractic panel and directed the parties to obtain a new panel pursuant to LC 4062.2.

Yanes v. Valley Children's Hospital, 2023 Cal. Wrk. Comp. P.D. LEXIS 138

The WCAB rescinded the WCJ's decision and held that the applicant appropriately requested a new QME panel in chiropractic after retaining an attorney.

- Because applicant was not evaluated by a doctor from the orthopedic panel before retaining an attorney, either party could request a QME panel pursuant to *Romero v. Costco Wholesale* (2007) 72 CCC 824 (significant panel decision).

- The parties were not required to issue a new objection letter to re-initiate a dispute resolution process underway that had appropriately resulted in the issuance of a prior panel.

- Requiring the parties to repeat the procedural steps necessary to obtain a panel of QMEs once applicant obtained counsel was inconsistent with the constitutional mandate to accomplish substantial justice in all cases expeditiously, inexpensively and without encumbrance of any character.

Yanes v. Valley Children's Hospital, 2023 Cal. Wrk. Comp. P.D. LEXIS 138

What do we think of this decision?

- *Romero* did not specifically address the procedural requirements for obtaining a new panel after an applicant retains an attorney.
- Here, the WCAB held that if the original panel was validly obtained, the parties needn't restart the process and may simply request a new panel with the Medical Unit.
- Note: The original panel in this case was requested by applicant. The WCAB found it sufficient that the Jan. 3, 2022 letter identified a medical dispute, so applicant could request a QME panel.
- Per CCR 30(c)(2), if the claims administrator requests a panel while applicant is unrepresented, it would have been required to attach a written objection to the PTP's report.

Rico v. Starcrest Products of California, Inc., 2023 Cal. Wrk. Comp. P.D. LEXIS 107

Facts of the Case:

- Defendant denied applicant's claim for a specific injury to her fingers, wrist, hand and arm.
- After applicant was seen by a QME, her attorney sent her to a chiropractor and requested a medical-legal report, as it was a contested claim. The chiropractor was designated as the PTP.
- The claim was settled by C&R, and the chiropractor's lien remained unresolved.
- Defendant disputed whether the chiropractor was entitled to medical-legal charges for the initial date of service.

Rico v. Starcrest Products of California, Inc., 2023 Cal. Wrk. Comp. P.D. LEXIS 107

The WCAB held that the chiropractor was entitled to payment for medical-legal services for the initial appointment.

- Per LC 4064, an employer is liable for the costs of medical-legal evaluations obtained by the employee pursuant to LC 4060.
- There was no dispute that the chiropractor was the treating physician.
- The board found that the case involved a dispute regarding industrial causation, and the treating physician's initial report was requested for the purpose of proving or disproving a contested claim.
- The WCAB found that the treating physician's initial report was compensable as a medical-legal expense.

Rico v. Starcrest Products of California, Inc., 2023 Cal. Wrk. Comp. P.D. LEXIS 107

What do we think of this decision?

- Practitioners generally think of medical-legal reports as AME and QME reports.
- CCR 9793 contemplates that PTPs also may provide medical-legal services.
- Per LC 4620(a), "[A] medical-legal expense means any costs and expenses incurred by or on behalf of any party, the administrative director, or the board … for the purpose of proving or disproving a contested claim."
- Here, because the claim was denied at the time the PTP performed the initial evaluation, the WCAB had no problem finding that a contested claim existed.

White v. City and County of San Francisco, 2023 Cal. Wrk. Comp. P.D. LEXIS 129

Facts of the Case:

- The parties settled a claim for a CT injury to the knees from April 14, 2016 to April 14, 2017 by way of C&R, which was approved on March 28, 2022.
- After the C&R was approved, applicant claimed a cumulative injury to his right knee during the period of Sept. 16, 2012 to Dec. 30, 2014. The claim covered an earlier CT period.
- Defendant denied the new CT claim because, among other reasons, in the March 28, 2022 C&R, applicant “agreed to resolve any and all claims for any and all species of workers' compensation benefits related to your [the applicant's] employment.”

White v. City and County of San Francisco, 2023 Cal. Wrk. Comp. P.D. LEXIS 129

The WCAB concluded that the C&R did not bar the new CT claim.

- Paragraph 3 of the preprinted C&R states, “This agreement is limited to settlement of the body parts, conditions, or systems and for the dates of injury set forth in Paragraph No.1 despite any language to the contrary in this document or any addendum.”

- The language in the addendum that purported to settle “any and all claims for any and all species of Workers' Compensation Benefits related to applicant's employment with defendant” was rendered void by the plain restriction in paragraph 3.

- Because it was a different date range, the WCAB concluded that the C&R did not settle applicant's subsequent claim.

White v. City and County of San Francisco, 2023 Cal. Wrk. Comp. P.D. LEXIS 129

What do we think of this decision?

- The language on the preprinted C&R form precludes a general release of all workers' compensation liability. It puts employers in a difficult position when settling cumulative trauma claims.
- They might need to strike paragraph 3 from the C&R, but would need agreement from applicant's attorney and approval from the WCJ.
- They also might want to include the entire period of employment.
- But even if the entire CT period is listed, the WCAB may find that the C&R resolves claims only against the employer/carrier named in the C&R. (See *Bodishbaugh v. Southern Maryland Blue Crabs, Miami Marlins,* 2022 Cal. Wrk. Comp. P.D. LEXIS 63.)

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