THE LAW OFFICE OF CARL TABER

SPECIALIZING IN WORKERS' COMPENSATION DEFENSE

April 4, 2008

Workcompcentral.com, Inc.
1320 Flynn Road, Suite 403
Camarillo, CA 93012

RE: Dianne Benson v. The Permanente Medical Group
Adjusted by Athens Administrators
WCAB No.: OAK 0297895
Claim No.: 03010001; 03001254
Date/Loss: 6-3-03
Our File No.: 55030

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WORKERS' COMPENSATION SPECIALIST

CALIFORNIA BOARD OF LEGAL SPECIALIZATION

Dear Workcompcentral:

Enclosed please find a copy of our Answer to CAAA's Amicus Brief in the Benson matter. I thought you might wish to post it in addition to the other materials regarding this important appeal.

Sincerely,

Carl Taber

CT:hp
encl. (Respondent's Answer to CAAA's Amicus Brief)
cc: Mr. Daniel Ordonio
Ms. Joann Rodriguez

IN THE COURT OF APPEAL FOR THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

COURT OF APPEAL CASE NO.: 1 CIVIL A120462

Dianne Benson

PETITIONER,

v.

Workers' Compensation Appeals Board and
The Permanente Medical Group, Inc.

RESPONDENTS.

WCAB No. OAK 0297895 and OAK 0326228

Honorable Rosa Moran

RESPONDENT'S ANSWER TO CALIFORNIA APPLICANTS' ATTORNEYS ASSOCIATION AMICUS BRIEF

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Service on WCAB required per Cal. Rules Ct., Rule 8.494(a)(1)(B)(3)

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TO THE HONORABLE PRESIDING JUSTICE AND THE HONORABLE ASSOCIATE JUSTICES OF THE FIRST DISTRICT, COURT OF APPEAL OF THE STATE OF CALIFORNIA:

Respondent The Permanent Medical Group herewith submits its Answer to the Brief submitted by the California Applicant's Attorneys Association (CAAA).

ARGUMENT

1. CAAA has Breached its Duty of Candor to This Tribunal by Refusing to Confront Controlling Supreme Court Precedent.

The central tenets of CAAA's Amicus Brief have already been amply considered and thoroughly rejected by the California Supreme Court. CAAA's failure to admit this fact in its brief is a violation of the duty of candor to this tribunal. Batt v. City & County of San Francisco (2007), 155 Cal. App. 4th 65, 82, footnote 9.

The California Supreme Court, in Brodie v. Workers' Comp. Appeals Bd. (2007), 40 Cal. 4th 1313, upheld the Legislature's plenary power to restructure the workers' compensation scheme. It recognized the Legislature both could and did change the scheme of apportionment from its prior configuration to a structure requiring parceling out the causative sources of overall disability to their respective sources. Brodie, supra, at 1328. CAAA utterly breaches its duty of

candor to this tribunal by failing to admit and confront this central conclusion of Brodie.

Instead, CAAA continues to assert the arguments eviscerated by Brodie in support of its position here. CAAA should be sanctioned for its unrepentant misconduct.

2. In Analyzing What the Contributing Forces Are to an Injury, One Must Consider Each Established Industrial Injury in That Equation.

In analyzing the causes of the disability found under SB 899, one must simply divide the pie in accordance with the evidence. This is all the Agreed Medical Examiner here did.

CAAA's convoluted argument that there can not be two simultaneous injuries under the regulatory scheme simply misstates the law and tortures the English language in order to reach its asserted conclusion.

Here, there was a specific injury and a cumulative injury that ended on the same date as the specific. Simple logic says that where you have two events, one must, perforce, precede the other. So, too, is it with two injuries.

A cumulative trauma claim is a series of micro-traumas over a period of time, rather than a specific event. That basic understanding demonstrates that there were not simultaneous injuries and, indeed, there could never be. CAAA's supposition, while superficially attractive to its position, bears neither scientific nor legal scrutiny. It also fails to follow the mandate of Brodie.

3. A Physician's Clinical Judgment, Based Upon a More-Probable-Than-Not Standard, Has Always Been Sufficient to Sustain a Medical Expert's Opinion.

