"Apportionment: Case Law Outline Focusing On Developing Themes, Trends, and Problem Areas."
(July 2020 Supplement)

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NOTICE TO READERS

Fundamental Analytical Principles

Introduction:

In my 2013 Apportionment Case Law update I included for the first time a section dealing with "fundamental analytical principles," based on the working assumption that it would provide an ongoing resource to the workers' compensation community as a reference and guide dealing with the critical underlying fundamental analytical concepts and principles related to Labor Code §4663 and Labor Code §4664, as well as a separate commentary on substantial medical evidence and correct legal standards. In subsequent outlines I intentionally eliminated or removed this section based on the belief that most, if not all, workers' compensation practitioners, judges, and evaluating physicians for the most part understood the basic fundamental analytical principles and concepts underlying the radical change in the law of apportionment effectuated by the passage of SB899 and Labor Code §§4663 and 4664.

However, in the intervening years since 2013, and after my review and analysis of numerous recent apportionment cases, it is abundantly clear that a significant number of practitioners and evaluating physicians still do not fully comprehend the fundamental core analytical principles and concepts essential to understanding the correct application of Labor Code §§4663 and 4664 and related substantial medical evidence standards.

Graphic examples to support my decision to once again include this section in the outline are exemplified by two recent cases, and numerous other recent cases, which clearly show a fairly widespread misunderstanding of the fundamental principles underlying Labor Code §§4663 and 4664. In the case of *Caires v. Sharp Health Care* (2014) Cal.Wrk.Comp. P.D. LEXIS 145 (WCAB panel decision), three different evaluating physicians in the same case all failed to demonstrate a basic understanding of the core concepts and principles related to Labor Code §4663 apportionment. What is striking about the *Caires* case is the fact the apportionment issue was fairly straightforward, involving whether or not there was valid legal apportionment related to preexisting degenerative conditions. *Caires* also deals with an important issue related to whether the AMA Guides can be used by reporting physicians to determine valid legal apportionment under Labor Code §§4663 & 4664.

Perhaps a more graphic example is the very recent case of *Pattiz v. SCIF/MTC Trucking, Inc.* 2015 Cal.Wrk.Comp. P.D. LEXIS 541, 43 CWCR 201, in which a workers' compensation judge in issuing a joint Findings of Fact and Award in two cases incorrectly dealt with four separate apportionment issues in the same case, including *Benson*, Labor Code §4663 nonindustrial apportionment, the interaction of medical evidence of apportionment and vocational evidence, and finally erroneously construed and applied the Labor Code §4662(b) determination of permanent total disability "in accordance with the fact." (sic). The fact a judge ten years after

the passage of SB899 and Labor Code §§4663 and 4664 could render an incorrect and erroneous decision on a "quartet" of apportionment issues in a single case is troublesome. The WCAB granted defendant's Petition for Reconsideration and rescinded the WCJ's Award. These cases and similar cases underscore the fact the core concepts and fundamental analytical principles underlying Labor Code §§4663 and 4664 require continued and repeated reemphasis.

Labor Code Section 4663

The following are three critical portions or provisions of Labor Code Section 4663 as enacted by SB 899 on April 19, 2004:

(a) Apportionment of permanent disability shall be based on causation.

(b) Any physician who prepares a report addressing the issue of permanent disability due to a claimed industrial injury shall in that report address the issue of causation of the permanent disability.

(c) "…A physician shall make an apportionment determination by finding what approximate percentage of the permanent disability was caused by the direct result of injury arising out of and occurring in the course of employment and what approximate percentage of the permanent disability was caused by other factors both before and subsequent to the industrial injury, including prior industrial injuries."

Comments: As reflected in the cases in the outline dealing with causation of injury, AOE/COE as opposed to causation of impairment or disability, Labor Code Section 4663 deals only with causation of permanent disability and not causation of injury.

The other significant issue is the net cast by Labor Code Section 4663 is extremely broad in terms of what may constitute legal apportionment. You will note the reference to "other factors" and not just to injuries or disability. The term "factors" is much broader than an injury whether that injury occurred prior to or subsequent to the industrial injury in question. The critical legal and medical questions to be resolved are to determine all the contributing causal factors of the applicant's permanent disability and impairment at the time of the MMI evaluation(s) in any case. A "factor" or "factors" that can be a contributing cause of impairment or disability are myriad and contingent on the specific medical record and facts. For example, in a psychiatric case, as indicated by cases in the outline, a "factor" contributing to an applicant's psychiatric impairment or disability may be a pre-existing personality disorder or other mental condition that is a contributing cause of the applicant's current psychiatric or psychological disability. As is also demonstrated repeatedly in the outline, a contributing "factor" to disability can be an asymptomatic pre-existing condition so long as that condition is a contributing cause or factor of

the applicant's present disability, i.e., making it worse than it would have been without the underlying causative factor.

Radical Change

Labor Code Section 4663 has been described in terms of its impact and change on pre-existing apportionment law as "radical", "a diametrical change", and a "new regime".

From a historical perspective, it must be kept in mind that from 1932 to 1968, a period of 36 years, the law of apportionment in California was basically the same as it is currently under SB 899, as reflected in Labor Code Sections 4663 and 4664. For the period of 1968 to the enactment of SB 899 in 2004, a span of another 36 years, there was basically very little opportunity for a defendant to obtain valid Labor Code Section 4663 apportionment since the case law during this period essentially placed the burden on defendant to establish injuries and other factors that were labor disabling as a basis for valid legal apportionment. From 1968 to 2004, there was no valid basis for apportionment to pre-existing pathology and other factors that may have been a contributing cause of the ultimate disability in a case if that contributing factor was not labor disabling in and of itself.

The California Supreme Court in Brodie v. WCAB (2007) 40 Cal. 4th 1313, 72 Cal Comp. Cases 565 discussed in detail the new "regime" of apportionment based on causation. The Brodie Court discussed the distinction and differences in pre-SB 899 Labor Code Section 4663 apportionment and post-SB 899 Labor Code Section 4663 apportionment as follows:

> Until 2004, former section 4663 and case law interpreting the workers' compensation scheme closely circumscribed the basis for apportionment. Apportionment based on causation was prohibited. (Pullman Kellogg v. WCAB (1980) 26 Cal. 3d 450, 454, 45 Cal. Comp. Cases 170)
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> Under these rules, in case after case courts properly rejected apportionment of a single disability with multiple causes (See, e.g., Pullman Kellogg v. WCAB, supra, 26 Cal. 3d at pp 454-455) no apportionment of lung injury between industrial inhalation of toxic fumes and nonindustrial pack-a-day smoking habit]; Zemke v. WCAB (1968) 68 Cal. 2d 794, 796-799, 33 Cal. Comp. Cases 358] [no apportionment of back disability between industrial back injury and nonindustrial arthritis]; Berry v. WCAB (1968) 68 Cal. 2d. 786, 788-790, 33 Cal. Comp. Cases 352] [no apportionment of knee disability where industrial knee injury triggered "advancement" of previously dormant nonindustrial fungal disease]; Idaho Maryland etc. Corp. v. IAC (1951) 104 Cal. App. 2d 567, 16 Cal. Comp. Cases 146] [no apportionment between industrial exposure to mine gas and nonindustrial latent heart disease]." In short, so long as the industrial cause was a

> but-for proximate cause of the disability, the employer would be liable for the entire disability without apportionment.

The Supreme Court, in contrasting current Labor Code Section 4663 with previous apportionment law and principles under Labor Code Section 4663, the Court stated:

> The plain language of sections 4663 and 4664 demonstrates they were intended to reverse these features of former sections 4663 and 4750. (Kleeman v. WCAB (2005) 127 Cal. App. 4th 274, 284-285, 70 Cal. Comp. Cases 133.) Thus, new sections 4663, subdivision (a) and 4664, subdivision (a) eliminates the bar against apportionment based on pathology and asymptomatic causes. (E.L. Yeager Construction v. WCAB (Gatten) (2006) 145 Cal. App. 4th 922, 71 Cal. Comp. Cases 1687; Escobedo v. Marshalls (2005) 70 Cal. Comp. Cases 604,617 (en banc))

Perhaps the most insightful comment or characterization the Supreme Court indicated in the Brodie decision as to the fundamental principle of applying Labor Code Section 4663 as enacted under SB 899 was as follows:

> "…the new approach to apportionment is to look at the current disability and parcel out its causative sources, nonindustrial prior industrial, current industrial, and decide the amount directly caused by the current industrial source. This approach requires thorough consideration of past injuries, not disregard of them."

Perhaps another way of characterizing the fundamental principles of new Labor Code Section 4663 in terms of causation of impairment is that in Brodie, Escobedo, and Gatten a reporting physician under Labor Code Section 4663 must give an opinion and the WCAB to make a finding, on what percentage of applicant's current overall permanent disability is attributable to each contributing cause industrial or non-industrial. As recognized by the Brodie court, multiple causes frequently interact to cause permanent disability. In essence, the purpose of apportionment is to limit the employer's liability to that percentage of actual permanent disability caused by the industrial injury, not to determine what the level of permanent disability would have been absent the non-industrial cause.

Basically, Labor Code Section 4663 comports with logic, common sense, and medicine in that with respect to any disability or impairment there may be multiple contributing causes and not one cause. These fundamental principles and concepts must be understood and applied by physicians, lawyers, WCJs as well as the WCAB and the Court of Appeal.

Given the radical change in apportionment under new Labor Code Section 4663, it was understandable that immediately after the enactment of SB 899 there was a very unsettled period of time when both the applicant's and defense bar expounded different theories and concepts as to the meaning of Labor Code Section 4663 and how it should be applied.

It was not until the WCAB issued its en banc decision Escobedo that the workers' compensation community had any clear guidance on how the new apportionment statutes should be implemented. In Escobedo (2005) 70 CCC 604, the WCAB basically provided an analytical roadmap as to the construction and application of the new apportionment statutes. However, a careful review of numerous WCAB panel decisions in the immediate aftermath of the Escobedo en banc decision demonstrated that both WCJs and the WCAB began to fully comprehend the dramatic and sometimes harsh impact Labor Code Section 4663 would have on many cases. Unfortunately, many of these early panel decisions and even recent decisions from line WCJs and the WCAB continue to mistakenly apply the pre-SB 899 requirement that there had to be an injury or a factor that was labor disabling in order to have valid apportionment under new Labor Code Section 4663. (See, *City of Petaluma et al., v. WCAB (Lindh)* 2018 Cal.App. LEXIS 1137, at page 31 of this outline as a prime example).

And again in E.L. Yeager Construction v. WCAB (Gatten) (2006) 145 Cal. App. 4th 922, 71 CCC 1687 the Court reversed the WCAB reminding the Board of their own earlier en banc decision in Escobedo and reaffirming the correct legal standards and principles in applying Labor Code Section 4663 apportionment.

The most significant case, as discussed hereinabove, was the California Supreme Court's decision in Brodie in 2007. (Brodie v. WCAB (2007) 40 Cal. 4th 1313, 72 Cal. Comp. Cases 565) The California Supreme Court articulated a number of core principles with respect to their analysis of Labor Code Section 4663, distinguishing and differentiating it from pre-SB 899 apportionment law and principles.

Labor Code §4664

Labor Code §4664 has three critical provisions.

Labor Code §4664(a) provides as follows: "the employer shall only be liable for the percentage of permanent disability directly caused by the injury arising out of and occurring in the course of employment."

Labor Code §4664(b) provides as follows:

> If the applicant has received a prior award of permanent disability, it shall be conclusively presumed that the prior permanent disability exists at the time of any

subsequent industrial injury. This presumption is a presumption affecting the burden of proof.

Labor Code §4664(c)(1) provides as follows:

> The accumulation of all permanent disability awards issued with respect to any one region of the body in favor of one individual employee shall not exceed 100% over the employee's lifetime unless the employee's injury or illness is conclusively presumed to be total in character pursuant to §4662. As used in this section, the regions of the body are the following:
>
> (A) Hearing.
> (B) Vision.
> (C) Mental and behavioral disorders.
> (D) The spine.
> (E) The upper extremities, including the shoulders.
> (F) The lower extremities, including the hip joints.
> (G) The head, face, cardiovascular system, respiratory system and all other systems or regions of body not listed in sub paragraphs (a) to (f), inclusive.

Labor Code §4664(c)(2) provides as follows "Nothing in this section shall be construed to permit the permanent disability rating for each individual injury sustained by an employee arising from the same industrial accident when added together from exceeding 100%.

Comment: Subsequent to the enactment of Labor Code §4664, most employers and defendants focused on Labor Code §4664(b) related to the conclusive presumption afforded/accorded to prior awards of permanent disability. Unfortunately, through evolving case law, what appeared to be a relatively straight forward concept became a quagmire related to burden of proof as to what constitutes an award and defendant's burden to prove overlapping factors of disability related to prior awards.

For example, many defendants and employers thought that if an applicant had a prior Findings & Award or Stipulated Award to the lumbar spine of 25% under the 1997 Permanent Disability Rating Schedule, and then suffered a subsequent injury to the lumbar spine under the AMA Guides of 30% after adjustment for age and occupation, they would be entitled to a conclusive presumption that the prior permanent disability, i.e. the 25% award existed at the time of the subsequent or second injury.

However, in 2006 the Court of Appeal in Kopping v. WCAB (2006) 142 Cal. App.4th 1099; 71 CCC 1229, in a well reasoned decision held that with respect to Labor Code §4664(b) defendants faced a difficult burden of proof. In Kopping, the Court of Appeal held that in each and every case involving Labor Code §4664(b), the defendant has the dual burden of proving the existence of a prior award and more importantly the additional burden of proving the overlap of factors of disability between the prior award and the current award.

As set forth in the primary apportionment outline, dealing with cases up to 2011, under the section dealing with overlap issues (burden of proof) and in this supplemental outline, defendants in case after case have been basically unable to meet their burden with respect to proving or showing the overlap of factors of disability between a prior award under the 1997 Permanent Disability Rating Schedule and the 2005 Permanent Disability Rating Schedule. However, the longer Labor Code §4664(b) remains in effect, the burden of proving overlapping factors of disability will diminish since there will be a prior award under the same Permanent Disability Rating Schedule, i.e., under the 2005 PDRS/AMA Guides. If there is an award and disability is determined under the 2005 Permanent Disability Rating Schedule, and there is a successive or later injury also under the 2005 Permanent Disability Rating Schedule/AMA Guides, then defendant will have a much easier time proving overlapping factors of disability.

Statutory Construction

Labor Code section 3202's requirement that workers' compensation statutes be liberally construed in favor of injured workers cannot supplant legislative intent as expressed in particular statutes such as Labor Code sections 4663 and 4664. *Davis v Workers' Comp. Appeals Bd*. 145 Cal. App.4th 324, 51 Cal.Rptr.3d 605, 2006 Cal.App. LEXIS 1893, review granted, depublished, (2/14/07), 55 Cal.Rptr.3d 715, 153 P.3d 282, 2007 Cal. LEXIS 1481, review granted, depublished, (4/4/07), 60 Cal. Rptr. 3d 31, 159 P.3d 507, 2007 Cal. LEXIS 3595. [See generally Hanna, Cal.Law of Emp. Inj. And Workers' Comp. 2d, sections 8.05[1], 8.07[2][d][i].]

Substantial Medical Evidence and Correct Legal Standards

As reflected and manifested in many of the decisions in this outline, reports from physicians whether they are AMEs, primary treating physicians, QMEs, or SPQMEs repeatedly fail to apply the correct legal standards with respect to apportionment determinations as outlined by the California Supreme Court in Brodie, by the Court of Appeal in a certified for publication case in Gatten, and the WCAB in their en banc decision in Escobedo.

In terms of assessing and evaluating a physician's opinion on apportionment it is critical to determine whether or not the physician has applied the correct legal standard or standards as articulated by the courts in the above referenced cases. In Gay v. WCAB (1979) 96 Cal. App. 3rd

555; 44 CCC 817, the Court stated, "physicians in workers' compensation matters must accordingly be educated by the parties of the correct legal standards." It needs to be emphasized repeatedly that physicians in workers' compensation matters write "medical-legal reports" not just medical reports. As a consequence reporting physicians must understand and apply the correct legal standards in order to render an opinion that constitutes substantial medical evidence whether that opinion is manifested in the form of a report or during the course of a deposition. "A medical opinion that refuses to accept correct legal principles does not constitute substantial medical evidence." (Hegglin v. WCAB (1971) 4 Cal. 3d 162; 36 CCC 93; Zemke v. WCAB (1968) 68 Cal. 2d 794, 33 CCC 358)

In order for a medical report to constitute substantial evidence on the issue of apportionment, a medical opinion "must disclose familiarity with the concepts of apportionment, describe in detail the exact nature of the apportionable disability, and set forth the basis for the opinion." (E.L. Yeager Construction v. WCAB (Gatten) (2006) 145 Cal. App. 4th 992, 71 CCC 1687) A medical opinion based upon an incorrect legal theory is not substantial medical evidence (Hegglin v. WCAB (1971) 4 Cal. 3d 162, 36 CCC 93; Place v. WCAB (1970) 3 Cal. 3d 372, 35 CCC 525)

Also in Blackledge v. Bank of America (2010) 75 CCC 613, in footnote 10, the WCAB again emphasized it was the duty of the parties to educate reporting physicians as to the utilization of the correct legal standards in every single case. Thus it is important for every evaluating physician to understand all pertinent legal concepts so they may correctly apply those standards to the specific facts of each case.

In terms of reasonable medical probability and substantial evidence, the Court of Appeal in Gay v. WCAB stated:

> We do not comprehend how the parties can expect any physician to properly report in workers' compensation matters unless he is advised of the controlling legal principles. Physicians are trained to discover the etiology of an illness. Finding the cause is important in preventative medicine and curing illness once developed. **Legal apportionment is not identical to theories of medical causation**. Physicians in workers' compensation matters must accordingly be educated by the parties in the correct legal standards of apportionment. (Emphasis added)

Labor Code section 4663(c) also indicates that a physician in making an apportionment determination may use an "approximate" percentage in determining industrial causes of permanent disability and non-industrial contributing causal factors. The fact a doctor makes an "estimate" or "approximation" does not render the opinion speculative.

