

# HEFLEY LAW NEWSLETTER

## Inaugural Edition

Pictured: Hefley Law Main Conference room. This is where many depositions or settlements take place. See page 6 for a discussion of settlements at depositions.



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Welcome to the first ever edition of the Hefley Law Newsletter. We are beyond excited to be able to share this monumental event with you and provide invaluable insight into the CA Workers Comp system, ongoing changes, trends and issues that impact our day to day handling of cases, claims, and our strategies for the best outcomes for your cases. Thank you for allowing us a few moments of your time and as always, please feel free to contact anyone at the firm for any questions or concerns.

### BAD ACTOR AWARDS

The DIR has suspended over 200 medical providers under Labor Code section 139.21 (a) (1). Nearly every day it seems as if there is a another list released of additional providers suspended.

The Orange County District Attorney, after a three year fraud investigation, charged 10 attorneys and six “cappers” for participating in a massive multibillion-dollar Worker’s Compensation insurance referral scheme that exploited persons in predominantly Spanish-speaking communities.



### UPCOMING LEGISLATIVE ISSUES

California lawmakers will hear testimony on AB 1749 and AB 2046 on April 4. AB 1749 would allow police officers to receive benefits for injuries sustained while responding to emergency situations if outside of the state of California. This of course is the "politically correct" reaction by politicians to the October 1 mass shooting in Las Vegas. AB 2046 would facilitate the sharing of information about Worker's Compensation fraud among state agencies. In addition, the Senate committee on labor and industrial relations will hear SB 1086 on April 11 which would repeal a statute sunsetting a law that allows dependents of police officers and firefighters up to 420 weeks to file a claim for workers compensation benefits.



### CASE LAW UPDATE

LC 4656

COUNTY OF SAN DIEGO,  
Petitioner,

v.

WORKERS' COMPENSATION APPEALS  
BOARD and KYLE PIKE,  
Respondents.

The question presented in this writ proceeding is straightforward. Is petitioner, County of San Diego (the County), correct that Labor Code section 4656, subdivision (c)(2)1 precludes respondent, Workers' Compensation Appeals Board (the Board), from awarding respondent, Kyle Pike, temporary disability payments for periods of disability occurring more than five years after the date of the underlying injury that

Pike suffered while working for the County? We conclude that the plain language of the statute indicates that the answer to this question is, "Yes." Section 4656, subdivision (c)(2) provides, "Aggregate disability payments for a single injury occurring on or after January 1, 2008,[2] causing temporary disability shall not extend For more than 104 compensable weeks within a period of five years from the date of injury." (Italics added.) Accordingly, we annul a Board order affirming a workers' compensation administrative law judge's order that awarded temporary disability benefits for periods of disability occurring more than five years after Pike's injury.

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## APPORTIONMENT, LC 4663, PREEXISTING CONDITIONS AND SME

In *Sobol v. State of California Department of Corrections and Rehabilitation*, 2017 Cal. Wrk. Comp. P.D. LEXIS 454, the WCAB determined that an AME's opinion on apportionment to genetic factors was not substantial evidence because it was conclusory and not substantiated with sufficient medical rationale. The applicant sustained an industrial injury to his lumbar spine. The AME reported that the cause of degenerative disease in the spine was convincingly shown to be principally genetic, and apportioned 25 percent of the disability to cumulative aggravation from the job. The WCAB stated that although *City of Jackson v. WCAB (Rice)* (2017) 82 CCC 437 allowed apportionment to genetic or heredity factors, a decision must be supported by substantial evidence. The WCAB found that the AME made a conclusory statement that degenerative disk disease was convincingly shown to be genetic, but did not provide any medical detail, data, studies or research articles to support his findings. The applicant was awarded permanent disability based on the AME's opinion without apportionment.

