

Bye Bye Vocational Apportionment

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What we'll cover

EN BANC DECISION OF *NUNES V. DMV*

- ❖ Introduction
- ❖ What cases does this apply to?
- ❖ Case brief: Facts, procedural history, issues, rules, analysis, conclusion
- ❖ Analysis: Application to work comp going forward
- ❖ Other recent case law developments



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Nunes v. DMV

- ❖ En banc decision from the Workers' Compensation Appeals Board
- ❖ En banc: all the commissioners at the Appeals Board
- ❖ Citable authority, controlling authority
- ❖ (Panel decisions are just persuasive authority, this is stronger than a panel decision)



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TL, DR: VR Experts Can't Do that

This En Banc decision says VR experts:

- ❖ Cannot do “vocational apportionment”
- ❖ Have to carefully consider medical experts’ apportionment factors
- ❖ Wait, what do you mean



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What Situations Does This Apply to?

A smaller subset of high-value cases where:

- ❖ A QME or AME finds medical apportionment of PD to a prior date of injury, reducing the PD value.
- ❖ This apportionment is often to a well-known prior specific DOI that settled via award or C&R.
- ❖ This reduces the monetary PD value of an award – that apportionment may be the difference between PTD and PPD. Or it may mean a 5-6 figure difference in dollars if no PTD in play.



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So Now Medical Apportionment Reduced PD

A smaller subset of high-value cases where apportionment applies, and applicant is unhappy:

- ❖ AA hires a vocational rehab expert
- ❖ Voc rehab expert says existing PD under the rating schedule is inadequate to fully compensate applicant for their ability to compete in the labor market



AA's Voc Rehab Expert Says

A smaller subset of high-value cases where apportionment applies, applicant is unhappy and voc rehab expert says:

- ❖ The QME's/AME's apportionment of PD to a prior DOI should be ignored
- ❖ Voc rehab expert either reduces the QME's apportionment (increasing PD), or throws it in the trash altogether – and replaces it with their own apportionment known as “vocational apportionment”
- ❖ We defendants get our own voc rehab expert, who disagrees



The Issue At Bar

Now that the AA's voc rehab expert has thrown the QME/AME's apportionment in the trash, the question is:



- ❖ Wait a second, can the VR experts actually ignore the medical evidence?
- ❖ They aren't doctors after all
- ❖ Why do they get to play medical-legal expert when they don't have any medical training or a medical degree
- ❖ Isn't that creating an inaccurate factual/medical history?



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Therein lies the problem ...

There was starting to be a line of cases that said this vocational apportionment is OK

- ❖ B&B's very own Greg Fletcher summarized it here in an August 2022 blog article actually titled "Scary New Concept: Vocational Apportionment, or Lack Thereof"

<https://bradfordbarthel.com/scary-new-concept-vocational-apportionment-or-lack-thereof/>



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Therein lies the problem...

There was starting to be a line of cases that said this vocational apportionment is OK

- ❖ My personal take: Nobody on our side liked the case Greg was talking about
- ❖ We published the blog so you'd know about it
- ❖ But were hoping that more AAs wouldn't know about it



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And Just Like That...

This wonderful en banc decision comes along saying vocational experts cannot do that



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The Facts: *Nunes v. DMV*



- ❖ Applicant has a specific and a CT
- ❖ QME says: WPI/PD for neck, left UE, carpal tunnel
- ❖ QME says: neck has apportionment of 40% to preexisting factors, and carpal tunnel has apportionment of 60% to nonindustrial diabetes



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The Facts: *Nunes v. DMV*



- ❖ Applicant doesn't like the QME
- ❖ So they get a VR expert
- ❖ AA's VR expert says:
- ❖ Applicant cannot compete in the open labor market
- ❖ That inability to compete has nothing to do with the nonindustrial apportionment
- ❖ Nonindustrial apportionment has zero impact on earning capacity. The vocational apportionment says applicant is PTD
- ❖ QME and AA's VR expert appear to agree applicant is PTD, ie 100% PD



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The Facts: *Nunes v. DMV*

- Defense VR expert says “not PTD” and
- Applicant’s vocational apportionment to nonindustrial factors is at least 10%