As stated in Anderson v. W.C.A.B. (2007) 149 Cal. App.4th, 1369, 72 Cal.Comp. Cases 389, 398, the fact that "percentages [of causation of permanent disability that the physician] provided are approximations that are not precise and require some intuition and medical judgment…does not mean his conclusions are speculative [where the physician] stated the factual bases (sic) for his determinations based on his medical expertise."

Age, Gender, and Genetics

Age and Gender Cases

The issue of alleged gender or age discrimination related to apportionment determinations by reporting physicians under Labor Code sections 4663 and 4664 is distinct from issues related to apportionment determinations involving genetics and heritability.

It's important to understand that pursuant to applicable statutes and related case law, there are certain impermissible, invalid and potentially unlawful nonindustrial contributing causal factors of permanent disability that should not be used to establish nonindustrial apportionment under sections 4663 and 4664. These impermissible and potentially unlawful factors would include but are not necessarily limited to age **alone** and gender **alone**. There are two primary Government Code sections applicable, section 12940(a) which deals with discrimination involving compensation, and section 11135(a) dealing with age and gender discrimination.

In general, the majority of workers' compensation cases dealing with alleged age and gender discrimination tend to support the premise that nonindustrial apportionment determinations where age or gender is but one factor among a multiplicity of other factors reflected in an injured workers medical history will not in and of itself serve to automatically render a nonindustrial apportionment determination invalid or unlawful. Discussed hereinafter, is a sampling of cases dealing with alleged age and gender discrimination.

In ***Slagle v. WCAB*** (2012) 77 Cal. Comp. Cases 467 (writ denied) a 64 year old applicant suffered a specific injury involving both his right knee and right hip. The AME determined that 80% of applicant's disability was industrial and the other 20% attributable to nonindustrial causative degenerative factors. The MRI diagnostic testing showed applicant had a mild medial degenerative joint disease process in the right knee and the operative report reflected a small interior patellar osteophyte. The applicant had knee surgery less than three months after the specific injury date. The operative report along with the MRI's confirmed the osteophyte was related to degenerative changes and not a specific injury. The AME noted that it was unremarkable for a 64 year old person to have some degenerative changes in their knee. Applicant filed a Petition for Reconsideration and argued the apportionment was invalid and also constituted age discrimination.

The WCAB in denying applicant's petition for reconsideration and affirming the nonindustrial apportionment determination indicated the AME did not apportion to age **alone**. Instead, apportionment was based on the degenerative changes that were objectively demonstrated as well as applicant's medical records i.e., the operative report and the MRI's. With respect to applicant's contention that apportionment constituted unlawful age discrimination under

Government Code section 11135, the WCAB **noted "that while there may be a relationship between age and degenerative changes, i.e., an increased probability for such changes, that does not mean that apportionment to degenerative changes, when such a apportionment is supported by substantial evidence in the record, constitutes age discrimination in every case involving an older person."** See also, *Gerletti v. Santa Maria Airport District*, 2009 Cal.Wrk.Comp. P.D. LEXIS 300 (WCAB panel decision), where the WCAB affirmed 50% nonindustrial apportionment of applicant's cervical spine disability based on a degenerative condition which developed "in response to both genetic and age related factors." The WCAB indicated this did not equate to improper apportionment to those factors, but rather to the underlying degenerative condition itself.

In ***Kos v. WCAB*** (2008) 73 Cal. Comp.Cases 529 (writ denied) applicant while employed as an office manager, suffered and admitted specific injury in 2002, to her back and legs. At the time of injury applicant was 51 years old and weighed 340 lbs and had diabetes with peripheral neuropathy. The reporting a physician was an AME in Orthopedics. Based on MRI diagnostic studies shortly after the injury the AME diagnosed applicant with severe multilevel degenerative disc disease with disc desiccation. There was also a very severe loss of disc height at L 4-5 indicating bone-on-bone along with foraminal stenosis and active denervation. The AME determined that most of the cause of applicant's disc herniation was related to the degenerative disease process and very little was related to applicant's work activities since she was in a sedentary type job. The AME indicated that 90% of applicant's permanent disability was caused by the aging process and by the degenerative disc disease. He did acknowledge that the simple act of sitting at work on the day of her injury aggravated accelerated the underlying disc herniation to the point that applicant became symptomatic at that time.

Notwithstanding the AME's opinion that 90% of the applicant's lumbar spine disability was non-industrial, the WCJ issued a Findings and Award that applicant was 100% permanently disabled without apportionment. Defendant filed a petition for reconsideration which was granted by the WCAB. The Board rescinded the WCJ's decision on the basis the AME's opinion constituted substantial medical evidence that 90% of applicant's permanent disability was apportionable to non-industrial causative factors. The WCAB cited *Escobedo* as well as subsequent appellate cases indicating that Labor Code section 4663 provides for apportionment of permanent disability caused by other factors both before and subsequent to the industrial injury, including prior industrial injuries and allows for apportionment of disability to pathology and asymptomatic prior conditions as long as such apportionment is based on substantial medical evidence citing the Supreme Court's decision in *Brodie*. Applicant also argued on reconsideration that the AME impermissibly and incorrectly assigned apportionment percentages to risk factors and also apportioned based on applicant's age. **With respect to alleged age discrimination, the WCAB stated "….that, even assuming that Labor Code section 4663 were (sic) inconsistent with the provisions of Government Code sections 12940(a) and 11135(a) to the extent that**

Labor Code section 4663 allows apportionment to age-related degenerative disc disease, the WCAB's decision would not be altered…."

The WCAB citing the California Supreme Court's decision in *Brodie* indicated that the "legislative intent of current section 4663 was to "eliminate the bar against apportionment based on pathology and asymptomatic causes." As a consequence "… therefore, the Legislature intended that apportionment to causation under Section 4663 may be based on age - related disc disease….." citing *E.L. Yeager Construction v. WCAB (Gatten)* 2006 145 Cal.App.4th 922, 71 Cal.Comp. Cases 1687. In *Gatten* the Court of Appeal remanded the case to the WCAB with specific directions to apportion 20% to the employee's disability age-related degenerative disc disease, and stated that "apportionment may be based on pathology and asymptomatic prior conditions." **The WCAB also noted that Labor Code section 4663 was a later enacted and more specific statute then the "more general "age" discrimination provisions of Government Code sections 12940(a) and 11135(a).**

Allen v. Workers' Comp. Appeals Bd. 2008 Cal.App.Unpub. LEXIS 10026 (Court of Appeal, Fifth Appellate District)

This unpublished case from the Court of Appeal focuses on alleged age discrimination with respect to the AME's apportionment determination of 20% nonindustrial. The WCJ found the AME's apportionment opinion and determination did not constitute substantial evidence. However, based on a defense petition for reconsideration, the WCAB reversed and found the AME's opinion on nonindustrial apportionment did constitute substantial medical evidence which was affirmed by the Court of Appeal in this non-published opinion.

Applicant suffered a 2003 specific back injury. She was 60 years old. As a consequence she had a surgical fusion. The reporting physician was an AME. There were two trials and the reason there was a second trial related exclusively as to what PDRS should apply either the 1997 PDRS or the 2005 PDRS. The AME's nonindustrial apportionment was attributable to pre-existing pathology in the form of a moderate disc collapse at L 2-3 with related arthritis and stenosis. The AME formed his opinion in part by reviewing x-rays taken in 2002 before applicant's industrial injury as well as recent x-rays which showed a compression fracture of L-4 which existed before the injury. In terms of other diagnostic testing, applicant also had a positive discogram which disclosed the basis for the stenosis and the need for surgical decompression. Also based on the operative report and other diagnostic findings the AME was of the opinion the need for the surgery could not have happened from or be related to one specific injury. The AME also indicated that some people develop arthritis more than other people. There are some 60 year olds that don't really have much arthritis, but with respect to the applicant it was more advanced than usual.

Notwithstanding the AME's opinion that 20% of applicant's lumbar spine disability was nonindustrial and attributable to pre-existing pathology, the WCJ awarded applicant permanent disability without apportionment. Defendant filed a petition for reconsideration that was granted. The WCAB reversed the WCJ and found the AME's opinion and report constituted substantial medical evidence on apportionment under *Brodie, Escobedo and Gatt*en and there was no age based discrimination. Applicant's counsel specifically argued to the Court of Appeal that the WCAB violated California's prohibition against classification based discrimination under Government Code section 11135 by adopting the AME's age based apportionment findings. In response both the WCAB and the Court of Appeal indicated as follows:

> We need not determine the relationship between the Government Code provision and the workers' compensation laws here because we are not persuaded the WCAB's apportionment was based on Allen's age rather than her individual medical health. "[T]he Legislature intended that apportionment of causation under Section 4663 may be based on age - related degenerative conditions. (Kos v. WCAB (2008) 73 Cal.Comp.Cases 529,536 (writ denied) Although Dr. Haider mentioned Allen was 60 years old and that it was a "factor" in her pre-existing pathology, he explained that arthritis was common among individuals her age and added that "in this case I think it was more advanced than usual." As the WCJ found, "While the doctor did say age was a factor in the pathology, he meant that people develop arthritis as they age. His apportionment was to [Allen's] specific medical conditions, not simply to her being 60 years old."

Vaira v. WCAB (2009) 72 Cal.Comp.Cases 1586 (not certified for publication) Although this case is not certified for publication, many of the cases cited in the opinion are. Moreover, there were a large number of briefs filed by several amicus curiae participants.

With respect to the apportionment issues, the AME confused causation of injury with causation of disability. Applicant also argued that the AME impermissibly apportioned to applicant's age and gender in violation of Government Code section 11135(a). One of the amici also argued apportionment of disability to age is per se unlawful and apportionment to osteoporosis is improper because it disproportionately impacts women.

With respect to the "disparate impact" argument related to osteoporosis even assuming it exists, the court stated:

> Reducing permanent disability benefits based on a persisting condition that is a contributing factor of disability is not discrimination. When the WCAB determines a preexisting condition contributes to a given disability, and apportions accordingly, this is merely recognition that a portion of the disability

> exists independent of the industrial injury. The injured worker is being compensated only for the disability caused by the industrial injury. To this extent the injured worker is being treated no differently than an injured worker who does not suffer from the preexisting condition. Both would be compensated for the amount of disability caused by the industrial injury. This is no different than if the WCAB apportioned disability to a prior industrial injury. Such apportionment is not discrimination based on disability.

The court also indicated that the facts of this case did "…not present a claim that the WCAB has apportioned disability to a condition particular to women while failing to give equal treatment to a condition peculiar to men that may also contribute to disability. Such unequal treatment of disabling conditions peculiar to a particular race, ethnicity or gender may give rise to a claim of discrimination."

As to the alleged age discrimination, the court stated:

> To the extent osteoporosis or some other physical or mental condition that might contribute to a work-related disability arises or becomes more acute with age, we see no problem with apportioning disability to that condition. However, in such case, apportionment is not to age but to the disabling condition. In this case, when Dr. Johnson mentioned petitioner's age as a contributing factor of her disability, he may have been referring to the fact that her osteoporosis has become more acute with age. On the other hand, he may have been using the term "age' as a shorthand reference to the many other physical and mental conditions that tend to come with age.

Genetics

City of Jackson v. Workers' Compensation Appeals Bd. (Rice) **(2017) 11 Cal.App. 5th 109, 82 Cal.Comp.Cases 437, 2017 Cal.App. LEXIS 383**

Issues: Whether 49% nonindustrial apportionment under Labor Code §4663 attributable in large part to heredity and genetics, constituted valid legal apportionment under Labor Code §4663 and was supported by substantial evidence contrary to the WCAB's determination that such apportionment was to, 1) "impermissible immutable factors; 2) apportionment to causation of injury as opposed to disability and, 3) that the medical opinion finding such apportionment valid was not based on substantial medical evidence.

Holding: The Court of Appeal in a decision certified for publication, annulled the WCAB's decision, holding that valid legal apportionment under Labor Code §4663 even when in large

part based on heredity or genetics, constituted valid legal apportionment to nonindustrial contributing causal factors when supported by a medical opinion constituting substantial medical evidence. Applicant's degenerative disc disease caused by genetic/hereditary factors did not reflect or constitute apportionment to "impermissible immutable factors; apportionment to causation of injury as opposed to causation of permanent disability, and the reporting physician's opinion was supported by substantial evidence.

Overview and Discussion: Applicant was a police officer who had a short employment history as well as being only 29 years old when he filed his cumulative trauma claim ending in April of 2009.

Applicant worked as a reserve police officer in 2004 and became full time with the City of Jackson in 2005. He filed a cumulative trauma injury ending on April 22, 2009. He never alleged any specific mechanism of injury.

Following trial, the WCJ found 49% valid nonindustrial apportionment based on the orthopedic QME's opinion that in large part there were genetic and hereditary factors contributing to applicant's cervical spine disability. However, the WCJ rejected alleged nonindustrial apportionment of 17% based on applicant's prior work activities and 17% to prior activities based on a lack of substantial evidence. Applicant's attorney filed a Petition for Reconsideration arguing that 49% nonindustrial apportionment to genetic risk factors was not substantial medical evidence since there was no evidence that applicant's family had a history of cervical degenerative disc disease and there was no genetic test for degenerative disc disease.

The WCAB reversed the WCJ, finding applicant was entitled to an unapportioned award. The WCAB cited three independent reasons for finding the Labor Code §4663 nonindustrial apportionment invalid. They were:

1. Any attempt to assign nonindustrial causation of permanent disability to genetics was deemed by the WCAB to be based on an "impermissible, immutable factor."

2. Nonindustrial apportionment based on applicant's genetic makeup reflects apportionment to causation of injury and not causation of disability and;

3. The orthopedic QME's apportionment determination did not constitute substantial medical evidence.

Medical Evidence: On November 7, 2011, prior to applicant undergoing cervical spine surgery, applicant was evaluated by the QME in orthopedics. The QME reviewed medical records. Both

the QME and applicant believed applicant's cervical pain symptomology was a consequence of repetitive bending and twisting of his head and neck.

The diagnostic pre-cervical spine surgery x-ray showed cervical degenerative disc disease. The QME's diagnosis was cervical radiculopathy as well as cervical degenerative disc disease. After her first evaluation of the of the applicant, the QME made a preliminary apportionment determination finding four contributing causal factors of the applicant's cervical spine disability consisting of 25% related to applicant's work activities for the City of Jackson, 25% attributable to the applicant's work activities prior to his employment with the City of Jackson, 25% to applicant's personal activities consisting of prior injuries and recreational activities, and 25% to what was described as applicant's personal history consisting of inheritability and genetics, history of smoking, and a diagnosis of lateral epicondylitis (tennis elbow).

The QME reevaluated the applicant after he had cervical spine surgery in May of 2013. Her diagnosis remained unchanged. However, the QME changed her apportionment determination. She increased her prior 25% nonindustrial apportionment to 49% based on heritability and genetics, history of smoking, and diagnosis of lateral epicondylitis based on specific medical publications she indicated lent more support to nonindustrial causation based on "genomics, genetics, and heritability issues related to applicant's cervical spine disability. The QME cited three studies that supported genomics as a significant causative factor in cervical spine disability. As a consequence, the QME's apportionment formula was revised to consist of 17% industrial related to applicant's employment with the City of Jackson. 17% related to applicant's previous employment, 17% related to applicant's personal activities consisting of prior injuries and recreational activities and 49% to applicant's personal history including genetic issues.

In a supplemental report the QME indicated she "could state to a reasonable degree of medical probability that genetics had played a role in Mr. Rice's injury." This was despite the fact there was no way to test for genetic factors.

With respect to the cited scientific/medical publications, the QME indicated that with respect to one study, heritability constituted 73% of the contributing causal factors of degenerative disc disease with only smoking, age, and work contributing a small percentage of the contributing causal factors that resulted in cervical spine disability.

Another scientific journal/publication cited the role of heritability in disc degeneration as 75% and another article at 73%. There was a fourth article consisting of twin studies that demonstrated that degeneration in adults may be explained up to 75% by genes alone. The same study found environmental factors to contribute little or not at all to disc degeneration.

The QME concluded these articles supported nonindustrial apportionment of 75% to applicant's personal history. However, in an abundance of caution "she decided to err on the side of the

patient in case there was some unknown "inherent weakness" in the study and decided that 49% was the "lowest level that could reasonably be stated."

In terms of clarification the QME stated that even without knowing the cause of applicant's father's background, the evidence that applicant's degenerative disc disease having a predominantly genetic cause was "fairly strong" especially where there is no clear traumatic (specific) injury as in applicant's case.

Court of Appeal's Analysis and Holding.

The Court held that apportionment may be properly based on genetic/heritability as long as it is supported by substantial medical evidence.

The Court of Appeal noted the WCAB without explanation held that apportionment to "genetics" opens the door to apportionment of disability to immutable factors." In a way the WCAB was hoisted on its own petard since the Court of Appeal indicated not only did they not perceive any impermissible apportionment in this case based on genetics and heredity, but more importantly there were a number of the WCAB's own prior apportionment decisions under similar facts and circumstances that undermined the validity of the WCAB's reasoning.

In holding under the particular facts of this case that valid nonindustrial apportionment under Labor Code §4663 could be properly based on genetics and heritability, the Court discussed in detail SB 899, and the California Supreme Court's decision in *Brodie.* Also discussed was the 1968 California Supreme Court's decision in *Zemke,* which had been clearly superseded by SB 899 as articulated by the California Supreme Court in *Brodie*. The Court noted that since the enactment of Senate Bill 899 "…apportionment of permanent disability is based on causation and the employer is liable only for the percentage of permanent disability directly caused by the industrial injury." (*Brodie, supra*, 40 Cal.4th at pp. 1324-1325).