## WELCOME



Hefley Law would like to welcome our newest associate attorney Mr. Augustine K. Oh. Mr. Oh comes to Hefley Law with extensive legal experience as a Workers Compensation Defense Attorney. He graduated undergrad from UC Irvine and received his Juris Doctorate from Washington University School of Law. He has worked at several statewide Defense firms and has represented virtually all major insurance carriers and TPA's including Sedgwick, Travelers, BHHC, Tristar, ESIS, Gallagher Bassett, AmTrust and York. He has substantial litigation background and extensive appellate experience. He is a certified member of Mensa and is a Black Belt in Tae Kwon Do.





## NATIONAL WORKERS COMPENSATION CONVENTION

### LAS VEGAS DECEMBER 2017



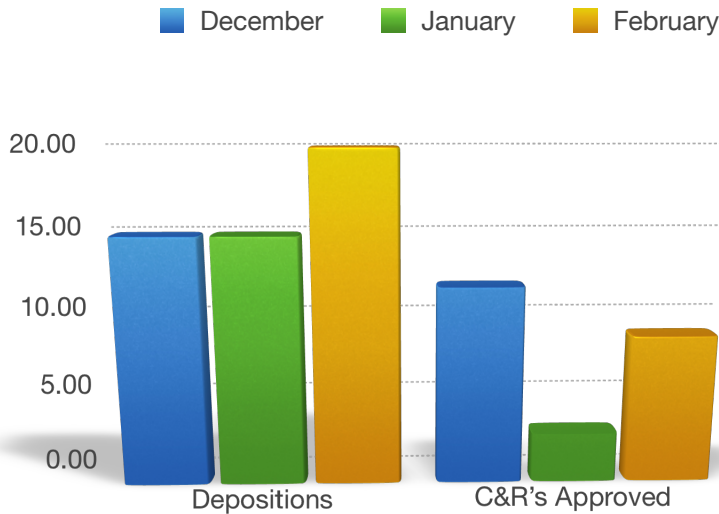
Hefley Law was proud to appear and participate in the National Workers Compensation & Disability Conference at the Mandalay Bay convention center in December. Thank you to all of those who took the time to stop by our booth and shake our hands. For many clients it was an opportunity for us to put a "face to the name". We had a wonderful time and look forward to next year.



See you again December 2018!



## BY THE NUMBERS: Settlements at Deposition



As you can see by the numbers, a deposition is your first and best “settlement opportunity”. Applicant attorneys have zero incentive to settle a case immediately. You may have 50 witnesses who all say that the applicant is a fraud and you may even have a medical report saying that the applicant is either embellishing, malingering, or flat out lying, but applicant attorney has taken the time

to file an application for adjudication of claim so there is no reason to believe that they are simply going to “put their hands up” and say I give. The incentive of a deposition allows them to obtain minimal Labor Code 5710 fees, as well as their fees from the compromise and release. Yes, you can in theory resolve the case without a deposition. Those cases need to be very fact specific with little dispute. However, in the majority of cases I would always recommend an immediate deposition within the first 90 days of the case. This not only gives you the opportunity to resolve the case at the time of the deposition, but if you are unable to do so it allows you the opportunity to gather valuable information to assist you in proceeding with defending the case going forward including obtaining testimony under oath about the applicant’s complaints, knowledge and disability, limitations, ADLs, etc.

The deposition does not guarantee a settlement, but we certainly make every effort to negotiate settlement at the deposition.

Please feel free to call or email for further information pertaining to the benefits of conducting a deposition in your claims.



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## AMA GUIDES: The Basics



# HEFLEY LAW, APC

PREMIER WORKERS COMP LEGAL DEFENSE

In every Newsletter this column will explore issues pertaining to the application and understanding of the AME Guides to the Evaluation of Permanent Impairment, 5th Edition. In today's column, we start right at the beginning.

## Chapter One:

## Philosophy, Purpose, and Appropriate Use of the Guides

## 1.1 History

- “The Guides was first published... in response to a public need for a standardized, objective approach to rating medical impairments” (p.1).

- “Chapter authors were encouraged to use the latest scientific evidence from their specialty and, where evidence was lacking, develop a consensus view” (p.1).