Issues, Procedural: *Nunes v. DMV*

- ❖ Trial on issues of: PD, apportionment, AA fees, whether AA rebutted the AMA Guides for PTD
- ❖ Trial judge: Applicant is PTD
- ❖ Defendant files petition for reconsideration
- ❖ Case goes to the Workers’ Compensation Appeals Board



Issues on Recon at WCAB: *Nunes v. DMV*

Defendant's petition for recon says:



- ❖ Trial judge impermissibly disregarded QME's apportionment to nonindustrial factors
- ❖ AA didn't rebut the AMA Guides
- ❖ Judge should issue a new award based on QME's reporting



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Issues on Recon at WCAB: *Nunes v. DMV*

AA's answer to the petition for recon says:

- ❖ Silly rabbit, PTD is based on a complete loss of earning capacity
- ❖ A complete loss of earning capacity isn't based on medical impairment
- ❖ Apportionment of PD is inappropriate in cases where there's a complete loss of earning capacity
- ❖ Defendant's vocational apportionment was speculative and based on an incorrect legal theory



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WCAB's Analysis: *Nunes v. DMV*

WCAB commissioners rule:

- ❖ Medical apportionment is required by the Labor Code 4663
- ❖ The Labor Code makes no provision for vocational apportionment
- ❖ Vocational experts can still be used to address issues relevant to PD



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WCAB's Analysis: *Nunes v. DMV*

WCAB commissioners rule (cont'd):

- ❖ VR experts have to address medical apportionment
- ❖ VR experts cannot substitute valid medical apportionment with “vocational apportionment”



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WCAB's Analysis: *Nunes v. DMV*

WCAB commissioners explain:

- ❖ Cite cases with prior awards
- ❖ Ignoring apportionment to a prior injury is inconsistent with SB 899, the bill where the Legislature firmly established apportionment in 2005
- ❖ Which is fitting, because many of the cases where this fact pattern arose had a prior award



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WCAB's Analysis: *Nunes v. DMV*

WCAB commissioners explain:

- ❖ VR reports that do
 - a. ignore well-established facts and
 - b. rely on facts that are not germane are NOT substantial medical evidence



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WCAB's Analysis: *Nunes v. DMV*

WCAB commissioners explain facts that aren't germane:

- ❖ Example of facts that are not germane given by WCAB is AA's VR experts complaining: "the prior DOI didn't require work restrictions"
- ❖ That complaint is irrelevant when one considers that there's a prior injury that clearly caused PD to the same body part, which is required to be considered under the apportionment statutes and Escobedo



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Nunes v. DMV: Is that the end of the story?

Appeal to the 5th DCA?

- ❖ No appeal filed
- ❖ 45-day deadline was 8/6/23



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Takeaways: *Nunes*

Looking forward, here are some of the strategic points defendants will want to employ:

- ❖ Make sure your expert has the most accurate medical and factual history
- ❖ Requires attention to detail by the expert and the attorney



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Takeaways: Nunes

Looking forward, here are some of the strategic points defendants will want to employ:

- ❖ Have doctors clearly and carefully explain why the apportionment to a preexisting or nonindustrial condition is important (build up the apportionment)
- ❖ Have doctors explain how nonindustrial factors contributed to potential difficulties that could affect retraining (and ADLs needed to work)



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Takeaways: Nunes

Looking forward, here are some of the strategic points defendants will want to employ:

- ❖ My favorite experts regularly point out every single ADL and lack of work restrictions when they help us argue that applicant can work
- ❖ My favorite experts regularly point out major flaws in AA's experts facts, medical summaries, and histories



Takeaways: Nunes

Looking forward, here are some of the strategic points defendants will want to beware of that AAs and their experts may employ:

- ❖ AAs will still can and will want to rebut the PDRS
- ❖ Defendants should be wary of a strong, fact-based arguments that applicant cannot RTW
- ❖ Defendants, get a rebuttal report from your expert
- ❖ Defendants, highlight any inaccuracies



WCAB's Analysis: *Nunes v. DMV*

Sidenote:

- ❖ Every now and then you'll have a sleazy AA argue that you cannot send a QME evidence of prior records of a different DOI
- ❖ This flies in the face of cases like Benson and Escobedo, which are controlling authority
- ❖ When I see that argument I just tell the judge "this applicant doesn't care about the last 18 years of case law judge, he thinks that doesn't apply"



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WORKAROUNDS

- ❖ Watch out in multiple body part cases: "VE may also assist the parties in evaluating the effect of multiple disabilities spread across multiple body parts and systems."
- ❖ Watch out for work restrictions due to parts of body that do not have any non-industrial apportionment.