> Apportionment may now be based on "other factors" that caused the disability, including "the natural progression of non-industrial condition or disease, a preexisting disability, or a post-injury disabling event [,]…pathology, asymptomatic prior conditions, and retroactive prophylactic work preclusions…" (*Escobedo v. Marshalls* (2005) 70 Cal.Comp.Cases 604, 617-618 (*Escobedo*).) Precluding apportionment based on "impermissible immutable factors" would preclude apportionment based on the very factors that the legislation now permits, i.e., apportionment based on pathology and asymptomatic prior conditions for which the worker has an <u>inherited</u> <u>predisposition</u>. (emphasis added)

The Court cited a prior decision by the WCAB in *Kos v. WCAB* (2008) 73 Cal.Comp.Cases 529, 530. In *Kos* the applicant developed back and hip pain while working as an office manager. She was diagnosed with multi-level degenerative disease. The reporting physician in *Kos* indicated applicant's underlying degenerative disc disease was not directly caused by work activities but her prolonged sitting at work "lit up" her preexisting disc disease. More importantly the reporting physician testified that the worker's "pre-existing genetic predisposition for degenerative disc disease would have contributed approximately 75% to her overall level of disability." (*Ibid*.)". Nevertheless, the ALJ found no basis for apportioning the disability. (*Id*. at p. 532.) The Board granted reconsideration and rescinded the ALJ's decision. (*Id*. at p.532.) The Board stated that in degenerative disease cases, it is incorrect to conclude that the worker's permanent disability is necessarily entirely caused by the industrial injury without apportionment. (*Id*. at p.533.) Thus, in *Kos*, the Board had no trouble apportioning disability where the degenerative disc disease was caused by a "pre-existing genetic predisposition."

The Court also noted that in *Escobedo*, the WCAB found valid legal apportionment of 50% of the worker's knee injury to non-industrial causation based on the medical evaluator's opinion that the worker suffered from "significant degenerative arthritis." In *Escobedo*, the Board stated:

> In this case, the issue is whether an apportionment of permanent disability can be made based on the preexisting arthritis in applicant's knees. Under pre-[Senate Bill No.] 899 [(2003-2004 Reg. Sess.)] apportionment law, there would have been a question of whether this would have constituted an impermissible apportionment to pathology or causative factors. [Citations.] Under [Senate Bill No.] 899 [(2003-2004 Reg. Sess.)], however, apportionment now can be based on non-industrial pathology, if it can be demonstrated by substantial medical evidence that the non-industrial pathology has caused permanent disability. Thus, the preexisting disability may arise from any source—congenital, developmental, pathological, or traumatic (*Id*. at pp. 617-619.) We perceive no relevant distinction between allowing apportionment based on a preexisting congenital or pathological condition and allowing apportionment based on a preexisting degenerative condition caused by heredity or genetics. (emphasis added).

In support of their decision the Court also discussed in depth *Acme Steel v. WCAB (Borman)* (2013) 218 Cal.App.4th 1137, where the Court of Appeal reversed the WCAB who had found no basis for nonindustrial apportionment and awarded the applicant 100% PTD. The Court of Appeal in *Borman* found 40% valid nonindustrial apportionment to the applicant's hearing loss attributable to "congenital degeneration" of the cochlea. The Court in discussing *Borman* stated "Again, we see no relevant distinction between apportionment for a preexisting disease that is congenital and degenerative, and apportionment for a preexisting degenerative disease caused by heredity or genetics."

The reporting physician properly apportioned to causation of disability and not causation of injury.

Both applicant's counsel and the WCAB erroneously determined the orthopedic QME had invalidly apportioned applicant's disability to causation of injury as opposed to causation of disability. The Court held that the QME had properly apportioned to causation of disability. In that regard the Court carefully distinguished what was being alleged as applicant's injury and what was being asserted as his resultant disability. In terms of injury, the Court described the mechanism of injury as a cumulative trauma injury as opposed to a specific injury. Applicant's injury was based on and caused by repetitive motion of his neck and head. The Court pointed out the QME did not conclude as the WCAB erroneously did, that this repetitive motion injury was caused by genetics at all. In contrast to applicant's injury, his disability consisted of "neck pain and left arm, hand, and shoulder pain, which prevented him from sitting for more than two hours per day, lifting more than fifteen pounds, and any vibratory activities such as driving long distances. All of these activities were included in Rice's job description"

The orthopedic QME properly concluded and opined applicant's cervical spine disability as described by the QME was caused only partially (17%) by his work activities for the City of Jackson and was caused primarily, i.e., 49% by his genetics. As the Court succinctly stated, "Contrary to the Board's opinion, Dr. Blair did not apportion causation to injury rather than disability."

The Orthopedic QME's opinion was based on substantial evidence.

The Court reviewed pertinent cases setting forth principles of substantial evidence. Based on these standards, the QME's opinion as to causation of the applicant's cervical spine disability constitutes substantial medical evidence. The QME explained in her initial apportionment determination, that 25% of the cause of applicant's cervical spine disability was attributable to his personal history. She also explained that studies taken from relevant medical literature indicated "heredity and genetics are significant causes of degenerative diseases of the spine…". The QME also "included in the personal history category, Rice's history of smoking and a previous diagnosis of lateral epicondylitis."

The Court also indicated applicant had incorrectly argued that the QME had concluded that genetics played a role in approximately 63% - 75% of degenerative disc disease cases. The Court noted that the QME had instead "indicated that degenerative disc disease in adults may be explained up to 75% by genes alone." Explained another way, "Every case of degenerative disc disease in adults is caused in part by genetics or heredity, and the other part by other factors."

Applicant also argued the QME had no way of knowing applicant's degenerative disc disease was caused by genetics because the QME had never researched applicant's family medical history.

The Court stated "It was unnecessary for Dr. Blair to conduct such an analysis because her research indicated that genetics or heredity was a majority factor in *all* cases of degenerative disc disease."

The Court concluded that the QME's reports met all of the requirements of *Escobedo*.

> Dr. Blair's reports reflect, without speculation, that Rice's disability is the result of cervical radiculopathy and degenerative disc disease. Her diagnosis was based on medical history, physical examination, and diagnostic studies that included X-rays and MRI's (magnetic resonance imaging scans). She determined that 49 percent of his condition was caused by heredity, genomics, and other personal history factors. Her conclusion was based on medical studies that were cited in her report, in addition to an adequate medical history and examination. Dr. Blair's combined reports are more than sufficient to meet the standard of substantial medical evidence.

In addition, the WCAB stated the AME,

> "…[D]id not give one sentence of reasoning behind his opinion. He made bold, conclusionary statements such as that the cause of degenerative disc disease has been convincingly shown to be genetic, but he does not back that up with substantial medical evidence; he does not state how, why, when or where the cause of degenerative disc disease was shown to be genetic, he just makes the statement. He does not list any research studies or facts pertinent to the instant case that support causation outside the industrial exposure…"

On appeal counsel for defendant cited the *Rice* case and the medical studies relied on by the doctor in *Rice*. However, there was no evidence that the AME relied on these same studies to formulate his opinion on apportionment.

Editor's Comment: There are a number of other decisions not cited by the Court that support finding valid legal apportionment based on pathology caused by heredity, genetics, and congenital factors. See *Gerletti v. Santa Maria Airport District* 2009 Cal.Wrk.Comp. P.D. LEXIS 300 (WCAB panel decision). WCAB found 50% of applicant's cervical spine disability was nonindustrial based on a cervical spine MRI confirming foraminal stenosis and degenerative spondylosis consistent with both age and genetic changes in the applicant's spine. Also, *Costa v.*

WCAB (2011) 76 Cal.Comp.Cases 261 (writ denied). In a 100% PTD cervical spine disability case, valid nonindustrial apportionment of 20% attributable to "preexisting congenital cervical spinal stenosis" causing applicant's cervical spine disability to be greater than it otherwise would be.

There is also *Paredes v. WCAB* (2007) 72 Cal.Comp.Cases 690 (writ denied) 10% valid nonindustrial apportionment related to applicant's cervical spine based on nonindustrial pathology consisting of mild stenosis confined by x-rays and MRIs taken shortly after his first injury. It was unnecessary for defendant to prove the nonindustrial pathology caused disability prior to the industrial injury, or that the pathology alone would have caused a particular amount of PD, absent the industrial injury.

However, there is a significant issue as to whether the "approximate" percentage figure related to nonindustrial contributing causal factors can be calculated or "quantified" directly from what caused a particular pathology as opposed to the actual pathology itself especially in progressive degenerative disease conditions that evolve over time. The article on page 24 discusses this provocative "dual" causation issue in depth.

In *Sobol v. State of California Department of Corrections and Rehabilitation* 2017 Cal.Wrk.Comp. P.D. LEXIS 454 (WCAB panel decision), decided after *Rice*, both the WCJ and WCAB found that an AME's apportionment opinion of 25% to nonindustrial factors based on genetics did not constitute substantial medical evidence. With respect to the genetic basis for apportionment the AME stated, "[t]he cause of degenerative disease of the spine, particularly as it involves discs, has been convincingly shown to be principally genetic in determination." The WCAB characterized this statement as "conclusory" and not "substantiated with sufficient medical rationale."

In *Owens v. San Mateo County Transit District*, 2017 Cal.Wrk.Comp. P.D. LEXIS 448 (WCAB panel decision), the Board ruled there was 60% valid nonindustrial apportionment of applicant's overall cervical spine disability of 36% attributable to congenital osteoarthritis. The QME's opinion on apportionment was based on the medical record as well as on "studies and articles" on the causes of spinal disc degeneration. With respect to the *Rice* decision, the WCAB stated:

> I remain persuaded that Dr. Piasecki has outlined his conclusions regarding apportionment of impairment in a manner that is consistent with the law. I note as well, as defendant has pointed out the recent published case of ***City of Jackson*** *v. Wkrs. Comp. Appeals Bd.* (***Rice***) (April 26, 2007) ___Cal.App.4th__ [ADJ8701916] endorsing apportionment to various causes other than the work-related injury; those factors included "heritability and genetics." There, also, the employee had argued that the genetic finding amounted to an analysis of

causation of injury, rather than disability or impairment, and that the doctor's opinions were not substantial medical evidence, arguments also advanced in this case.

In *Schuy v. City of Yuba* 2018 Cal. Wrk. Comp. P.D. LEXIS 136 (WCAB Panel Decision), the WCAB reversed a WCJ's Award of 29% PD lumbar spine permanent disability without apportionment and found 50% valid legal apportionment. The WCAB relied on the apportionment determination made by the orthopedic AME that applicant's widespread degenerative disease of the low back, for the most part, such changes are "genetically determined." The AME in his deposition reiterated that 50% of applicant's lumbar spine permanent disability was due to non-industrial causation factors that were "genetic in origin."

The WCAB cited a number of cases including *City of Jackson v. WCAB* (Rice) (2017) 11 Cal. App. 5th 109 [82 Cal. Comp. Cases 437] that "established the principle that, under sections 4663 and 4664(a), apportionment of permanent disability is mandated where substantial evidence established that some definable percentage of that disability was caused by, among other things, pathology, an asymptomatic preexisting condition or genetic/hereditary factors."

Apportionment of Permanent Disability Related to Genetics and Heredity: Is It A Causational Diversionary Red Herring?

The recent decision from the Court of Appeal in *City of Jackson v. Workers' Compensation Appeals Board (Rice)* (2017) 11 Cal.App. 5th 109, 2017 Cal.App. LEXIS 383 (certified for publication), has justifiably engendered wide spread controversy in the workers' compensation community as evidenced by numerous articles and upcoming seminars related to analysis of the case as well as proposed litigation strategies all focused on what may be a causational diversionary red herring. Before I weighed in with my own analysis, commentary and opinion, I wanted to wait for the dust to settle. In my opinion as discussed in detail hereinafter, without further development of the record, the orthopedic QME's determination of 49% nonindustrial apportionment in *Rice* is invalid and speculative. The nonindustrial apportionment in *Rice* reflects apportionment to the etiology (genetics and heritability) expressed in percentage terms of what caused applicant's pathology (cervical degenerative disc disease and related radiculopathy) and not to the pathology itself and more importantly the severity of the pathology after applicant's neck surgery and when the QME's maximum medical improvement (MMI) examination took place. So no one is confused, I am not talking about causation of injury versus causation of disability. The Court in *Rice* correctly analyzed that issue. The issue I am raising is much different. Apportionment to etiology is in my opinion not apportionment of or to disability as defined and discussed in *Rice* as "…actual incapacity to perform the tasks usually encountered in one's employment and the wage loss resulting therefrom, and…physical impairment of the

body that may or may not be incapacitating and …[p]ermanent disability is the irreversible residual of an injury…" (citations omitted).

While it may be interesting to know the etiology or cause of a particular underlying pathology (congenital, developmental, genetic, heredity, etc.), it can be argued that whether genetics or heredity may have played a "predominant" or "large part" in the actual causation or existence of the underlying pathology, it should be carefully distinguished from the separate issue under Labor Code Section 4663, as to what approximate percentage the *extent* or *severity* of the pathology or disease process itself (as confirmed by diagnostic studies and supported by substantial evidence) is a present contributing causal factor of the permanent disability at the time of the MMI examination determining permanent disability and apportionment.

It is extremely important to acknowledge that orthopedic related degenerative diseases and conditions such as the one in *Rice* (cervical degenerative disc disease) are generally not static, but are progressive over time and this progression over time can relate to both industrial and nonindustrial causative factors. This principle is evidenced by hundreds (if not thousands) of apportionment decisions involving degenerative disease pathology and orthopedic injuries decided by the WCAB since SB 899 was enacted in 2004, along with scores of writ denied cases and a number of published decisions by the Court of Appeal and the Supreme Court in *Brodie.*

The Court of Appeal in *Rice* tacitly recognized the significance of the critical causational distinction between etiology and pathology in stating that: "The QME concluded that the employee's ***disability***—neck, shoulder, arm, and hand pain--was caused by cervical degenerative disc disease, **and the disease was, in turn, caused in large part by heredity or genetics.**"(emphasis added). So if I understand the Court, there are actually two separate and distinct causal components. One related to causation of pathology and the other to the disability attributable to a particular pathology. Therefore, pursuant to Labor Code 4663, an apportionment analysis should focus on the pathology itself and not what caused the pathology.

In *Rice* the QME in her second report after the applicant's neck surgery, used or relied on various medical publications to justify and support her increasing the nonindustrial apportionment percentage related to applicant's cervical spine disability from 25% to 49%. The QME's original diagnosis of cervical radiculopathy and cervical degenerative disc disease remained unchanged. While I agree with the QME that some approximate percentage of applicant's neck permanent disability is nonindustrial as being causally related to his cervical spine pathology, I question whether her reliance on medical literature/studies alone warranted almost a doubling of the nonindustrial apportionment from 25% to 49%. In my opinion merely establishing the etiology or causation of the underlying pathology (cervical degenerative disc disease) as being attributable "largely" or "predominantly" to genetics and heritability does not automatically or necessarily translate into the degree or extent a particular pathology (the critical percentage

approximation in the apportionment equation) is actually manifested in an individual injured worker at a given point in their life and more importantly at the time of the MMI examination assessing permanent disability. This requires a separate analysis and determination to be made by the reporting physician based upon a combination of a variety of factors including but not solely limited to diagnostic studies, operative reports, medical records, clinical findings, clinical judgment, and a complete and accurate medical history. In short, apportionment determinations and related approximate percentages of industrial and nonindustrial contributing causal factors of permanent disability based on and attributable to the etiology of a pathological disease or condition as opposed to pathology itself is inherently speculative and unreliable. My opinion on this issue may perhaps be viewed as "contrarian" or an "outlier" of sorts since it is radically different from the Court of Appeal's holding in *Rice* and that of many recent commentators.

The *Acme, Kos,* and *Escobedo* Cases: The Court in *Rice* cited *Acme Steel v. Workers' Comp. Appeals Bd.* (2013) 218 Cal.App.4th 1137, 1139 in support of their holding that "apportionment may be properly based on Genetics/Hereditability." However, what must be emphasized is that in *Acme*, the AME in hearing loss in finding 40% nonindustrial apportionment based upon pathology consisting of a degenerative cochlea condition or disease process made this determination by relying on diagnostic audio testing that clearly established a portion (40%) of the applicant's hearing loss was not related to industrial exposure. As to the nonindustrial component, the AME indicated this form or aspect of hearing loss was suspicious but was "most consistent [with] a congenital degeneration of the entire organ." The AME did not base his nonindustrial apportionment determination on the cause of the degenerative cochlea condition which was congenital but on the pathology itself assessed by diagnostic testing which demonstrated the severity of the hearing loss and causal components related to this worker at a particular point in time. Etiology was of interest but was not directly relevant in determining or assessing the severity of the pathology expressed as an approximate percentage for purposes of determining nonindustrial apportionment based on Labor Code 4663. See also, *Costa v. WCAB* (2011) 76 Cal.Comp.Cases 261, 2011 Cal.Wrk.Comp. LEXIS 25 (In a 100% permanent total disability case valid 20% nonindustrial apportionment related to applicant's preexisting asymptomatic congenital lumbar spinal stenosis, the *severity* of which was confirmed by significant findings on MRI, CT studies.).

The Court also discussed *Kos v.Workers' Comp.Appeals Bd.* (2008) 73 Cal.Comp.Cases 529 (writ denied) where the WCAB "….had no trouble apportioning disability where the degenerative disc disease was caused by a pre-existing genetic predisposition. However, in *Kos*, diagnostic testing in the form of an MRI taken less than six weeks after the applicant's specific injury as well as her pre-injury chiropractic records were critical in assessing and determining the extreme severity of the applicant's disc herniation/multi-level disc disease and in my opinion formed the basis for the reporting physician to find that approximately 90% of applicants permanent total disability was non-industrial. The reporting physician opined that the etiology or

cause of the applicant's degenerative disc disease was largely attributable to her "genetic predisposition." However, in my opinion it was the extreme severity of the applicant's degenerative disc disease as confirmed by MRI diagnostic testing shortly after the injury and her pre-injury medical records that provided the most compelling support for the valid 90% nonindustrial apportionment, not the etiology of the multi-level disc disease. In *Kos* there was apportionment to pathology not to what caused the pathology. Both *Acme* and *Kos* in my opinion support the argument that valid legal apportionment pursuant to Labor Code 4663 can be based on pathology but not directly to the etiology or cause of the pathology itself.

