

Significant Decision

Senate Bill 899's New Apportionment Rules Apply to All Claims Not Reduced to Final Judgment as of April 19, 2004.

Kleemann v. Workers' Comp. Appeals Bd.

(Filed 3/2/2005)

Second Appellate District, Div. Seven, Civil No. B177466

2005 Cal. App. LEXIS 316

Significance: This is the first published appellate-level case interpreting last year's blockbuster reform legislation, Senate Bill 899. And it is a case State Fund handled on behalf of the State of California, Department of Justice ("DOJ"). Proving once again (as if there was any doubt) that State Fund is *the* workers' compensation leader!

Facts: Once upon a time, Gregory Kleemann worked for the "City of Angels" as a police officer where he suffered a back and right knee injury on May 27, 1986, for which he received 16.5% permanent disability indemnity. Eventually, Kleemann came to work for DOJ as a special agent and investigator. In this capacity, Kleemann claimed industrial injury to his right knee on April 14, 1999 and on August 14, 2001. Kleemann and State Fund initially stipulated that the April, 1999 knee injury resulted in zero permanent disability. But Kleemann later petitioned to reopen that claim for new and further disability. Kleemann's consult—Dr. Dennis Ainbinder—reported that Kleemann's right knee disability should be apportioned 40/60 between the 1999 and 2001 knee injuries with DOJ. Conveniently, Dr. Ainbinder refused to apportion any permanent disability to the 1986 injury because "Kleemann did rehabilitate himself."

Meanwhile, Kleemann also claimed cumulative injury to his cardiovascular system from 1996 to April 30, 2000 while working for DOJ. Kleemann's internist reported that Kleemann's cardiovascular and hypertensive disease precluded heavy work and unduly stressful environments (as opposed, one assumes, to *duly* stressful environments). DOJ's internist reported that Kleemann had no residual permanent disability and that his coronary and hypertensive condition was caused by multiple factors, including hereditary predisposition, abnormal lipids, and work stress.

Kleemann's claim was submitted for decision on March 24, 2004. On April 28, 2004, however, the WCJ vacated submission and scheduled a status conference. The WCJ's order indicated that the medical record required further development because of amendments to the apportionment rules under SB 899. Kleemann petitioned the WCAB for removal, claiming that the WCJ's "retroactive" application of SB 899's new apportionment rules would cause irreparable harm. In the report on removal, the WCJ explained that the new apportionment rules became applicable to Kleemann's claim upon enactment of SB 899. The WCAB adopted the WCJ's report and denied removal, reasoning that there was no substantial prejudice or irreparable harm because Kleemann could petition for reconsideration after the WCJ made a final decision. The WCAB expressly declined to decide whether SB 899's new apportionment rules applied.

Holding and Rationale: As of its effective date, SB 899 *repealed* former Labor Code §§ 4663, 4750, and 4750.5. In their place, SB 899 substituted newly amended § 4663 and new § 4664. Among other things, § 4663 requires apportionment of permanent disability based on *causation* and § 4664 creates a conclusive presumption that the disability associated with a prior permanent disability award still exists at the time of a subsequent injury. Both sections are implicated in Kleemann's injury claims. The Court of Appeal concluded that the Legislature intended new §§ 4663 and 4664 to apply to pending cases such as Kleemann's prospectively from the date of enactment of SB 899, regardless of the date of injury. While Section 47 of SB 899 specifically states that this act "shall not constitute good cause to reopen or rescind, alter, or amend any existing order, decision, or award" of the WCAB, the Court of Appeal ruled that this language refers to *final judgments* subject to reopening under the WCAB's five-year continuing jurisdiction. Thus, SB 899's new apportionment rules apply to all claims not reduced to a final judgment as of SB 899's effective date, April 19, 2004.

The reason for this holding lies in the wholly statutory nature of worker's compensation benefits. Here is the money quote sans footnote citations:

"When new legislation repeals existing law, statutory rights normally end with repeal unless the rights are vested pursuant to contract or common law. In a case such as this, where workers' compensation rights which are purely statutory and not based on common law are at issue, repeal ends the right absent a savings clause. Rights end during litigation if repeal occurs before final judgment."

Comment: Oral argument in *Kleemann* occurred on February 4, 2005 along with another State Fund case: *State of California, Employment Development Dept. v. Workers' Comp. Appeals Bd. [Kral]* 2005 Cal. App. Unpub. LEXIS 1602. The issue was the same in both cases and both did not need to be published. Therefore, *Kral* remains unpublished; but, this is a solid double-win for State Fund, California employers, and the side of Goodness and Light.

There is one unresolved issue in *Kleemann* that bears watching, however. Kleemann's cardiovascular injury implicates Labor Code § 3212.7 which creates a rebuttable presumption of industrial injury for "heart trouble" that manifests or develops during a DOJ "state safety class" member's employment. In his petition for writ of review, Kleemann argued that the "anti-attribution" clause of § 3212.7 (which precludes rebutting the presumption by showing that the "heart trouble" pre-existed the employment) somehow precludes apportionment to causation under newly amended § 4663. One would think that a statute regarding a rebuttable presumption of industrial injury has nothing to do with apportionment of permanent disability since they are completely separate issues. The Court of Appeal wisely punted the issue to the WCAB to decide after further proceedings consistent with the court's opinion. We will have to wait and see how the WCAB handles this issue.