

COMPENSATION NEWS

MONTHLY REPORT

En Banc decision of the WCAB on Wilkinson V WCAB 19 Cal.3d 491

This is an en banc decision of the WCAB

This is a significant decision from the Workers' Compensation Appeals Board (WCAB).

The WCAB evaluated a case under SB 899 as to how the former Supreme Court case *Wilkinson v WCAB* applied.

The applicant filed two cases. One for a specific injury of June 3, 2003. The other injury filed was for a cumulative trauma

ending June 3, 2003. There was an Agreed Medical Examiner in the case that indicated the applicant sustained two separate injuries to her neck. The doctor apportioned 50% to the cumulative trauma and 50% to the specific. Both injuries became permanent and stationary at the time of the evaluation on the same date.

The Workers' Compensation Judge (WCJ) found the applicant had a single award based on the combined disability of the two injuries at 62%. The defendant appealed indicating under SB899 the WCJ has to apportion to each injury and that SB899 abrogated the *Wilkinson* rule.

The WCAB heard the case en banc and wrote a very lengthy decision of 29 pages. They reviewed applicable statutes and case law. They indicated that the rule in *Wilkinson* is antithetical to the new causation regime in the current law of apportionment.

The WCAB indicated that in successive injury cases you must apportion to each injury. *Wilkinson* is not consistent with Labor Code section 4663 and 4664. However, they left a big loophole. If the physician is unable to determine based on reasonable medical probability then there will only be one award. The physician might also determine that all of the disability is due to one of the successive injuries. Thus, each case will now be on a case by case basis revolving around the factual issues and whether the physician is able to apportion to each successive injury.

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