The WCAB's en banc decision in *Escobedo v Marshalls* (2005) 70 Cal.Comp.Cases 604 (WCAB en banc) is also instructive on this issue. In *Escobedo* the WCAB found valid non-industrial apportionment of 50% based on the contributing causal factor of pre-existing pathology consisting of degenerative arthritis in the applicant's knees. In *Escobedo*, the actual cause or source of the nonindustrial pathology whether congenital, genetic or hereditary was essentially irrelevant in determining valid nonindustrial apportionment since diagnostic tests in the form of an MRI and x-rays confirmed both the existence and more importantly the **severity** of the degenerative arthritis at a particular point in time. In *Rice* the Court emphasized that in *Escobedo* the injured worker had pathology in the form of **significant** degenerative arthritis to his knees. In *Escobedo*, the **"significant"** degenerative arthritis noted by the Court was based primarily on diagnostic studies not the etiology or cause of the significant degenerative arthritis itself. This is generally the scenario in the majority of orthopedic injuries involving degenerative diseases and conditions. In *Escobedo* the reporting physician's opinion constituted substantial medical evidence since he explained in detail how and why applicant's degenerative arthritis expressed as an approximate percentage was a nonindustrial contributing causal factor of the applicant's knee disability.

Both *Brodie and Escobedo* found valid non-industrial apportionment based on pathology and asymptomatic causes without reference to or reliance on heredity and genetics: The Court of Appeal in *Rice* quoted extensively from both *Brodie v. Workers' Comp. Appeals Bd.* (2007) 40 Cal.4th 1313 and *Escobedo v. Marshalls (2005)* 70 Cal.Comp.Cases 604 (WCAB en banc) related to apportionment based on an expansive set of contributing causal factors of permanent disability, including pathology and asymptomatic causes. Prior to SB 899, apportionment to pathology and asymptomatic causes as well as instances where an industrial injury aggravated or accelerated an industrial injury were generally prohibited. As a consequence, employers were liable for the entire resulting disability without apportionment to nonindustrial contributing causal factors. In *Brodie*, the Supreme Court held that "[T]he plain language of new sections 4663 and 4664 demonstrates they were intended to reverse these features of former sections 4663 and 4750." In citing *Brodie* and the radical diametrical changes engendered by 4663 and 4664, the Court in *Rice* stated:

> Since the enactment of Senate Bill No. 899(2003-2004 Reg. Sess.), apportionment of permanent disability is based on causation, and the employer is liable only for the percentage of permanent disability directly caused by the industrial injury. (*Brodie, supra*, 40Cal.4th at pp.1324-1325.) Apportionment may now be based on "other factors" that caused the disability, including "the natural progression of a non-industrial condition or disease, a preexisting disability, or a post-injury disabling event[,]…*pathology*, *asymptomatic prior conditions*, and retroactive prophylactic work preclusions…."(*Escobedo v Marshalls* (2005) 70 Cal.Comp.Cases 604, 617-618(*Escobedo*).) Precluding apportionment based on "impermissible immutable factors" would preclude apportionment based on the very factors that the legislation now permits, i.e., *apportionment based on pathology and asymptomatic prior conditions* for which the workers has an inherited predisposition. (emphasis added).

Prior to SB 899, any apportionment to pathology would have been invalid. In contrast, under current 4663 and 4664 the Court in *Rice* cited *Escobedo* in describing the expansive nature and extent of valid non-industrial contributing causal factors of disability as follows:

> [H]owever, apportionment now can be based on non-industrial pathology, if it can be demonstrated by substantial medical evidence that the non-industrial *pathology* has caused permanent disability. Thus, the preexisting disability may arise from any source—*congenital, developmental, pathological, or traumatic*."(Id. at pp.617-619.) We perceive no relevant distinction between allowing apportionment based on a preexisting congenital or pathological condition and allowing apportionment based ***on a preexisting degenerative condition caused by heredity or genetics.*** (emphasis added).

In *Rice*, it is undisputed the 29-year-old applicant with a relatively short cumulative trauma injury period, was diagnosed with cervical spine pathology consisting of cervical spine radiculopathy and degenerative disc disease. In my opinion, based on 4663 and 4664 as well as *Brodie* and *Escobedo* and a legion of related cases involving orthopedic injuries and degenerative diseases and conditions, the existence of pathology (whether symptomatic or asymptomatic) provides a potential viable basis for nonindustrial apportionment so long as it is supported by a medical opinion that constitutes substantial medical evidence. The fact the QME in *Rice* identified the primary source or etiology of the pathological degenerative condition itself as being primarily caused by genetics and heredity to a "large" degree" is largely irrelevant in terms of substantial medical evidence as to the approximate percentage the pathological degenerative condition or disease process or condition is a actual contributing cause of permanent disability at the particular point in time the applicant had his MMI examination after his neck surgery to determine his permanent disability and any basis for apportionment.

The Record in *Rice* should have been further developed in order for the QME to apportion properly to pathology and not etiology: The QME's determination that the pathology itself was "largely" or "predominately" caused by genetics and heredity based on medical studies/literature to between 73% and 75% or a reduced percentage of 49%, does not mean these same percentage figures are at all relevant and somehow automatically equate to the approximate percentage the actual underlying pathology is a contributing nonindustrial causal factor of the applicant's cervical spine disability.

Arguably applicant's degenerative disc disease with related radiculopathy had progressed and was severe enough to cause the need for neck surgery. However, when the orthopedic QME reevaluated applicant after his neck surgery and issued her MMI supplemental report, it appears she did not analyze or discuss the operative report findings and any closely related cervical spine diagnostic testing. Such an analysis and detailed discussion of the diagnostic testing and operative report findings would clearly establish to a reasonable medical probability the severity of the applicant's pathology at that point in time and could have been used by the QME to help her "parcel out" all of the contributing industrial and nonindustrial contributing causal factors of applicant's cervical spine disability without reference to any medical literature related to the etiology of the underlying pathology. As a consequence, based on the defective report of the QME we have no way of knowing to what extent applicant's underlying degenerative disc disease had progressed at the time of his neck surgery and more importantly at the time of the later MMI examination.

I believe the Court of Appeal in *Rice* should have remanded the case back to the WCAB for further development of the record. The QME should have been ordered to issue a supplemental report based on her review of the operative report findings from applicant's neck surgery and any closely related cervical spine diagnostic testing in order for her to determine the severity of applicant's degenerative disc disease at the time of the MMI evaluation. This would provide a reliable basis for her to determine the extent to which applicant's cervical disc disease had progressed and enable her to form an opinion as to what approximate percentage the underlying pathology (not the etiology of the pathology) was a contributing causal factor of the applicant's cervical spine disability as required by Labor Code 4663.

In Summary Important Points to Consider Are:

1. Pursuant to *Brodie* and *Escobedo* and related cases, the fact that pathology whether symptomatic or asymptomatic is congenital or caused by genetics or hereditary is not a bar to valid legal apportionment.

2. The “approximate” percentage figure representing the industrial and nonindustrial contributing causal factors of an applicant’s permanent disability should be based on the pathology in question based on diagnostic testing and not a questionable speculative percentage the underlying genetics, hereditary, or congenital factors allegedly caused the pathology at issue.

3. The fact that genetics or heredity played a “large” or “predominant” role in causing the pathology at issue does not automatically equate to nor is it synonymous with an approximate percentage figure the pathology itself is a contributing causal factor under Labor Code 4663 of the applicant’s permanent disability.

4. Diagnostic studies, operative report findings, medical records, clinical findings, clinical judgment, and a complete and accurate medical history are among but not the exclusive components or factors to be used in assessing the extent to which a given underlying pathological condition or disease process is a contributing causal factor of the applicant’s permanent disability as reflected in many of the cases cited in the body of the article.

"RISK FACTORS", PATHOLOGY, AND ASYMPTOMATIC PRIOR CONDITIONS-CAUSATION OF INJURY VERSUS CAUSATION OF PERMANENT DISABILITY

City of Petaluma et al., v. WCAB (Lindh) **29 Cal. App. 5th 1175, 83 Cal. Comp. Cases 1869 (Petition for Review denied 3/13/19).**

Issues & Holding: The Court of Appeal in reversing both the trial WCJ and the WCAB held that when there are multiple contributing causal factors of an applicant's permanent disability apportionment is required so long as there is substantial medical evidence establishing valid legal apportionment.

Factual & Procedural Overview: Applicant was employed as a law enforcement officer. The parties stipulated he sustained injury AOE/COE to his left eye, while engaged in canine training suffering three to six blows to the left side of his head. Afterwards he suffered headaches that would last between several hours and one or two days. However, over a month later on June 16, 2015, while he was off duty, applicant suddenly lost most of the vision in his left eye. He was initially examined by treating physicians from two different facilities. Neither of the two treating physicians believed the applicant's vision loss was related to the blows that he suffered to his head during canine training.

Applicant was then examined by a neuro-ophthalmolgist QME. The QME diagnosed applicant with five different conditions. None of these conditions had caused disability prior to applicant's suffering the blows to his head during canine training. The QME also indicated that applicant had an underlying condition which the QME identified as "vasospastic-type personality." The QME opined that this underlying condition put the applicant at higher risk of suffering a disability. The QME also described the underlying condition of vasospasticity as a rare condition. The QME indicated the applicant's blood circulation to his left eye was defective. The QME repeatedly stated the applicant did not have any disability prior to receiving the blows to his head during canine training.

Injury AOE/COE: In terms of injury AOE/COE the QME indicated that the blows to the applicant's head contributed to his injury. He also indicated that as to causation of disability, he would apply the same analysis.

Apportionment: With respect to the permanent disability related to applicant's left eye, the QME initially found there was non-industrial apportionment of 90%. However, following the QME's deposition and the issuance of a supplemental report, he modified the apportionment percentage to 85% non-industrial and 15% industrial which equated to permanent disability of 40% if there was no valid legal apportionment. If there was 85% valid non-industrial apportionment, the applicant's left eye permanent disability would be 6%.

The WCJ's and WCAB's decisions: The WCJ rejected the QME's apportionment analysis concluding that it was not supported by substantial medical evidence and therefore awarded the applicant 40% permanent disability without apportionment. The City of Petaluma filed a Petition for Reconsideration which was denied by the WCAB who affirmed the WCJ's decision. The Board's denial of defendant's Petition for Reconsideration was based on the reasoning that the applicant's preexisting asymptomatic condition of hyperractive type personality and systemic hypertension and vasospasm were "mere risk factors" that predisposed the applicant to having a left eye injury, but that the actual resultant left eye disability based on partial left eye blindness was entirely caused by industrial factors. The Board indicated that the QME had "confused causation of injury with causation of disability and therefore, there was no valid legal basis for apportionment".

The City of Petaluma filed a Writ with the Court of Appeal which was granted, and the Court of Appeal annulled the WCAB's decision finding that the QME's opinion constituted substantial medical evidence and therefore ordered an apportioned Award of 6% permanent disability.

Discussion: In a lengthy and well reasoned decision with an in-depth analysis and discussion of SB 899, Labor Code §4663 and 4664 and applicable case law, the Court of Appeal held that both SB 899 and applicable case law clearly permitted valid legal apportionment based on preexisting asymptomatic pathology as well as prior asymptomatic conditions. The WCAB also affirmed the fact that unlike case law prior to SB 899, current Labor Code sections 4663 and 4664 and applicable case law establish that when an industrial injury aggravates or accelerates an underlying disease process whether that disease process is symptomatic or asymptomatic, there may be a basis for valid legal apportionment that was now allowed prior to the enactment of SB 899.

With respect to SB 899 and the enactment of Labor Code sections 4663 and 4664, the court in citing the California Supreme Court's decision in *Brodie* indicated that SB 899 "overhauled the statutes governing apportionment." The court also indicated that Labor Code §4663 provides and requires that apportionment be based on causation. Under SB 899 a physician is required to make an apportionment determination by finding "what approximate percentage of the permanent disability was caused by the direct result of injury arising out of and occurring in the course of employment and what approximate percentage of the permanent disability was caused by other factors both before and subsequent to the industrial injury, including prior industrial injuries."

More importantly the Court of Appeal indicated that Labor Code §4664 specifically and expressly states "The employer shall only be liable for the percentage of the permanent disability *directly caused* by the injury arising out of and occurring in the course of employment." (Labor Code §4664, subdivision (a), italics added.)

The Court of Appeal focused on the fact that one of the significant changes to apportionment effectuated by SB 899 enacted in 2004 was that "other factors" are required to be taken into account for apportionment, "making clear that pathology and preexisting asymptomatic conditions are among such factors", that may provide a basis for valid legal apportionment.

The Court's Analysis of Applicable Case Law: The Court of Appeal analyzed a number of the most significant cases decided by the California Supreme Court and the Court of Appeal subsequent to the enactment of SB 899, as well as a number of WCAB decisions. These cases included *City of Jackson v. WCAB* (2017) 11 Cal.App.5th 109 (*Jackson*), *Brodie v. WCAB* (2007) 40 Cal.4th 1313 (*Brodie*), *Acme Steel v. WCAB* (2013) 218 Cal.App.4th 1137 (*Acme Steel*), *Escobedo v. Marshalls* (2005) 70 Cal.Comp.Cases 604 (*Escobedo*), *E.L. Yeager Construction v. WCAB* (2006) 145 Cal.App.4th 922 (*E.L. Yeager*) and *Costa v. WCAB* (2011) 76 Cal.Comp.Cases 261 (*Costa*).

The Court of Appeal set forth the following key points and the holdings of prior cases that supported its opinion that valid legal apportionment can be based on pathology and asymptomatic conditions, so long as they were contributing causal factors of the applicant's permanent disability and there was substantial medical evidence to support the apportionment determination.

1. The Court of Appeal rejected applicant's argument and the WCAB's opinion that the QME impermissibly apportioned to "risk factors" by citing from *Costa*. "Applicant's argument that the WCJ improperly apportioned to a risk factor ignores the medical opinion that applicant's preexisting congenital condition went beyond being a risk factor to being an actual cause of his increased permanent disability, when applicant sustained his industrial injury."

2. The Court of Appeal rejected both the WCAB's and Applicant's repeated mischaracterization of the applicant's underlying pathology and asymptomatic condition as simply or merely a "risk factor." The Court also indicated that labeling or characterizing an underlying condition whether symptomatic or asymptomatic as a "risk factor" does not change the fact that it is still an "underlying condition" that can be a contributing causal factor of the applicant's resultant permanent disability.

3. The Court of Appeal also stated, "[m]ore importantly, the post-amendment cases do not require medical evidence that an asymptomatic preexisting condition, in and of itself, would eventually have become symptomatic. Rather, what is required is substantial medical evidence that the asymptomatic condition or pathology was a contributing cause of the disability. (citing *Brodie*, supra, 40 Cal.4th at page 1328).

Also citing *Brodie* the Court of Appeal stated that under SB 899 ["the new approach to apportionment is to look at the current disability and parcel out its causative sources-nonindustrial, prior industrial, current industrial – and decide the amount directly caused by the current industrial source"].

4. The Court of Appeal flatly rejected applicant's arguments and the Board's erroneous decision and related arguments that apportionment is required only "where there is medical evidence the asymptomatic preexisting condition would invariably have become symptomatic, even without the workplace injury." The Court indicated these arguments merely reflect the state of the law prior to the 2004 amendments in SB 899. "Under the current law, the salient question is whether the disability resulted from both nonindustrial and industrial causes, and if so, apportionment is required." (citing *Brodie, Jackson* and *Acme Steel*) The Court of Appeal characterized as "immaterial" whether or not an asymptomatic preexisting condition that contributes to an applicant's disability would, alone have inevitably become manifest and resulted in disability.

5. The Court of Appeal also rejected applicant's argument that valid legal apportionment can only be based on a preexisting degenerative condition. The Court citing *Jackson* indicated "[w]e perceive no relevant distinction between allowing apportionment based on a preexisting congenital or pathological condition and allowing apportionment based on a preexisting degenerative condition caused by heredity or genetics". The Court stated the key to understanding the principles and concepts of apportionment based on Labor Code sections 4663 and 4664 is to "focus on whether there is substantial medical evidence the disability was caused, in part, by nonindustrial factors, which can include "pathology and asymptomatic prior conditions for which the worker has an inherited predisposition." (*Jackson*, supra, 11 Cal.App. 5th at p. 116; see *Escobedo*, supra, 70 Cal.Comp.Cases at p. 617 [separately listing, and thus distinguishing between, all the "factors" that are apportionable-including those apportionable *prior to 2004* ("the natural progression of a non-industrial condition or disease, a preexisting disability, or a post-injury disabling event") and those apportionable *after 2004 amendments* ("pathology, asymptomatic prior conditions, and retroactive prophylactic work preclusions")].)

6. Lastly, the Court of Appeal rejected applicant's argument that there can be no valid apportionment to a condition that did not cause disability prior to the work-related injury. The Court emphatically and unambiguously stated "[b]y definition, an asymptomatic preexisting condition has not manifested itself, and thus, by definition has not caused a prior disability. "Prior disability or evidence of modified work performance is no longer a prerequisite to apportionment. If the presence of these

factors is necessary to constitute substantial evidence, there would have been no purpose in changing the law." (see *E.L. Yeager, supra,* 145 Cal.App.4th at p. 929).