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Post Nunes case

Gunnoe v. Best Buy 2023 Cal.Wrk.comp. P.D. LEXIS 174

- ❖ Facts
- ✓ Applicant suffers 5/5/13 injury to her head, neck, back, and psyche.
- ✓ AME finds 33% apportionment to non-industrial factors for lumbar spine



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Gunnoe cont'd

- ✓ Although VR expert tried to sidestep orthopedic impairment in favor of psychological disability, he relied on AME's comments on residual pain to find her unemployable.
- ✓ VR expert also ignored AME's apportionment to find 0% to non-industrial factors.
- ✓ WCAB reversed award of PTD and remanded for reconsideration of apportionment due to orthopedic injuries.



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Gunnoe cont'd

- Likely outcomes:

- ❖ AA gets his VR expert to back off the ortho and put the blame on psyche which had no apportionment.
- ❖ Defense gets VR expert to rebut or pushes back on applicant's VR expert on the change of opinion.



OTHER CASES

Two recent noteworthy decisions came down recently:

- ❖ CA Supreme Court: Employers don't owe a duty to protect nonemployees from Covid
- ❖ 2nd DCA: WCAB must stop its grant and study practice



The Supremes



Case: *Kuciemba v. Victory Woodworks*

A federal court asked the CA Supreme Court to answer two questions about the state of the law in California. Those questions were:

1. If an employee contracts Covid-19 at his workplace and brings the virus home to his spouse, does California's derivative injury doctrine bar the spouse's claim against the employer?
2. Under California law, does an employer owe a duty of care to an employee's household members to prevent the spread of Covid-19?



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The Supremes Weigh in on Covid

The high court ruled:

- ❖ Exclusive remedy of workers' compensation and the derivative injury doctrine does not bar an employee from bringing a lawsuit for the wrongful death of a family member (or spouse)
- ❖ However, employers do not owe a duty of care to nonemployees to stop the spread of Covid-19



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What Does That Mean?



It means:

- ❖ The plaintiff had the right to bring the suit
- ❖ But they cannot win because in order to win, they would need to prove that the employer owed their family member/spouse a duty of care, and that the employer violated that duty
- ❖ No duty = employer prevails



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What Does That Mean for WC?

- ❖ Before this ruling, the See's Candies case had a ruling from the high court that an employee could bring such a suit
- ❖ As such, employers were concerned about other wrongful death suits and derivative injury suits for Covid
- ❖ For WC, if a hypothetical TPA/carrier accepted a Covid claim, they may be unknowingly be creating evidence that a party could potentially use against the employer in a wrongful death suit
- ❖ Now with that type of suit gone, less pressure on TPAs/carriers



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2nd DCA: Does Away with Grant and Study

- ❖ Before this ruling, the See's Candies case had a ruling from the high court that an employee could bring such a suit
- ❖ As such, employers were concerned about other wrongful death suits and derivative injury suits for Covid
- ❖ For WC, if a hypothetical TPA/carrier accepted a Covid claim, they may be unknowingly be creating evidence that a party could potentially use against the employer in a wrongful death suit
- ❖ Now with that type of suit gone, less pressure on TPAs/carriers



2nd DCA: Does Away with Grant and Study

Decision name: *Earley v. WCAB*

- ❖ 2nd District Court of Appeal ruled that:
- ❖ WCAB cannot issue a vague decision granting reconsideration but saying “we need more time to review this,” then take years to review it
- ❖ Applies to about 500-800(?) cases currently waiting for decisions



2nd DCA: Does Away with Grant and Study

The fine print

- ❖ 2nd DCA tried to appease both sides by specifying what the WCAB can do under the statutes. They can still:
 - ❖ Grant reconsideration
 - ❖ Issue a decision on the merits after reconsideration



2nd DCA: Does Away with Grant and Study

This appears to suggest that the 2nd DCA wants:

- ❖ The WCAB to stop the practice of issuing short decisions granting reconsideration but saying “we need more time”
- ❖ The WCAB to issue more substantive decisions identifying the issues, and maybe more summarization of the evidence
- ❖ That being said, the WCAB can still grant recon and issue a decision on the merits later





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