- “The fifth edition includes most of the common conditions, excluding unusual cases that require individual consideration” (p.2).

## 1.2 Impairment, Disability, and Handicap

- Impairment is “a loss, loss of use, or derangement of any body part, organ system, or organ function” (p. 2).

- An impairment can be manifested objectively (e.g., a fracture) or subjectively (e.g., through fatigue and pain) (p. 2).

- An impairment is permanent when it has reached “Maximum Medical Improvement (MMI), meaning it is “well established and unlikely to change substantially in the next year with or without medical treatment” (p. 2).

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Impairment percentages or ratings developed by medical specialists are “consensus-derived estimates that reflect the severity of the medical condition and the degree to which the impairment decreases an individual’s ability to perform common activities of daily living (ADL), *excluding* work” (p. 4, emphasis in original):

- **Self care, personal hygiene** (e.g., urinating, defecating, brushing teeth, combing hair, bathing, dressing oneself, eating)
- **Communication** (e.g., writing, typing, seeing, hearing, speaking)
- **Physical activity** (e.g., standing, sitting, reclining, walking, climbing stairs)
- **Sensory function** (e.g., hearing, seeing, tactile feeling, tasting, smelling)
- **Nonspecialized hand activities** (e.g., grasping, lifting, tactile discrimination)
- **Travel** (e.g., riding, driving, flying)
- **Sexual function** (e.g., orgasm, ejaculation, lubrication, erection)
- **Sleep** (e.g., restful, nocturnal sleep pattern)

A **0% whole person (WP) impairment** rating is assigned to an individual with an impairment if the impairment has no significant organ or body system functional consequences and does not limit the performance of the common activities of daily living indicated in Table 1-2 (i.e., self-care, personal hygiene, communication, physical activity, sensory function, nonspecialized hand activities, travel, sexual function, sleep) (p. 5).

A **90% to 100% WP impairment** indicates a very severe organ or body system impairment requiring the individual to be fully dependent on others for self-care, approaching death (p.5).

**Disability** “has historically referred to a broad category of individuals with diverse limitations in the ability to meet social or occupational demands” (p. 8).

Impairment does not necessarily correspond to work disability.

- “For example, an individual who receives a 30% whole person impairment due to pericardial heart disease is considered from a clinical standpoint to have a 30% reduction in general functioning as represented by a decrease in the ability to perform activities of





daily living. For individuals who work in sedentary jobs, there may be no decline in their work ability although their overall functioning is decreased. Thus, a 30% impairment rating does not correspond to a 30% reduction in work capability” (p. 5).

•“Similarly, a manual laborer with this 30% impairment rating due to pericardial disease may be completely unable to do his or her regular job and, thus, may have a 100% work disability (p. 5).

#### 1.6 Causation, Apportionment Analysis, and Aggravation

•The AMA Guides notes there are many definitions of causation, and that the legal standard for causation varies from jurisdiction to jurisdiction, but nevertheless provides a definition of causation as “an identifiable factor (e.g., accident or exposure to hazards of a disease) that results in a medically identifiable condition” (p. 11).

•The AMA Guides recognizes that “apportionment” may also have a unique legal definition in the context of the system in which it is used (p. 12). In California, Labor Code sections 4663 and 4664 define apportionment, as well as case law, which are not entirely consistent with the Guides’ definition of apportionment as a distribution or allocation of causation of “injury or disease and resulting impairment” (p. 11). The AMA Guides indicates that, in its view, before apportioning impairment to a prior factor, “the physician needs to verify that all of the following information is true for an individual:

1. There is documentation of a prior factor.
2. The current permanent impairment is greater as a result of the prior factor (i.e., prior impairment, prior injury, or illness).
3. There is evidence indicating the prior factor caused or contributed to the impairment, based on a reasonable probability (>50% likelihood)” (p. 11).

NEXT TIME: We will cover Chapter 2 of the AMA Guides

For a further discussion, please feel free to call or email us.



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