Editor's Comments: The Court of Appeal's decision in *Lindh* broke no new ground nor did it establish any new concepts or principles related to apportionment law. Its importance is that it expressly and unambiguously rearticulated and reaffirmed the radical diametrical change in prior apportionment law reflected in SB 899 and Labor Code sections 4663 & 4664. The Court did this by conducting a comprehensive review and analysis of appellate decisions ranging from the Supreme Court's decision on *Brodie*, numerous Court of Appeal decisions, and the WCAB's en banc decision in *Escobedo*, (affirmed by the Court of Appeal) and key panel decisions. In doing so, the Court of Appeal rejected both the WCJ's and WCAB's misunderstanding and misapplication of existing case law on apportionment.

The Court of Appeal in *Lindh*, as it has done numerous times in other cases since the enactment of SB 899, reminded the WCAB that SB 899 and Labor Code Sections 4663 & 4664 reflect a radical and diametrical change in the law of apportionment that existed for 36 years prior to 2004. This radical change in the law of apportionment based on causation (prior to 2004 apportionment based on causation was prohibited) will frequently result in any given case to a potentially large reduction of an applicant's permanent disability award based on apportionment to non-industrial contributing causal factors so long as there is substantial medical evidence to support such a determination.

In *Lindh*, the Court of Appeal annulled the WCAB's decision since the WCAB erroneously rejected the QME's legally correct non-industrial apportionment analysis and opinion apportioning 85% of the applicant's eye permanent disability to a preexisting asymptomatic non-disabling underlying pathological condition that was aggravated and accelerated by applicant's industrial injury. The WCAB erroneously applied pre-SB 899 apportionment law in rejecting the QME's medically and legally correct opinion on apportionment resulting in an unapportioned award of 40% permanent disability. In annulling the WCAB's decision, the Court of Appeal awarded applicant 6% permanent disability after 85% valid nonindustrial apportionment.

The Court of Appeal reaffirmed prior case law interpreting and applying Labor Code sections 4663 and 4664 that apportionment is required to be based on causation and that valid nonindustrial contributing causal factors may include pathology as well as asymptomatic prior conditions even if the underlying pathology is caused in large part by heredity and genetics. The Court flatly rejected both the applicant's and the WCAB's attempts to nullify and eviscerate valid legal apportionment based on the labeling and mischaracterization of pathology and prior asymptomatic conditions as "mere risk factors" and also the WCAB's erroneous finding that apportionment based on asymptomatic pathology and prior conditions impermissibly related to risk factors of injury as opposed to causation of permanent disability.

The Court also stressed that the WCAB erroneously applied pre-SB 899 apportionment law by requiring that any pre-existing pathology or asymptomatic prior conditions had to be disabling in some form either prior to or subsequent to the current industrial injury or injuries. The Court of Appeal said that with respect to post SB 899 apportionment this was simply "immaterial." "If the presence of these factors is necessary to constitute substantial evidence, there would be no purpose in changing the law."

Martinez v. County of Alameda, PSI and York Risk Services Group **(2018) 83 Cal.Comp.Cases 747, 2018 Cal. Wrk. Comp. P.D. Lexis 17 (WCAB Panel Decision) Caution: The rationale for the holding in this case may no longer be viable in light of the subsequent decision by the Court of Appeal in *City of Petaluma et al., v. WCAB (Lindh)* 29 Cal. App. 5th 1175, 83 Cal. Comp. Cases 1869 (Petition for Review denied 3/13/19)**

Issues: Whether the WCJ's Award of 100% permanent total disability without apportionment was correct even though the AME in internal medicine opined that 60% of applicant's permanent disability was non-industrial. Also, whether applicant was deemed 100% permanently totally disabled in accordance with the fact pursuant to Labor Code § 4662 (b) and whether the conclusive presumption of permanent total disability under Labor Code § 4662 (a)(4), which establishes the conclusive presumption of permanent total disability for "an injury to the brain resulting in permanent mental incapacity."

Holding: The WCAB in a split panel decision with Commissioner Razo dissenting, found the applicant to be 100% permanently totally disabled and the AME in internal medicine's opinion that 60% of applicant's overall permanent disability was due to non-industrial factors and 40% to industrial factors constituted invalid apportionment based on the fact the AME was apportioning to the causation of the injury (i.e. applicant's non-industrial risk factors for suffering a stroke), rather than causation of the resulting permanent disability. Moreover, the WCAB concluded that because applicant's stroke was "directly caused by the current industrial source", there can be no legally valid apportionment of the applicant's permanent disability.

Factual and Procedural Overview: Applicant was employed in a position with the County of Alameda where she was exposed to high levels of stress. She suffered a stroke. However, even before she suffered a stroke, she took the initiative to enroll in a class for stress management at Kaiser Permanente. In terms of causation of injury, there was no specific acute sudden stressful event on the day applicant suffered an acute stroke. Rather the stroke related to chronic industrial stress over time. In terms of the nature of the applicant's work stress, applicant testified in her deposition that she was yelled at least once by her supervisor and as a consequence there was some apprehension when she went to meet her supervisor thereafter. In terms of causation, the WCJ noted that such psychological stress is well-recognized to result in an increase in adrenaline

in the blood stream. This supported the WCJ's finding based on the medical evidence that within reasonable medical probability the acute stroke suffered by the applicant on the date of injury was precipitated by industrial factors.

Applicant had pre-existing significant pathology consisting of pre-existing non-industrial atherosclerotic plaque disease at the bifurcation of the LEFT carotid artery. The applicant suffered a stroke in the distribution of the same left carotid artery, qualifies this moderate amount of plaque as significant and at the time of the stroke the plaque represented "symptomatic carotid disease." The WCJ also based on the medical evidence concluded that within reasonable medical probability the stroke suffered by the applicant was caused by a thrombotic event. There was also the presence of what was characterized as "hyperdense middle cerebral artery sign"…

The Medical Evaluators and Medical Reporting: There was an AME in internal medicine and an AME in neuropsychology. The AME in internal medicine issued four medical reports and was deposed on one occasion. The AME in neuropsychology issued two reports and was deposed once.

The AME in internal medicine diagnosed applicant with an acute ischemic cerebrovascular accident on the date of her injury affecting the left middle cerebral artery distribution. More importantly, he indicated the applicant had stroke residuals consisting of aphasia, severe cognitive deficits, and right upper extremity weakness, including slight handgrip weakness. He also diagnosed applicant as having "[p]re-existent atherosclerosis of the LEFT carotid at the bifurcation and of the LEFT middle cerebral artery as well as a pre-existent histories of controlled hypertension, dyslipidemia, and glucose-intolerance."

The AME in internal medicine also indicated that under the AMA Guides applicant had various impairments, including impairments of her higher cognitive functions, communication derived speech impairment, and a right upper extremity impairment.

In terms of employability, the AME in internal medicine indicated applicant was "unable to return to her prior employment even with restrictions". Also, due to her cognitive deficiency, the applicant was unable to perform complex cognitive tasks and unable to communicate effectively orally or by way of written word.

The Apportionment Analysis from the Two AME's:

The AME in Internal Medicine:

In his initial report dated January 10, 2014, the AME in Internal Medicine indicated the following apportionment analysis:

> There is very substantial medical evidence for apportionment of the ultimate disability rating from residuals of the acute stroke to non-industrial factors. By far, more likely than not, absent the pre-existent non-industrial atherosclerotic disease the stroke on the date of injury would not have resulted in as severe ultimate disability rating. Furthermore, absent the pre-existent non-industrial atherosclerotic disease the acute stroke may not have occurred at all, or at least not have occurred at the time it did. Conversely, absent the industrial stress factors the stroke may not have occurred at all. Apportionment assessment of the ultimate disability rating needs to consider the greater background predisposition to stroke in Ms. Martinez. Therefore, within reasonable medical probability, the ultimate disability rating in her case is apportioned 60% to non-industrial factors and 40% to industrial factors.

In a supplemental report, the AME in internal medicine indicated that in terms of causation of injury based on applicant's deposition testimony, she confirmed the relatively acute and ongoing stressors at her workplace at the time she suffered the stroke.

During his deposition, the AME in internal medicine testified the applicant was at a somewhat higher risk of having a stroke due to her pre-existing conditions related to being hypertensive, having diabetes, dyslipidemia and also some atherosclerosis. Subsequent to his deposition, the AME issued a supplemental report. In his report he addressed the issue of whether subconjunctival hemorrhages are associated with a higher chance of stroke. He indicated he could not find such an association within the medical literature and therefore, the occurrence of subconjunctival hemorrhage is a potential sign of hypertension, but not a sign associated, per the medical literature, with a higher chance of stroke." He again confirmed that the industrial causation of the stroke that occurred on February 13, 2013 remained unchanged. During the course of his deposition he also recommended the applicant be examined by a neuropsychologist.

The AME in neuropsychology:

In his initial report the AME in neuropsychology felt it was not his role to address industrial causation of the applicant's stroke. He did assess the applicant's residual disability and in doing so noted the applicant was essentially doing nothing but sitting and watching TV all day. He also noted the applicant had marked verbal memory difficulty, word-finding difficulty and language difficulty well beyond what could potentially be explained on English as a second-language. In terms of employability, the AME in neuropsychology indicated there was no doubt in his mind that the applicant was "totally disabled from any work in a competitive work force." He elaborated further on this issue by stating that in his opinion "[i]t goes without saying that my perspective is this woman is completely unable to perform her usual and customary work and is clearly totally disabled from any competitive employment."

He also opined that from his perspective, he believed the permanent disability he indicated flows entirely from the sustained stroke in that applicant's permanent disability was "caused on a 100% basis by the specific stroke of February 13, 2013."

With respect to apportionment of permanent disability, he indicated "[I]t is a matter of law whether or not any apportionment for the stroke as discussed by Dr. Larach or others should pass through to apportionment for the disability I have rated consequent to the stroke. My input to the parties is that the disability I have rated flows entirely from the stroke and if there are appropriate applications of apportionment that should flow through, then those can be applied per the law. They would be outside the domain of neuropsychology."

The neuropsyche AME was deposed. In describing applicant's impairment he went beyond the AMA Guides. He described her impairment as "severe" and that from a pure mental perspective, if she had no physical impairments and was out in public by herself she would be at risk for getting lost or hit by a car. He opined that she had no capability of independently functioning outside the family home. He further opined that "in a broad sense, applicant is cognitively 100% disabled, i.e., she is totally disabled in the context of being unable to work and the potential for competitive work is not there." However, under the AMA Guides 40% is the most accurate WPI.

In his deposition he again attempted to address apportionment. He refused to provide an opinion on apportionment of permanent disability based on causation by stating, "I'm not going to take it upon myself to make the[e] distinction of what's causation of the injury versus causation of the impairment…[W]hat caused the stroke is not my province."

The Internal Medicine AME's Supplemental Report:

Following issuance of the report from the AME in neuropsychology, the AME in internal medicine issued another supplemental report and did not change his WPI ratings. He also did not change his conclusion that applicant was unable to return to her prior employment even with restrictions. He also indicated his opinions on causation of the stroke remained unchanged.

With respect to apportionment the AME in internal medicine stated "I continue to find that there is very substantial medical evidence for apportionment of the ultimate disability rating from residuals of the acute stroke to non-industrial factors. The non-industrial factors consist not of a prior disability, but significant pre-existent pathology. The pathology may not have manifested significant disability prior to the stroke." He also found "that by far, more likely than not, absent the pre-existent non-industrial atherosclerotic disease the stroke on the date of injury would not have resulted in a severe of ultimate disability rating." He again confirmed that within reasonable medical probability in his opinion the "**ultimate disability rating in her case is apportioned 60% to non-industrial factors and 40% to industrial factors."** (original emphasis).

The AME in internal medicine also tried to buttress and support his apportionment determination by using an example from the AMA Guides related to assessment of pre-existent impairment from hypertensive heart disease. Based on a very detailed analysis and discussion, and what he described as pre-existing end-organ damage given the severity of her LEFT ventricular hypertrophy as well as the presence of cerebrovascular disease he stated, "[T]herefore, within reasonable medical probability, she did have preexistent, though asymptomatic, impairment from hypertensive heart disease, at 49% WPI."

The WCJ's Decision:

With respect to the apportionment issue, the WCJ found that the internal AME's apportionment opinion did not constitute substantial medical evidence because it was allegedly inconsistent with the *Escobedo* decision. Specifically the apportionment opinion failed to explain how or why the cognitive residuals would be 60% less severe if applicant did not have underlying atherosclerotic disease. Also the WCJ indicated the AME did not explain the 60/40 breakdown and also failed to differentiate between the cause of the stroke and the disability resulting from the stroke. Also the AME failed to differentiate between the causation of the injury and the causation of the disability. The WCJ also noted that it appeared there was apportionment by the AME to causation of the stroke and to risk factors that caused it rather than to the disability resulting from it and the doctor never explained how he arrived at the 60/40 split. As a consequence defendant failed to meet its burden of proof on apportionment. Predictably, defendant filed a petition for reconsideration.

The WCAB's decision denying defendant's petition for reconsideration:

The WCAB acknowledged that defendant's petition for reconsideration stated the correct legal principles underlying sections 4663 and 4664(a). The WCAB also conceded that it is now permissible to apportion permanent disability where that disability is actually caused, at least in part, by a preexisting, asymptomatic, non-industrial condition or disease. However, they also noted that the mere fact that a physician opines that some portion of an injured worker's permanent disability is attributable to non-industrial causation does not mean that the physician's opinion necessarily rests on correct legal principles.

The WCAB cited the *Escobedo* decision distinguishing and defining causation as used in Labor Code section 4663 as referring to causation of permanent disability and not causation of injury. "[T]he percentage to which an applicant's *injury* is causally related to his or her employment is not necessarily the same as the percentage to which an applicant's *permanent disability* is causally related to his or her injury. The analyses of these issues are different and the medical evidence for any percentage conclusions might be different." (italics in original).)

The WCAB also noted the *Escobedo* decision was consistent with the California Supreme Court's subsequent decision in *Brodie*. "In *Brodie*, the Supreme Court declared that "the new approach to apportionment is to look at the current disability and parcel out is causative sources - non-industrial, prior industrial, current industrial, and decide the amount **directly caused** *by the current industrial source.* (40 Cal.4th at p. 1328 (bolding and italics in the original)).)

The WCAB's analysis of *Brodie* led them to conclude "Accordingly, under *Brodie*, if an employee's industrial *injury* is the sole cause of his or her permanent disability, there can be no legally valid apportionment of the employee's *permanent disability*." In footnote 6, the WCAB cited the *Hikida* case in support of this conclusion.

With respect to the issue of apportionment to risk factors, the WCAB indicated that the AME in Internal Medicine impermissibly apportioned to risk factors i.e., applicant's predisposition to a stroke due to the pre-existing atherosclerotic disease in her left carotid artery. The Board said this was contrary to *Escobedo* and once again citing *Brodie* stated that "…because applicant's stroke was "directly caused by the current industrial source" there can be no legally valid apportionment of the applicants permanent disability to non-industrial causation."

In affirming the WCJ's 100% Award of permanent total disability, the WCAB concluded the AME in Internal Medicine had impermissibly apportioned 60% of applicant's overall permanent disability based on causation of injury and risk factors as opposed to causation of the disability.

Commissioner Razo's dissent:

Commissioner Razo in a lengthy analytical well reasoned dissent would have reversed the WCJ's 100% PTD award based on the majority's incorrect determination there was no valid legal basis for non-industrial apportionment and would have found that 60% of applicant's overall permanent disability must be apportioned to non-industrial causation. Commissioner Razo reviewed all of the applicable case law including the recent decision by the Court of Appeal in *City of Jackson v. WCAB (Rice)* (2017) 11 Cal.App.5th 109, 82 Cal.Comp.Cases 437. (other numerous citations omitted).

He emphasized that under controlling case law and Labor Code sections 4663 and 4664, valid legal apportionment can be based on contributing causal factors of the permanent disability including the natural progression of a non-industrial condition or disease, preexisting disability, or a post-injury disabling event as well as pathology and asymptomatic prior conditions and retroactive prophylactic work preclusions. "All of the foregoing cases establish the principle that, under sections 4663 and 4664(a) apportionment of permanent disability is mandated where substantial evidence establishes that some definable percentage of that disability was caused by, among other things, pathology, an asymptomatic preexisting condition, or genetic/hereditary factors."

He also indicated that consistent with sections 4663 and 4664 (a) the AME in internal medicine's opinion that "60% of applicant's permanent disability after her stroke was due to non-industrial causation, specifically her pre-existing, asymptomatic non-industrial atherosclerotic disease" and this "opinion fully comports with the case law holding that sections 4663 and 4664(a) permit the apportionment of permanent disability to pre-existing, asymptomatic, non-industrial degenerative conditions or diseases."(citations omitted).

Also with respect to the opinions of the AME in neuropsychology, Commissioner Razo indicated they did not support the conclusion that applicants post-stroke disability was entirely due to industrial causation. Commissioner Razo's stated that the AME in neuropsychology made it very clear that he was not rendering any opinion with respect to the apportionment of the causes of applicant's post-stroke permanent disability.

Editor's Comments: In light of the Court of Appeal's subsequent decision in *City of Petaluma et al., v. WCAB (Lindh)* 29 Cal. App. 5th 1175, 83 Cal. Comp. Cases 1869 (Petition for Review denied 3/13/19) it is highly questionable whether the rationale used by the WCAB in reaching their decision in this case and other similar cases ie., the combination of "mere risk factor or factors" combined with underlying pathology or asymptomatic conditions confirmed by appropriate diagnostic studies being relevant only to causation of injury versus causation of permanent disability can withstand scrutiny. See also, *Ham v. State of California* 2018 Cal.Wrk.Comp. P.D. LEXIS 619 (WCAB split panel decision, Commissioner Razo dissenting) where the WCAB in another questionable decision rejected the opinions of AME's in orthopedics and internal medicine that there was valid apportionment based on the applicant's confirmed non-industrial diabetic neuropathy. The WCAB found no apportionment on the basis the respective opinions of the two AME's were allegedly based on incorrect legal theory and confused causation of injury with causation of disability.

