Apportionment

From: JTruce@aol.com
Subject: Is There Life After Nabors?
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Date: 6/9/06; Time: 10:45 a.m.; Place: Lobby Bar at the Hyatt; Opening scene:
George the bartender had just remarked that it was the earliest he had ever seen me at the bar. I told George that I actually had an appearance at the WCAB but it was difficult to concentrate amid all the cheering and dancing going on by the applicant's attorneys once the Court of Appeal announced it's decision in **Nabors,** overruling the Board's en banc decision which allowed employers to take credit for the percentage of disability received by an injured worker in a prior Findings and Award. After ordering my second Martini I explained that the Court of Appeal in **Nabors** agreed with it's neighboring Court in the 5th district **(Dykes)** that employers and carriers, under L.C. 4664, could only receive credit for the dollar amount of the previous award, not the percentage of disability awarded. " That's crazy" said George--"that would mean that an injured worker could receive multiple awards, well exceeding a total of 100%. Can you do something about this absurdity, what about the Board's en banc decision in **Escobedo** that you told me about the last time you were in here?" **Ah George, as Shakespeare so eloquently put it: "There's the rub--at least as far as the applicant's attorney's are concerned."** In interpreting L.C. 4663 the Board in **Escobedo** opened whole new vistas for employers and insurance carriers as the **Board** held that L.C. 4663 changed the landscape of apportionment and now defendants are allowed to apportion to prior retroactive work restrictions, asymptomatic conditions or any other conditions that contribute to the applicant's present permanent disability. Had the doctors in Dykes and Nabors apportioned the applicant's present disability to a retroactive prior prophylactic work restriction the Courts may have approved the apportionment to percentages under L.C. 4663 where they did not under L.C. 4664. However while L.C. 4664 does not allow the concept of **"rehabilitation"** from a prior award or disability L.C. 4663 does.. Prior to SB 899 applicant's quite frequently testified that since receiving their prior awards they have had absolutely no problems or complaints and have completely recovered from the effects of the prior injury. Therefore it is extremely important that we interview the applicant's prior supervisors to see if the applicant continued with his subjective complaints or if the applicant, after his injury, was given a lighter job as a result of his work restrictions. This is evidence that mitigates against the concept of **"rehabilitation." "What a minute," said George, "I always thought the word permanent in permanent disability meant forever! "Not in workers comp George."** Before the AMA Guides one of the real problems faced by employers and carriers was the concept of the prophylactic or preventative work restrictions. Applicants who had no objective findings and basically minimal subjective complaints still received awards based on prophylactic work restrictions which basically said that you may not have disability now but if you continue to do heavy work you may suffer disability in the future. **"Hold on said George, How can an applicant now prove that he has rehabilitated himself from a prior prophylactic work restriction when he had no disability in the first place? I smiled: He can't George--make mine a double.-- joe truce**

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