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Trovillion, Inveiss & Demakis, APC has grown in reputation as one of Southern California's premier law firms specializing in representation of employers, insurance carriers and third party administrators in workers' compensation litigation.

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CHALLENGING CAUSATION, IMPAIRMENT AND APPORTIONMENT CONCEPTS IN CUMULATIVE TRAUMA CLAIMS - A DEFENSE ATTORNEY'S APPROACH

In California work injury claims disputes relating to compensability of an injury are determined based on an injured worker's testimony and opinion of physicians. In majority of cumulative trauma cases, a worker's testimony as to the repetitive nature of work, vibration, and forces will invariably lead to a finding of cumulative trauma injury. The scientific basis for the physician's findings is rarely questioned nor do physicians bother to provide a scientific rationale for their determination regarding causation. Yet, in majority of the cases, popularly held beliefs that repetitive work and heavy physical labor invariably cause injuries such as neck/back pain, carpal tunnel syndrome or meniscal tears are unsupported by scientific medical evidence.

Need for Substantial Medical Opinion

In California, to constitute substantial evidence, a medical opinion must be predicated on reasonable medical probability. *McAllister v Workermen's Comp App Bd* (1968) 69 Cal 2d. 408.

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Page 11, Section 1.6a of the *5th Edition of the AMA Guides to the Evaluation of Permanent Impairment* provides the following regarding causation:

"Physicians may be asked to provide an opinion about the likelihood that a particular factor (injury, illness or preexisting condition) caused the permanent impairment. Determining causation is important from a legal perspective, as it is a factor in determining liability.....Medical or scientifically based causation requires a detailed analysis of whether the factor could have caused the condition, based upon scientific evidence and, specifically, experienced judgement as to whether the alleged factor in the existing environment did cause the permanent impairment. Determining causation requires a synthesis of medical judgement with scientific analysis."

Resource for Causation Standards

In California, the standard for causation in work injuries is evidence based medicine from scientific research. The task of the defense attorney seeking guidance on issues of causation and apportionment has been made relatively simple by the publication of the *2nd Edition, AMA Guides to the Evaluation of Disease and Injury Causation*. This book provides a scientific basis for challenging the physician's findings regarding causation and apportionment. Unfortunately, it is rarely used by defense attorneys.

Challenging Causation Opinions

Reports finding cumulative trauma neck injury from work as a receptionist, assembly line packer, truck driver, or cook, are routinely accepted as normal and routinely go unchallenged by defendants. The injured worker must move his head up and down in performing these activities, right? Most panel QMEs and AMEs simply find causation and then apportion to some degenerative changes in an MRI, where that exist. No explanation is ever provided as to the scientific evidence in support of such a finding. However, it will come as a surprise that there is insufficient scientific evidence for neck posture, heavy physical work, prolonged work in a sedentary position or repetitive and precision work as risk

factors for neck pain. Similarly, there is insufficient scientific evidence for heavy work by itself as a risk factor for low back pain.

Any kind of work that involves repetitive use of the upper extremities invariably leads to a finding of industrial causation for carpal tunnel syndrome. However, as the Guides point out, research over the last two decades has shown many factors may cause or contribute to CTS, including genetics, and a variety of diseases such as diabetes mellitus, hyperthyroidism, obesity and physical inactivity. Recent studies have shown computer keyboard use does not increase the risk of CTS, the prevalence of this condition in computer users being similar to the general population.

The defense attorney should fully understand the risk factors for a particular injury and obtain detailed job description before confronting the physician. The risk factors for majority of work injuries can be found in the Guides. In deposing the physician, questions as to the basis for a particular finding on causation will often be met with a reference to the physician's extensive medical experience in dealing with such injuries. The attorney should then ask if the physician has conducted any scientific studies or participated in studies in the particular area under consideration. More often that not, the answer is a negative. Reference should then be made to the various studies contradicting the particular finding on causation as summarized by the Guides. The photocopied sections of the Guides in question should then be attached as an exhibit to the deposition transcript. To avoid any objection as to surprise, a copy of the relevant sections of the Guides to be used in cross-examination of the physician should have been provided to the applicant's attorney at start of deposition.

Challenging Apportionment Opinions

Where a frontal assault on causation for a particular injury is unsuccessful, provision of scientific evidence setting out the injured worker's risk factors for the particular injury can result in substantial apportionment. For example, genetics

is scientifically established as a major risk factor for back pain. Age is also a high risk factor for meniscal tears and rotator cuff injuries. The defense attorney will ask why the physician does not consider it more appropriate to attribute a higher percentage of disability to age and genetics where scientific evidence demonstrates such factors pose higher risk factors than repetitive or heavy physical work. The defense attorney will proceed further and suggest a percentage of apportionment due to non-industrial risk factors supported by the scientific evidence. The defendant should request the trial judge adopt defendant's suggested level of apportionment, in a trial brief, if the physician declines.

In the recent Court of Appeal , 3rd Appellate District decision in *City of Jackson v. WCAB (Christopher Rice)*, a panel QME's decision holding that genetic issues were causative factors that merit apportionment was upheld. Defendant should ensure that they identify all potential non-industrial risk factors associated with the injury in question and frame appropriate questions to the injured worker at time of deposition to confirm the risk factors.