While the WCAB post *Lindh* still has the authority and discretion to determine whether a given medical report constitutes substantial evidence as they stated in *Thorn v Toyota Motor Sales of San Bernardino* 2018 Cal.Wrk.Comp. P.D. LEXIS 621, decided 8 days after the Court of Appeals decision in *Lindh*, the real issue or question is whether the WCAB in assessing whether a medical report constitutes substantial evidence is applying the correct legal standards and correct legal theory as it relates to apportionment under Labor Code sections 4663 and 4664. In *Lindh* the WCAB erroneously concluded that the SPQME had applied the wrong legal standard and legal theory in determining whether applicant's eye disability in the form of loss of vision was subject to apportionment. However, as the Court of Appeal in *Lindh* held in annulling the WCAB's decision, ruled it was actually the WCAB that had applied the wrong legal standard and theory related to apportionment in erroneously determining the SPQME's report did not constitute substantial medical evidence on apportionment.

Many of the cases in this area center around counsel and doctors characterizing pre-existing conditions and pathology(whether symptomatic or not) as mere "risk factors" and in doing so they arguably are only relevant to causation of injury and are therefore not seen as valid nonindustrial contributing causal factors of an applicant's permanent disability. However, as the cases demonstrate, one doctor or attorney's "risk factor" is another attorneys or doctors "pathology or asymptomatic condition". It is clear that under *Brodie* and numerous other cases, and also as expressly reiterated in *Lindh*, that "pathology and asymptomatic causes or conditions" can be potentially valid nonindustrial contributing causal factors of an applicant's permanent disability. The editor suggests one query that may help to determine whether pathology or asymptomatic conditions may be a contributing causal factor for the PD in question and that is to simply ask whether the applicant's PD for the involved body parts, conditions or systems would be as great or as large as it is in the absence of the causal factor(s) in question or at issue.

Moreover, under Labor Code sections 4663 and 4664, if an industrial injury aggravates, accelerates and lights up an underlying disease process (whether symptomatic or not) there is a potential basis for valid legal apportionment which was not possible before SB899 was enacted.

For other recent cases dealing with this challenging and provocative issue see, *Jensen v. County of Santa Barbara* 2018 Cal.Wrk.Comp. P.D. LEXIS 185 (WCAB panel decision). In *Jensen*, a split panel decision, the WCAB affirmed a WCJ's 34% PD award after apportionment. The WCAB found valid legal apportionment of applicant's hypertensive disability based on a medical opinion that two-thirds of applicant's PD was caused by a combination of applicant's obesity, family history of hypertension and eight year pre-injury history of being overweight. The dissenting Commissioner characterized such apportionment as invalid since they were "risk factors" for developing hypertension and suffering a stroke as opposed to contributing causal factors of the applicant's hypertensive PD.

Diaz v. The Gainey Vineyard **2017 Cal.Wrk.Comp. P.D. LEXIS 154 (WCAB panel decision)**

Issues: Whether 20% nonindustrial apportionment of applicant's lumbar spine disability related to preexisting nonindustrial spondylolisthesis and degenerative changes confirmed by diagnostic studies constituted valid legal apportionment or whether such apportionment was based on risk factors as opposed to causation of applicant's lumbar spine disability.

Holding: The WCAB determined that the AME's 20% nonindustrial apportionment did not constitute substantial medical evidence since the Board determined it was apportionment related to risk factors as opposed to causation of the applicant's lumbar spine disability and did not meet the substantial medical evidence test set forth in *Escobedo v. Marshalls* (2005) 70 Cal.Comp.Cases 604, 611 (WCAB en banc).

Overview and Discussion: Applicant, a Vineyard worker, suffered an admitted October 13, 2011, specific injury to his lumbar spine. The reporting physician was an AME in orthopedics. The WCJ relying on the orthopedic AME's opinion awarded applicant 50% permanent disability after 20% nonindustrial apportionment related to preexisting nonindustrial spondylolisthesis and degenerative changes. Both applicant and defendant filed Petitions for Reconsideration.

In addition to the issue of whether or not the AME's opinion related to apportionment constituted substantial medical evidence, there were other issues related to the proper calculation of impairment under the AMA Guides and *Almaraz/Guzman*.

The Apportionment Issue: In preparing his reports, including the MMI report the AME reviewed lumbar spine diagnostic testing. There were two lumbar spine MRI findings of 10/27/11 and 6/23/13, which indicated there was an L5-S1 spondylolisthesis and interior wedge compression fractures of T12, L1, and L2. There was also confirmation of a 5-mm spondylolisthesis. The AME's diagnosis was left L5-S1 radiculopathy, degenerative disc disease, and spondylolisthesis of L5 on S1 causing bilateral LS nerve root impingement. He also found multilevel mild spondylosis of the lumbar spine as well.

In addition to the diagnostic studies supporting to the AME's diagnosis, he considered several scientific studies. It was still his opinion that 20% of applicant's permanent disability should be apportioned to his nonindustrial spondylolisthesis and degenerative disc disease. The AME in orthopedics indicated applicant had a one-level spondylolisthesis, which he described as a situation where vertebrae slip and overlap, creating an unstable back. As a consequence, the applicant was predisposed to develop back pain more than another individual who had no spondylolisthesis. In terms of the causation of the spondylolisthesis, the AME stated: "The most common cause is a developmental problem. By developmental, it develops, period. Very rarely

would it develop—or occur secondary to trauma, and that would have to be a major trauma to fracture both sides of what we call the pars inter-articularis. It didn't have that. So this is a nonindustrial, not from instantaneous injury or a CT."

He also indicated that even barring any injuries, the applicant would have low back pain because of his spondylolisthesis.

The WCAB found that the AME's opinion did not constitute substantial medical evidence, applying the *Escobedo* standard. The WCAB majority concluded that the AME's apportionment determination was based upon the risks that spondylolisthesis posed in the development of back pain. The AME found that applicant was predisposed to the development of back pain by virtue of this non-industrial condition. The WCAB in finding the AME's apportionment invalid indicated that apportionment has to be to the cause of the disability and it is not appropriate to apportion to what they described as "risk factors." Therefore, the WCAB found that applicant was entitled to an unapportioned award.

Editor's Comment: There is absolutely no dispute based on the California Supreme Court's decision in *Brodie* that Labor Code §§4663 and 4664 eliminated the prior bar against apportionment based on pathology and asymptomatic causes. *Brodie v. WCAB* (2007) 40 Cal.4th 1313, 1327; *EL Yeager Construction v. WCAB* (2006) 145 Cal.App.4th 922, 926-927; *Escobedo v. Marshalls* (2005) 70 Cal.Comp.Cases 604, 617 (en banc).

In describing a potential contributing causal factor of permanent disability as a "risk factor" it is critical to properly define and characterize whether the "risk factor" in question is really pathology. If the risk factor in question is in actuality pathology, then it is potentially apportionable based on *Brodie* and the cases cited hereinabove. Apportionment can be based on pathology even if the pathology is asymptomatic and did not result in any disability or medical treatment before the industrial injury in question. All that is required is a medical report and opinion that constitutes substantial medical evidence as to why the pathology in question or at issue is a contributing cause of the applicant's permanent disability, i.e. would the applicant's permanent disability be as great as it is in the absence of the underlying pathology.

Arguably, in this case the AME's, opinion as the dissenting commissioner indicated, met the *Escobedo* standard of substantial medical evidence by considering the applicant's entire medical history, appropriate diagnostic studies, scientific/medical literature, and noting that the applicant's disability would not be as great as it would be in the absence of the spondylolisthesis.

The AMA Guides: Impairment versus Apportionment of Disability:

The AMA Guides under California's workers' compensation system are for determining whole person impairment (WPI) and not apportionment under Labor Code Labor Code §§4663 & 4664.

In three cases, *Caires v. Sharp Healthcare* (2014) Cal.Wrk.Comp. P.D. LEXIS 145 (WCAB panel decision) and *Hosino v. Xanterra Parks & Resorts* 2016 Cal.Wrk.Comp. P.D. LEXIS 351 (WCAB panel decision) and *Pini v. WCAB (2007)* 73 Cal.Comp.Cases 160 (writ denied), the WCAB held that while whole person impairment and permanent disability are closely related, they should not be equated nor are they synonymous when used by evaluating physicians to determine whether or not there is valid nonindustrial apportionment under the AMA Guides to the Evaluation of Permanent Impairment, Fifth Edition (AMA Guides).

In *Caires*, the WCJ awarded 9% permanent disability relying on WPI and apportionment opinions and determinations by a PQME in orthopedics, a primary treating physician in orthopedics, and an AME in psychiatry. Applicant filed a Petition for Reconsideration contending the opinions of all three evaluating physicians on apportionment did not constitute substantial medical evidence. The WCAB granted applicant's Petition for Reconsideration, rescinded the award, and remanded the case back to the trial level for further development of the record. The WCAB found that all three reporting physicians' opinions on apportionment were fundamentally flawed for different reasons. Moreover, in light of what appeared to be a clear lack of familiarity with the basic concepts and principles of valid legal apportionment under Labor Code §4663, the parties should consider the use of an AME, or if they were unable to do so, the WCJ may consider appointing a "regular physician" under Labor Code §5701.

A large part of the WCAB's decision focused on the opinion of the SPQME in orthopedics who found that 87.5% of applicant's 24% whole person impairment was related to nonindustrial degenerative conditions, leaving only 3% permanent disability as industrial.

In assessing and determining WPI, the SPQME in orthopedics utilized the range of motion method (ROM). However, with respect to apportionment and causation of orthopedic permanent disability, the SPQME used DRE lumbar Category IV. The SPQME was deposed by applicant's counsel. He was specifically questioned as to why he determined impairment using ROM and then used DRE Category IV in determining apportionment. In trying to explain the methodology he used, the SPQME specifically referenced an example in the AMA Guides as follows:

> A. Well, to answer your question about using rating—using impairment—rating impairment using range of motion and then apportionment using the DRE category four, actually, there's a classic example in the AMA guides using the same method of analysis. It's actually the [*7] book. It's one of the examples in the book. They rate a condition by range of motion, and then at the very end they

> say because there is a degenerative condition, one might use the DRE method to apportion out the preexisting condition. So it is within the AMA guides cited as one of the example cases. So that's how I followed this rule. (Exh. E, September 9, 2009 deposition transcript, pp. 20:3-14.)

The WCAB found the SPQME's opinion on apportionment did not constitute substantial medical evidence since he relied exclusively on an apportionment example in the AMA Guides as opposed to rendering an opinion on apportionment in accordance with Labor Code §§4663 and 4664, which the Board emphatically stated, "…defines apportionment without reference to the AMA Guides." In footnote 3, in *Caires*, the WCAB stressed, that the Guides acknowledge that "[m]ost states have their own customized methods for calculating apportionment." (Guides §1.6b, p.12). In a lengthy two and a half page analysis and discussion, the WCAB made a careful distinction between a determination of whole person impairment under the AMA Guides as opposed to a separate and distinct determination of disability and apportionment.

Initially, the WCAB indicated that under the Labor Code whole person impairment is merely a component of permanent disability. In that regard the Board stated:

> *Labor Code section 4660(b)(1)* requires an evaluating physician to use the descriptions, measurements, and percentages in the *American Medical Association Guides to the Evaluation of Permanent Impairment 5th Edition* (AMA Guides) as part of the basis for determining whole person impairment. (*City of Sacramento v. Workers' Comp. Appeals Bd. (Cannon) 222 Cal.App.4th 1360 [79 Cal.Comp.Cases 1]; Blackledge v. Bank of America (2010) 75 Cal.Comp.Cases 613, 619-620 (Appeals Board en banc)*.) Whole person impairment is a component of permanent disability. (*Lab.Code § 4660*; Schedule for Rating Permanent Disabilities (Dept. of Industrial Relations, Div. of Workers' Comp.' January 2005), p.1-5; AMA Guides, § 1.8, p. 13.)

In *Caires*, the WCAB also indicated that if an evaluating physician uses an example from the AMA Guides to make an apportionment determination, that example must be consistent with Labor Code §4663 and requires a detailed explanation by the evaluating physician.

> "…[W]hen evaluating apportionment of permanent disability, a physician must offer an opinion in accordance with Labor Code sections 4663 and 4664, which define apportionment without reference to the AMA Guides. An example from the AMA Guides may be utilized by a physician if he or she explains how the example addresses the current cause of permanent disability under Labor Code section 4663 and *Escobedo*. (emphasis added).

In *Caires*, the SPQME in orthopedics failed to provide any explanation as to why the apportionment example he used from the AMA Guides was consistent with §4663 and applicable case law.

In *Pini v. WCAB* (2007) 73 Cal.Comp.Cases 160 (writ denied), the WCJ awarded applicant 46% P.D. without apportionment. Applicant's QME cited an example from the AMA Guides related to the "aging process" and apportionment. The WCAB rescinded the award and remanded the case for further development of the record on apportionment stating the opinion of applicant's QME on apportionment was not substantial evidence, "since it was based on the AMA Guides rather than on Labor Code Labor Code §4663 and the applicable case law."

In the most recent case, *Hosino v. Xanterra Parks & Resorts* 2016 Cal.Wrk.Comp. P.D. LEXIS 351 (WCAB panel decision), the second and most recent case, the WCJ relying on the opinion of an AME in orthopedics related to an October 26, 2011, specific injury, awarded applicant 34% permanent disability after nonindustrial apportionment of 35%. Applicant filed for Reconsideration, which was granted by the WCAB. The case was returned to the trial level for further proceedings related to permanent disability and apportionment. The AME was deposed by applicant's counsel and the WCAB included in its lengthy Opinion seven full pages from the AME's deposition transcript.

The WCAB indicated there were numerous ambiguities and conflicts in the AME's deposition testimony. The most significant flaw in the AME's opinion and analysis was that the AME equated apportionment of impairment with apportionment of disability which the WCJ also erroneously adopted. The WCAB stated:

> We disagree with the WCJ's statement that "the proper method of determining apportionment was utilized," because Dr. Wood and the WCJ apportioned impairment not permanent disability. Of course impairment and permanent disability are closely related, but they should not be equated to determine apportionment.

The WCAB then cited *Caires* to remind the WCJ on remand that the AMA Guides can be used to evaluate whole person impairment but that with respect to determining apportionment, Labor Code §4663 is "controlling." As it did in *Caires*, the WCAB in *Hosino* stated:

> In contrast, when evaluating apportionment of permanent disability, a physician must offer an opinion in accordance with Labor Code sections 4663 and 4664, which define apportionment without reference to the AMA Guides." In *Caires*, the Board panel also noted in footnote 3 that "[t]he Guides acknowledge that [m]ost states have their own customized methods for calculating apportionment." (Guides § 1.6b, p. 12)."

As a consequence the Board found that the AME's opinion on apportionment did not constitute substantial medical evidence. While affirming parts of the WCJ's Findings and Award the WCAB amended the Findings of Fact, indicating that the issues of permanent disability and apportionment should be deferred pending further proceedings and a new decision by the WCJ on remand with jurisdiction reserved. (See also, subsequent decision *Hosino v. Xanterra Parks*

and Resorts 2017 Cal.Wrk.Comp. P.D. LEXIS 341 (WCAB panel decision) (WPI does not directly equate to permanent disability; when evaluating apportionment of permanent disability, a physician must offer an opinion in accordance with Labor Code §§4663 and 4664, which define apportionment without reference to the AMA Guides.)

The critical lessons and practice pointers from *Caires, Hosino* and *Pini* are:

1) While WPI and permanent disability are closely related, they are not synonymous. WPI does not directly equate to permanent disability As a general rule the AMA Guides cannot be used by evaluating physicians or the parties to determine valid legal apportionment under Labor Code §§4663 & 4664.

2) Labor Code §4663 and related case law construing and applying §§4663 & 4664 define apportionment without reference to the AMA Guides, including any references or examples of apportionment in the Guides.

3) If an evaluating physician attempts to utilize an example in the AMA Guides to determine apportionment, he or she must explain in detail how the apportionment example in the AMA Guides addresses the current causes of the applicants permanent disability under Labor Code §§4663 and 4664 as well as *Brodie*. *Escobedo* and other cases construing and applying §4663. The author believes very few, if any, evaluating physicians will be able to provide such an explanation that will constitute substantial medical evidence.

Petitions to Reopen/*Vargas*

Wilson v. 20/20 Administrative Services, The Hartford Insurance Company **2016 Cal.Wrk.Comp. P.D. LEXIS 654 (WCAB panel decision)**

Issues: What is the proper methodology to determine apportionment related to Petitions to Reopen for New and Further Disability under the WCAB's en banc decision in *Vargas v. Atascadero State Hospital* (2006) 71 Cal.Comp.Cases 500 (WCAB en banc). In addition, whether the defendant properly and timely raised the issue of apportionment.

Holding: The proper methodology to determine whether there is valid legal apportionment under Labor Code §§4663 and 4664 related to a Petition to Reopen for New and Further Disability under the *Vargas* case is to determine whether there are any nonindustrial contributing causal factors of the applicant's increased permanent disability from the time of the prior award until the time of the P&S/MMI evaluation related to the Petition to Reopen for New and Further Disability. The fact permanent disability was identified as a disputed issue for trial is generally sufficient to raise the related issue of apportionment.

Overview and Discussion: Following trial the WCJ issued an amended Findings and Order related to a cumulative trauma from April 2007 to April 2008, where applicant sustained industrial injury to her neck, back, upper extremities, psyche, internal system, high blood pressure/nervous system, and sleep, with permanent disability of 68% after apportionment.

Applicant had also received a prior Stipulated Award on January 25, 2012, for 68%. Given the prior Award, the WCJ found the present permanent disability of 68% was no greater than the prior award of 68%, and that applicant take nothing further related to her Petition to Reopen for New and Further Disability.