CAAA boldly suggests that it is "impossible for a medical expert or trier of fact to determine the effect of one injury on another when the medical condition is fluid." CAAA's Amicus Brief at p. 11. Of course, CAAA has no legal support cited at that location to support its rash assertion. The simple reason is that there is none.

In discussing apportionment to causation under SB 899, the two appellate cases that have addressed this issue have rejected CAAA's suggestion that clinical judgment is speculative. Instead, the Appellate Courts have endorsed medical conclusions based upon medical judgment, some intuition, and approximations based upon reasonable medical probability as not being speculative. Andersen v. Workers' Comp. Appeals Bd. (2007), 149 Cal. App. 4th 1369, 1382 [72 Cal. Comp. Cases at 398]. Likewise, a medical opinion on apportionment "cannot be disregarded as being speculative when it is based upon his expertise in evaluating the significance of these facts." E. L. Yeager Construction v. Workers' Comp. Appeals Bd. (2006), 145 Cal. App. 4th 922, 930 [71 Cal. Comp. Cases at 1693].

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4. The Liberal Construction Rule of Labor Code §3202 Does Not Apply Where the Supreme Court has Already Concluded the Statute in Question is Not Ambiguous.

The Supreme Court in Brodie rejected CAAA's ambiguity argument, claiming that the new "regime" of apportionment to causation was not an ambiguous statute. As to Labor Code §3202, the Court concluded:

> It is of little or no use here, where other tools permit us to divine [the Legislature's] intent.

Brodie, supra, at 1332

5. CAAA's Effort to Raise a Substantial Evidence Issue Must Be Rejected as That Issue Was Never Raised by the Petitioner.

The general rule of appellate procedure is that an Amicus may not expand the scope of review. This is based upon the:

> . . . universally recognized [principle] that an appellate court will consider only those questions properly raised by the appealing parties. Amicus curiae must accept the issues made and propositions urged by the appealing parties, and any additional questions presented in a brief filed by an amicus curiae will not be considered [citations].

Pratt v. Coast Trucking, Inc., 1964 228 Cal. App. 2d 139, 143.

Here, Petitioner Benson failed to raise any issue, as required under Labor Code §5952 (see Respondent's Answer to Petition for Writ of Review, pages 9-10). CAAA's effort to "launch out upon a judicial expedition of its own" (Id.) is thus barred under the general rule that an Amicus may not raise issues not raised by the primary participants.

CONCLUSION

Amicus CAAA has raised no issues in its Brief that merit consideration by this Court. Unhappy with the legislative change that has obliterated prior case law, CAAA simply flails against the changing evolutionary tides. The Legislature adopted new rules governing apportionment to causation and the Supreme Court upheld the change. CAAA, flailing against that change, much like a mammoth caught in the tar pits, fails to understand its evolutionary fate.

The Workers' Compensation Appeals Board's decision in Benson was a correct interpretation of the mandates set out by Brodie, and there is no reason for this Court to grant the writ of review. The Supreme Court defined the path; the Workers' Compensation Appeals Board simply followed the breadcrumbs. This writ should be denied.

Dated: April _____, 2008

Respectfully submitted,

Carl Taber, Esq.
Attorney for Respondent
The Permanente Medical Group, Inc.

VERIFICATION OF CARL TABER

I am an authorized representative of the Permanente Medical Group, a party to this action, and am authorized to make this verification for and on its behalf. I make this verification for that reason. I have read the Respondent's Answer To California Applicants' Attorneys Association Amicus Brief. The matters related in it are true of my own knowledge or were obtained from sources which I believe to be reliable, and based upon that information and belief I believe them to be true.

I declare, under penalty of perjury under the laws of the State of California, that the foregoing is true and correct. Executed this ____ day of April, 2008, at Petaluma, Sonoma County, California.

Carl Taber, Esq.
Attorney for Respondent
The Permanente Medical Group, Inc.

STATEMENT OF COMPLIANCE

As attorney of record herein, I certify that pursuant to 8.204(c)(1) of the California Rules of Court, this brief of Petitioner is produced using 13 point Times New Roman type, including footnotes, and approximately 2,051 words and less than the 14,000 words permitted by this rule.

Executed on April ____, 2008, at Petaluma, Sonoma County, California

Carl Taber, Esq.
Attorney for Respondent
The Permanente Medical Group, Inc.