Applicant filed a Petition for Reconsideration arguing that the AME in psychology and the PQME in internal medicine had both found new and further permanent disability and that any apportionment related to the new and further disability found by the WCJ was not supported by substantial medical evidence. Applicant also argued defendant had not timely raised the issue of apportionment before the case was tried and submitted.

Whether defendant properly raised apportionment as an issue before the case was tried and submitted.

On Reconsideration the WCAB found that defendant had properly and timely raised the issue of apportionment. In that regard the WCAB stated:

> Even though the "apportionment" box on page three of the Pretrial Conference Statement of July 13, 2015 was not checked, the "other issues" box at the bottom of the same page was checked, and "LC 4664" was handwritten within the list of "other issues." Secondly, the issue of permanent disability was identified in the "Stipulations and Issues" statement in the Minutes of Hearing at trial on February 3, 2016, and although "apportionment" was not specifically raised, the identification of permanent disability as a disputed issue was sufficient to raise the issue of apportionment. (See *Bontempo v. Workers' Comp. Appeals Bd*. (2009) 173 Cal.App.4th 689, 704 (74 Cal.Comp.Cases 419): (Raising the issues of permanent disability (Lab. Code §4660) and apportionment (Lab. Code, §§4663, 4664) was sufficient to raise the 15% increase in permanent disability under Labor Code section 4658(d).].)

The reporting physicians in psychiatry and internal medicine and the WCJ failed to properly determine apportionment related to applicant's Petition to Reopen for New and Further Disability.

In every case involving a Petition to Reopen for New and Further Disability the methodology for calculating nonindustrial apportionment related to any purported new and further disability is set forth in the controlling case of *Vargas v. Atascadero State Hospital* (2006) 71 Cal.Comp.Cases 500 (WCAB en banc). *Vargas* requires that any new and further disability is to be determined commencing from the day after any prior award up to the MMI/P&S evaluation determining whether any new and further disability exists. Any alleged or purported nonindustrial apportionment related to any new and further disability must be assessed over this specific limited period of time. Any reference to apportionment that may have existed prior to the date of the Award is not to be considered.

Under the facts of this case, the reporting physician in orthopedics determined there was no new and further disability. However, the AME in psychiatry found there was new and further disability, but also applied 12% nonindustrial apportionment to applicant's psychiatric disability. The PQME in internal medicine found there was 80% nonindustrial apportionment to applicant's cardiovascular disability related to the Petition to Reopen for New and Further Disability. There was no indication by either of these reporting physicians that the percentage of nonindustrial apportionment was determined related to the specific time frame from immediately after the prior Stipulated Award of January 25, 2012, up until each of their respective MMI/P&S evaluations and related reports.

Moreover, the WCAB determined that the PQME in internal medicine's opinion on apportionment did not comply with the *Escobedo* standards since he did not describe in detail the exact nature of the apportionable disability caused by applicant's preexisting hypertension and

that the physician was "opaque" in setting forth the basis for his apportionment opinion. The WCAB also took issue with the fact the AME in psychology may have derived his apportionment percentage determination from the flawed apportionment opinion of the PQME in internal medicine.

As a consequence, the Board found good cause to develop the record further on the issue of apportionment and remanded the case for supplemental opinions consistent with their analysis. The WCAB stressed in Footnote No. 2 that, "the question for both physicians is whether there is a medical basis to apportion applicant's *present* new and further permanent disability, if any, without reference to any apportionment that may have existed at the time of the prior Stipulated Award."

Editor's Comment: In the first few years after SB 899 and Labor Code §§4663 and 4664 were enacted, physicians, attorneys, and trial judges had an exceedingly difficult time determining how to properly calculate and determine apportionment in cases involving Petitions to Reopen for New and Further disability. This led to the WCAB's en banc decision in *Vargas v. Atascadero State Hospital* (2006) 71 CCC 500, which provides explicit guidance with respect to the correct methodology in determining and applying valid legal apportionment under Labor Code §§4663 and 4664 related to Petitions to Reopen For New and Further Disability. For a medical opinion to constitute substantial medical evidence an applicant has suffered new and further disability over and above a prior award, the determination of valid legal apportionment must be based on a focal timeline between the date the prior Stipulated Award issued and the MMI/P&S evaluations in any related medical specialty. It is only during this defined and limited timeframe that any contributing nonindustrial causal factors of the applicant's new and further disability must be determined without reference to any apportionment or basis for apportionment that may have existed at or before the date of the prior Stipulated Award.

Another recent case illustrating the problem of physicians and a workers' compensation judge not using the correct methodology mandated in the WCAB's en banc decision in *Vargas* is *Condit v. Panama Buena Vista Unified School Dist.* PSI 2018 Cal. Wrk. Comp. P.D. LEXIS 232 (WCAB Panel Decision)

In *Condit*, the applicant received a prior Award in July 2013, which in part was based upon a compromise of psychiatric permanent disability from two psychiatrists. One psychiatrist indicated a GAF of 52 which equated to a 27% WPI with 20% non-industrial apportionment resulting in 45% psychiatric permanent disability after apportionment. The other psychiatrist found a GAF of 41, equal to a 48% WPI without apportionment equating to 81% PD. On the Petition to Reopen, the same reporting physicians agreed that applicant now had a GAF of 31 with equated to 69 WPI. One psychiatrist found 40% of the increased psychiatric permanent disability was attributable to non-industrial factors. The WCJ found that applicant did not suffer

any new and further disability despite the fact both psychiatrists found increased psychiatric permanent disability. The WCAB rescinded and remanded the WCJ's decision. The WCJ erroneously relied on the reporting of one of the physicians since the doctor did not specify the non-industrial apportionment of the increased psychiatric disability occurred during the time frame of the date of the prior Award issued on July 9, 2013, and the MMI evaluation in December of 2014. Both the WCJ and the reporting physician are prohibited from changing any nonindustrial apportionment to applicants' entire Award, which includes the disability found previously.

In another recent case *Knapp v Department of Social Services* 2019 Cal.Wrk.Comp. P.D. LEXIS 102 the WCJ as well as both defense and applicant's counsel used the wrong methodology to calculate apportionment involving a Petition to Reopen involving a pre-SB899 combined award involving three separate spine injuries (two specifics and one CT) that resulted under the *Wilkinson* case in a combined award of 25% PD. Applicant filed a timely Petition to Reopen the combined PD award of 25%. The parties did not dispute applicant suffered new and further PD. However, in calculating the value of the new and further disability factoring in 30% nonindustrial apportionment to be applied to the nonindustrial portion of applicant's increased PD, the WCJ and the parties failed to use the correct methodology. The WCAB concluded that the 30% nonindustrial apportionment must be applied to applicant's increased percentage of disability, not to the overall dollar value of the nonindustrial portion of the increase in the PD award. The WCAB characterized this case as unique since the *Vargas* en banc decision involved a post SB 899 petition to reopen case involving only a single injury and the instant case involved a pre-SB 899 combined award related to three separate injuries under the old *Wilkinson* case that was essentially abrogated by SB 899 as reflected in the *Benson* WCAB en banc decision.

For other cases illustrating the correct application of the methodology under the WCAB's en banc decision in *Vargas*, see *Charon v. WCAB (Ralph's Grocery Company* (2013) 78 Cal.Comp.Cases 869 (writ denied) (Valid 10% nonindustrial apportionment in a Petition to Reopen in a psychiatric case based on applicant's nonindustrial issues and interactions with her daughter and grandchildren that <u>all</u> occurred after the original Stipulated Award of 48% in February of 2000. Applicant's award of 100% PTD on the Petition to Reopen was reduced to 90%), see also, *Rocha v. TTX Company* 2008 Cal.Wrk.Comp. P.D. LEXIS 348 (WCAB panel decision); *Bunnie Orange v. Hilton Hotel Corp., Specialty Risk Services* 2008 Cal.Wrk.Comp. P.D. LEXIS 14 (WCAB panel decision); *Cruz v. Santa Barbara County Probation Dept.* 2008 Cal.Wrk.Comp. P.D. LEXIS 427 (WCAB panel decision); *Milivojevich v. United Airlines* (2007) 72 Cal.Comp.Cases 1415, 2007 Cal.Wrk.Comp. LEXIS 322 (writ denied); *Wilson-Marshall v. WCAB* (2007) 72 Cal.Comp.Cases 1736 (writ denied); *Johnson v. City of Los Angeles* (2009) 74 Cal.Comp.Cases 1, Court of Appeal (not certified for publication, 18 ½ page decision!); *Rowe v. County of San Diego* 2009 Cal.Wrk.Comp. P.D. LEXIS 470 (WCAB panel decision); *Balderas v. GTE Corporation* 2010 Cal.Wrk.Comp. P.D. LEXIS 270 (WCAB panel

decision); *Tull v. General Lighting Service (CIGA)* 2010 Cal.Wrk.Comp. P.D. LEXIS 391 (WCAB panel decision); *Ortiz v. Orange County Transportation Authority, PSI* 2012 Cal.Wrk.Comp. P.D. LEXIS 429 (WCAB panel decision); *Bates v. WCAB* (2012) 77 Cal.Comp.Cases 636; 2012 Cal.Wrk.Comp. LEXIS 80 (writ denied).

BENSON

Alea North American Ins. Co., v. W.C.A.B. (Herrera) (2018) 84 Cal. Comp.Cases 17, 2018 Cal.Wrk.Comp. LEXIS 123 (writ denied on 12/5/18), prior history, U.S. Fire Insurance Company v. Workers' Compensation Appeals Board (Herrera) **(2018) 83 Cal.Comp.Cases 1829, 2018 Cal. Wrk. Comp. LEXIS 98 (Writ Denied); *Herrera v. Maple Leaf Foods*, 2018 Cal. Wrk. Comp. P.D. LEXIS 430 (WCAB Panel Decision); and *Herrera v Maple Leaf Foods*, 2018 Cal. Wrk. Comp. P.D. LEXIS 284 (WCAB Panel Decision)**

Issues: Whether there is a valid exception to the requirement under the *Benson*, "limited circumstances" exception when two of the three reporting physicians were unable to parcel out permanent disability between applicant's specific and cumulative trauma injuries, based on the fact there were some aspects of the industrially-caused permanent disability that could be parceled out and others that could not.

Holding: The WCAB rescinded the WCJ's separate awards of permanent disability for applicant's specific injury and cumulative trauma injury since two of the three reporting physicians could not parcel out the applicant's gastrointestinal and psychiatric permanent disabilities between the specific and cumulative trauma injuries with reasonable medical probability. The WCAB in these circumstances concluded this would satisfy the *Benson* "limited circumstances" exception and that applicant was entitled to a combined award of 83% permanent disability.

Factual & Procedural Overview: This case has a very complex procedural history. Before the Writ was filed with the Court of Appeal there were two prior WCAB panel decisions.

The applicant suffered two injuries, both involving orthopedic, internal and psychiatric injuries. He suffered a specific injury in October 15, 2002, and a cumulative trauma injury for the period of October 15, 2002 through January 2, 2003. The applicant alleged injuries to the same body parts and conditions for both injuries. The reporting physicians were AME's in the fields of orthopedics, internal medicine and psychiatry.

The WCJ awarded the applicant two separate awards, consisting of 39% permanent disability for the specific injury of October 15, 2002, and 68% permanent disability for the cumulative trauma injury from October 15, 2002 through January 2, 2003. Both the applicant and defendant filed Petitions for Reconsideration, challenging the WCJ's permanent disability award, as well as apportionment findings.

The WCAB initially granted reconsideration and rescinded the WCJ's separate awards of 39% and 68% for applicant's two dates of injury and remanded and instructed the DEU rater to issue a

combined permanent disability rating for applicant's two injuries based on the factors of disability described by the AMEs without apportioning disability between the injuries pursuant to *Benson*. The rater found that applicant's combined PD for the specific and cumulative injuries after 20% non-industrial apportionment related to applicant's gastrointestinal disability was 83%. On remand, defendants objected to the WCAB's rating instructions on several grounds as follows:

1. The rating instructions were contrary to Labor Code §4663 and the "cannot parcel out" exception outlined in *Benson*.

2. That apportionment of applicant's psychiatric and gastrointestinal disability should be in accordance with the orthopedic apportionment found by the orthopedic AME who had apportioned all of applicant's right finger, right shoulder and cervical spine permanent disability to the October 15, 2002, specific injury and the lumbar spine disability 40% to the October 15, 2002, specific injury and 60% to the cumulative trauma injury.

3. With respect to the psychiatric apportionment, defendant argued that the AME report in psychiatry expressly indicated that the AME would apportion 80% of applicant's psychiatric disability to his orthopedic condition, and this should be apportioned along the lines of orthopedic apportionment.

4. Defendant's also argued that with respect to gastrointestinal disability, the AME in internal medicine attributed applicant's gastrointestinal complaints to medications taken for the orthopedic injury and therefore, gastrointestinal permanent disability apportionment should follow the orthopedic apportionment.

In response the WCAB rescinded the WCJ's separate awards and followed the recommended combined rating of 83% permanent disability after non-industrial apportionment of 20%. In reaching its decision the WCAB explained "under Labor Code §4663 and *Benson*, apportionment of PD must be based on causation, *except* in those cases where the contribution of separate industrial injuries to PD cannot be parceled out by the evaluating physician, in which circumstances a combined award is justified."

Citing *Benson* the Board indicated that in most circumstances there is generally medical evidence that will enable each distinct industrial injury to be separately rated based on its individual contribution to the employee's permanent disability.

The Board also noted in the *Benson* decision by the Court of Appeal that there could be "limited circumstances", when an evaluating physician cannot parcel out, with reasonable medical

probability, the approximate percentages to which each distinct industrial injury causally contributed to the employee's overall permanent disability. The Board noted that in such "limited circumstances" when the employer has failed to meet its burden of proof, a combined award of permanent disability may still be justified.

In terms of the reasoning used by the AMEs in internal medicine and psychiatry where they indicated they could not "parcel out" the applicant's permanent disability in their respective fields, the AME in internal medicine indicated that applicant's gastrointestinal permanent disability was "not amendable to separation based on various dates of injury," and that "[i]t would require speculation to allocate specific levels of apportionment to each date of injury," supported application of the *Benson* "cannot parcel out" exception."

The WCAB rejected defendant's argument that apportionment of applicant's gastrointestinal disability was somehow mandated by the internal AME's conclusion that the gastrointestinal injuries resulted from applicant's use of pain medication to treat his orthopedic pain. The Board indicated that this relates to causation of injury and is not equivalent to causation of disability.

The rationale for the Board to find that the applicant's permanent disability related to his internal and psychiatric disability could not be reasonably "parceled out" between the two dates of injury was "that where, as here, some aspects of the industrially-caused permanent disability from two or more separate industrial injuries cannot be parceled out because the disability is inextricably intertwined (in this case, the psychiatric and gastrointestinal disability), then a combined PD award must issue even though other aspects of the industrially-caused permanent disability from those injuries can be parceled out with reasonable medical probability (in this case, the orthopedic disability)."

Editor's Comment: A recent case applying the holding in *Herrera* is *Mills v. American Medical Response* 2019 Cal.Wrk.Comp. P.D. LEXIS 84 (WCAB panel decision). In *Mills* the WCAB affirmed a WCJ's award of 100% PTD related to four specific injuries and one cumulative trauma injury. In applying the *Benson* "limited circumstances" exception the WCAB held that even though the AME in orthopedics was able to apportion applicant's orthopedic disability between the various dates of injury, the internal AME was unable to do so. Since there was no unanimity amongst the reporting physicians indicating valid apportionment between the multiple dates of injury, defendant failed to meet their burden and the WCJ correctly awarded a single combined disability award of 100% PTD.

In a recent safety member case involving a deputy sheriff, *Bates v. County of San Mateo* 2019 Cal.Wrk.Comp. P.D. LEXIS 72; 47 CWCR 82 (May 2019), apportionment under *Benson* of PD related to successive CT injuries was precluded based on the combined applicability of Labor Code sections 3212 and 4663(e). Applicant received a combined award for separate 3212

presumptive heart injuries without apportionment of PD between the two injuries. In *Bates*, applicant suffered a CT from May 10, 2009 through May 10, 2010 and received a stipulated award of 41% PD in December of 2013 related to his heart and circulatory/cardiovascular injuries. He filed a timely Petition to Reopen. He continued to work for the same employer in the same job, and filed a second CT injury up to his last date of employment to the exact same body parts as in the first CT. The AME opined that 75% of applicant's current PD related to the original CT injury and 25% to the new CT injury.

At trial the parties stipulated that if there was a finding of new and further disability only for the first 2010 CT, the rating would be 80% less the dollar amount of the prior award, and if there was finding of apportionment pursuant to *Benson*, the rating would be 60% to the 2010 CT and 20% for the second CT injury. Following trial the WCJ ruled that the applicant was entitled to the LC 3212 heart presumptions for both CT injuries which caused 80% PD with defendant to receive credit for the dollar value of the 41% Award for the first CT. The WCJ also found that LC 4663(e) precluded *Benson* apportionment of PD between the two CT injuries. Defendant's Petition for Reconsideration was denied. The WCAB indicated that defendant's argument on reconsideration disregarded 4663(e)'s provision that the apportionment to the causation provisions of 4663 do not apply to injuries or illnesses covered under LC sections 3212-3213.2. The WCAB also relied on *Department of Corrections and Rehabilitation v WCAB (Alexander)* (2008) 166 Cal.App. 4th 911, 73 CCC 1294 and subsequent cases holding that 4663(e) prohibits the application of the apportionment provisions of 4663 to injuries or illnesses covered by 3212.2. "Accordingly the WCAB concluded that applicant was entitled to a combined award and that *Benson* apportionment was precluded. It would be "inconsistent with the Legislature's unified scheme of apportionment based on causation to conclude that 4664(a) somehow overrides the specific and later enacted provisions of 4663(e)."

Gonzalez v. EDCO Disposal Waste and Recycling Services **2019 Cal.Wrk.Comp. P.D. LEXIS 199 (WCAB Panel Decision)**

Issues & Holding: In this case involving three separate dates of injury the WCAB rescinded a WCJ's finding that applicant was 100% permanently totally disabled in accordance with the fact under L.C. 4662(b). The WCAB also held that the WCJ could not issue a combined award for three separate specific injuries absent a finding that the medical evidence establishes that applicant's disability cannot be parceled out between the three separate specific injuries pursuant to *Benson v. Workers' Comp. Appeals Bd*. (2009) 170 Cal.App.4th 1535, 1560 [74 Cal.Comp.Cases 113].)

Procedural & Factual Overview: Applicant suffered three specific injuries involving various body parts and conditions. The strict AMA Guides impairment ratings supported a 73% permanent disability rating. However, the WCJ found applicant was entitled to a permanent total

disability award based on part on Labor Code 4662(b) in accordance with the fact (sic). In addition the WCJ issued a joint combined award of permanent total disability without a finding by the WCJ that the medical record did not support the apportionment of permanent disability between the three separate specific injuries. Defendant filed a Petition for Reconsideration that was granted by the WCAB who rescinded the WCJ's combined Findings and Award and returned the matter to the trial level for further proceedings necessary to correct the errors identified by the WCAB.

Discussion: With respect to the *Benson* issue, the WCAB reiterated the holding in *Benson* that "[A]bsent a finding that the medical evidence establishes that applicant's disability cannot be parceled out between his separate dates of injury, applicant's disability must be apportioned between his separate dates of injury." Ordinarily and except in limited circumstances, "there will be medical evidence that will enable each distinct industrial injury to be separately rated based on its individual contribution to the employee's permanent disability." (*Benson*, supra, 170 Cal.App.4th at p. 1560.) In this case the WCJ issued a combined award of permanent total disability without any reference to whether the medical record justified this determination. "There is no legal basis for the issuance of a joint award of permanent disability in the absence of a finding by the WCJ that the medical record does not support the apportionment of permanent disability between the separate industrial injuries."

With respect to the WCJ's finding that applicant was entitled to a permanent total disability award under 4662(b) in accordance with the fact (sic) as opposed to the 73% AMA Guides impairment rating, the WCAB reversed and rescinded the WCJ's PTD award. The WCAB held that the WCJ could not independently rely on 4662(b) but must instead base a finding of an award of PTD only through impairment ratings by application of the AMA Guides pursuant to Labor Code section 4660 pursuant to the Court of Appeal decision in *Department of Corrections & Rehabilitation v. Workers' Comp. Appeals Bd. (Fitzpatrick)* (2018) 27 Cal.App.5th 607 [83 Cal.Comp.Cases 1680]. In *Fitzpatrick* the Court of Appeal held that Labor Code section 4662(b), "in accordance with the fact," does not provide "a second independent path to permanent total disability findings separate from section 4660."

Langley v 101 Casino, Mitsui Sumitomo Marine Management **2019 Cal.Wrk.Comp. P.D. LEXIS 293 (WCAB split Panel Decision)**

Issues & Holding: WCJ in a case involving a cumulative trauma and specific injury found applicant to be totally permanently disabled but with no apportionment of disability between the two injuries under *Benson* based on the fact that one of four reporting physicians, an orthopedic PQME opined that the two injuries were inextricably intertwined based on the alleged complexity of the two injuries as well as the medical record. The orthopedic PQME also testified in deposition that he was unable to apportion between the specific and CT injury primarily

because the applicant was asymptomatic at any time prior to suffering her specific injury almost five months into the cumulative trauma injury period. The WCAB in a split panel decision denied defendant's Petition for Reconsideration and affirmed the WCJ's award of permanent total disability.

Overview & Discussion: There were four reporting physicians in this case in different medical specialties. There was an SPQME in orthopedics, an AME in psychiatry, as well as a neurologist and internist. Both the neurologist and AME in psychiatry were able to apportion the applicant's permanent disability between the specific and cumulative injuries.

On Reconsideration, the WCAB rejected the defense argument that the orthopedic SPQME reports did not constitute substantial evidence on apportionment. The WCAB held that the orthopedic SPQME was able to provide non-conclusory reasons as to why he could not apportion the applicant's permanent disability between the specific and cumulative trauma injuries and that the PD from both injuries was inextricably intertwined. Commissioner Lowe, in a lengthy dissent argued that the medical record needed to be further developed on the *Benson* issue based on her assessment that the orthopedic SPQME's opinion on apportionment was "confusing and contradictory on causation of injury and causation of permanent disability/apportionment."

Chavez v. Chief Auto Parts, AutoZone, Inc. **2018 Cal. Wrk. Comp. P.D. LEXIS 257 (WCAB Panel Decision)**

Issues & Holding: The WCAB rescinded the WCJ's award of 100% permanent total disability without apportionment. The Board found the WCJ improperly merged three separate and distinct injuries into one cumulative trauma. The WCJ also failed to apportion to nonindustrial causative factors of the applicant's permanent disability under Labor Code §4663. The WCJ erroneously relied solely on the opinion of one of three AMEs that applicant's permanent disability was "inextricably intertwined." The Board held that two of the three AMEs were able to apportion the applicant's permanent disability among the three separate and successive injuries under *Benson.* The Board rejected the opinion of the AME in internal medicine whose opinion they characterized as not constituting substantial evidence when he opined he could not apportion among the three injuries, because applicant's internal permanent disability was "inextricably intertwined."

Procedural & Factual Overview: The applicant suffered two specific injuries, one on May 24, 1995 and the other August 7, 1997, as well as the cumulative trauma from March 28, 1983 through September 28, 1998.

The evaluating physicians consisted of three AME's in orthopedics, internal medicine and psychiatry. All three of the AMEs found a basis for nonindustrial apportionment under Labor

Code §4663. In addition, the AME's in orthopedics and psychiatry were also able to apportion applicant's permanent disability among the three dates of injury.

The AME in internal medicine found that 20% of the applicant's permanent disability caused by internal conditions was attributable to non-industrial factors. However, the AME in internal medicine, unlike the other two AMEs in orthopedics and psychiatry, opined he could not parcel out applicant's internal medicine permanent disabilities among the three separate and successive injuries because they were "inextricably intertwined".

The WCJ issued a Joint Findings Award and Orders, finding all of applicant's 100% permanent total disability was attributable to the cumulative trauma and none to the two specific injuries notwithstanding the medical reporting of the AMEs in orthopedics and psychiatry to the contrary.

Defendant filed a Petition for Reconsideration arguing in part that the WCJ committed error by relying upon the medical opinion of the AME in internal medicine, to find that the internal permanent disability from applicant's three injuries was "inextricably intertwined". Defendant also contended the record needed to be further developed on the issue of apportionment under both Labor Code §4663 and *Benson*. The WCAB granted defendant's Petition for Reconsideration and rescinded the WCJ's 100% Award of permanent disability without apportionment.

The WCAB's Decision and Analysis

Improper Merger of Separate and Successive Injuries: The WCAB found there was no factual or legal basis for the WCJ to rely on the *Benson* "limited circumstances" exception to merge the two specific injuries of May 24, 1985, and August 7, 1997, into one cumulative trauma injury. The WCAB indicated this was clear error. In that regard the Board stated, although *Benson* may authorize the combining of permanent disabilities in "limited circumstances", it does not authorize the merger of distinct industrial injuries.

On remand the WCAB specifically instructed the WCJ that "before deciding whether this case falls within the "limited circumstances" exception, the WCJ must proceed from the fact that applicant sustained three distinct industrial injuries, one of which is a cumulative trauma injury." The Board indicated that what the judge needed to do on remand was to "consider each of the three injuries and the nature of the permanent disability attributable to each injury, before considering whether applicant's disabilities fall within *Benson's* "limited circumstances" exception. "The merger of injuries is not part of this analysis."

Apportionment to Non-industrial Factors Under Labor Code §4663: On remand the WCAB also instructed the WCJ that based on the present medical record there was a basis for nonindustrial apportionment under Labor Code §4663 as well as apportionment of disability

between the industrial injuries under *Benson*. With respect to Labor Code §4663, the WCAB noted that the AME in internal medicine apportioned 20% of the applicant's internal medicine permanent disability to nonindustrial factors. The WCAB noted the other AMEs in orthopedics and psychiatry also found a basis for non-industrial apportionment. As a consequence, the WCAB indicated they were not persuaded an Award of 100% permanent total disability without apportionment was warranted based on Labor Code §4663 without considering apportionment of the applicant's residual industrial permanent disability in all three medical specialties among the three separate and successive injuries.

***Benson* Apportionment:** The WCAB indicated it was difficult for them to understand why the two AMEs in orthopedics and psychiatry were able to apportion the applicant's permanent disability in their respective fields among the three separate injuries and why the AME in internal medicine was unable to do so. They described the AME's opinion in internal medicine that the permanent disability caused by the various internal injuries as "inextricably intertwined" was not credible. The Board stated the AME's opinion "on this point disregards the medical history and the findings of the other medical evaluators who apportioned permanent disability to prior work injuries as well as the specific and cumulative trauma injuries.

Considering the fact the AME's in both orthopedic and psychiatric medicine were able to find *Benson* apportionment but the AME in internal medicine could not, the Board concluded that further resort to the internal AME to provide a "supplement opinion would be unfruitful." The WCAB then suggested that the WCJ appoint a regular physician under Labor Code §5701 in the specialty of internal medicine.

Imad v. Galpin Ford; Virginia Surety Company, administered by Sedgwick CMS; Miller Honda; Zurich North America **2018 Cal. Wrk. Comp. P.D. LEXIS 919 (WCAB Panel Decision)**

Issues & Holding: Whether the workers' compensation judge's (WCJ) joint findings, award and order, awarding the applicant 100% permanent total disability without apportionment constituted substantial medical evidence where the reporting AME in psychiatry indicated he could not apportion the applicant's psychiatric disability between two specific injuries because the psychiatric disability was "inextricably intertwined."

With respect to the psychiatric permanent disability apportionment aspect of the case, the WCAB granted defendant's Petition for Reconsideration and rescinded the WCJ's award of 100% permanent total disability and remanded the case for further development of the record on the issue of both Labor Code §4663 nonindustrial apportionment and *Benson* apportionment.

Procedural & Factual Overview: The applicant filed two separate cumulative trauma injuries against different employers that were consolidated for hearing. In ADJ2768261 applicant filed a cumulative trauma from December 1997 to March 7, 2002 against Galpin Ford. In case number

ADJ562166 he filed a separate cumulative trauma injury for the period of March 8, 2002 to October 11, 2004 while employed by Miller Honda. The applicant alleged injury to the same body parts and conditions in both cumulative trauma claims. One of the reporting physicians in the case was an AME in psychiatry. The AME in psychiatry evaluated the applicant several times and was deposed at least four times.

The AME opined applicant sustained a catastrophic industrial CT injury to his psyche and found him to be 100% permanent totally disabled. In his MMI report dated April 17, 2013, based on his evaluation of the applicant of November 29, 2012, with respect to apportioned, the AME in psychiatry apportioned half of applicant's permanent impairment to be split equally between non-industrial factors and the remaining 50% to be equally divided between the two cumulative trauma injuries. The matter was set for trial in August 2016. However, it was taken off calendar for further development of the record with the WCJ ordering the parties to obtain supplemental reporting from the AME in psychiatry and for the AME to clarify his apportionment findings specifically in respect to "inextricably intertwined" related to each of the two CT injuries.

The AME in psychiatry issued a supplemental report in which he concluded that his determination of the applicant being 100% permanent totally disabled was based on his own definition of reasonable medical probability, based on an 85% level of reliability and confidence. With respect to apportionment of the applicant's psychiatric permanent disability between the two cumulative trauma injuries, he used an 85% level of reliability. The AME indicated that the applicant's psychiatric WPI is not likely to be accurate with any degree of reasonable medical probability and that the psychiatric disability from the two injuries was "inextricably intertwined".

Both CT claims were consolidated for hearing. The WCJ issued a Joint Findings Award and Order, finding applicant suffered two cumulative trauma injuries while employed by Galpin Ford and Miller Honda to the same body parts and conditions. The WCJ found the applicant to be 100% permanent totally disabled and there was no substantial evidence to apportion psychiatric disability between the two cumulative traumas based on the psychiatric AME's October 31, 2016, supplemental report.

Defendant Galpin Ford filed a Petition for Reconsideration which was granted by the WCAB. In his report on reconsideration the WCJ acknowledged that the psychiatric AME's findings and apportionment did not constitute substantial medical evidence and since defendant failed to meet its burden of proof, the applicant was entitled to a joint award, as opposed to separate awards for each CT under *Benson*.

The WCAB's Decision and Analysis: The WCAB in rescinding the WCJ's joint 100% total disability award without *Benson* apportionment focused on a number of cases dealing with what constitutes substantial medical evidence. In terms of one of the reasons a medical report may not constitute substantial evidence is that the medical report or opinion is based on an incorrect legal

theory. *Hegglin v. Workmen's Comp. Appeals Bd.* (1971) 4 Cal.3d. 162, 169 [36 Cal.Comp.Cases 93, 97].

The WCAB also noted the two burdens that an applicant must meet. The first is the burden of proving injury AOE/COE, and the second is the level of permanent disability caused by the injury. (*South Coast Framing v. Workers' Comp. Appeals Bd.* (Clark) (2015) 61 Cal.4th 291, 297-298, 302; Labor Code §§5705; 3600(a); *Escobedo, supra,* at p. 612).

More importantly in terms of applicant's burden with respect to proving AOE/COE, the employee need only show that the "proof of industrial causation is reasonably probable, although not certain or "convincing." (*McAllister v. Workmen's Comp. Appeals Bd*. (1968) 69 Cal.2d 408, 413 [33 Cal.Comp.Cases 660].) More importantly the WCAB indicated that the burden on applicant proving AOE/COE is a burden that "manifestly does not require the applicant to prove causation by scientific certainty." (*Rosas v. Workers' Comp. Appeals Bd.* (1993) 16 Cal.App.4th 1692, 1701 [58 Cal.Comp.Cases 313].)

The WCAB also reaffirmed that defendant always has the burden of proof on apportionment of permanent disability. To meet this burden, defendant "must demonstrate that, based upon reasonable medical probability, there is a legal basis for apportionment." (*Gay v. Workers' Comp. Appeals Bd*. (1979) 96 Cal.App.3d 555, 564 [44 Cal.Comp.Cases 817]; see also *Escobedo, supra,* at p. 620.)

Moreover, with respect to defendant's burden of showing a legal basis for apportionment, it is based on reasonable medical probability. Among other things and in the context of apportionment determinations, a medical opinion must disclose familiarity with the concepts of apportionment, etc. (*Escobedo, supra,* at p. 621, citations omitted.)

With respect to a physician applying correct legal standards in the context of an opinion constituting substantial medical evidence. The WCAB cited the Court of Appeal in *Gay*.

> Physicians are trained to discover the etiology of an illness. Finding the causes is important in preventive medicine and curing illness once developed. Legal apportionment is not identical to theories of medical causation. Physicians in workers' compensation matters must accordingly be educated by the parties on the correct legal standards of apportionment. (*Gay, supra* at p. 563, citations omitted.)

The WCAB also reaffirmed that contrary to common misconception "apportionment is a factual matter for the Appeals Board to determine based upon all the evidence." (*Gay, supra* at p. 564, citations omitted.) As a consequence, both the WCJ and the Board have the authority to determine the appropriate amount of apportionment, if any. The Board further stated "however, as outlined above, in order for a decision by the Appeals Board to be supported by substantial

evidence, the underlying medical opinions relied upon by the WCJ must be substantial evidence, which includes a correct application of the law by the physician."

The WCAB rejected the opinion of the psychiatric AME both on permanent disability and apportionment, since it was not based on substantial medical evidence. The Appeals Board has never previously quantified "reasonable medical probability" as a specific percentage of certainty and it declined to do so in this case. The psychiatric AME defined reasonable medical probability as an opinion that achieves at least an 85% level of reliability and confidence. Even seeking scientific certainty to support the AME's medical opinion that applicant is permanently totally disability is an incorrect legal standard.

With respect to the psychiatric AME's opinion that the applicant's permanent psychiatric disability was "inextricably intertwined" which allegedly prevented him from apportioning the psychiatric disability between the two cumulative trauma injuries, the Board referenced *Benson*.

Defendant's Burden of Proof on Apportionment under Benson: The WCJ in his report on reconsideration to the Board indicated that he found the psychiatric AME's opinion on apportionment was not substantial medical evidence, and because it is defendant's burden to prove apportionment, defendant failed to meet its burden.

In response, the WCAB reaffirmed it is defendant's burden to prove apportionment under *Benson*. However, the record in the form of the AME's deposition and medical reporting indicates the AME in psychiatry "may have applied an improper legal standard to his opinions regarding both permanent disability and apportionment." His opinions therefore did not constitute substantial medical evidence, and it is required that his findings must comply with established legal precedent and proper legal standards.

Development of the Record: Given the fact the AME's opinion with respect to apportionment and *Benson* was based on his application of improper legal standards and precedent, the Board determined that the record needed to be developed. "The Appeals Board has a duty to develop the record when there is not substantial medical evidence in the record to support a finding." (citations omitted) The WCAB indicated the preferred procedure for developing a deficient record under the applicable case law, was to allow supplementation of the medical record by the physicians who have already reported in the case. The Board indicated the parties should attempt to return to the psychiatric AME for a supplemental opinion in order to provide the AME with an opportunity to address permanent disability and apportionment pursuant to a correct application of the law. However, the WCAB also indicated that if the psychiatric AME cannot cure the defects in his opinion, then the selection of another AME should be considered by the parties. If the parties cannot agree on another psychiatric AME then the WCJ could appoint a "regular physician pursuant to Labor Code §5701."

McClendon v. Home Pest Defense (Rollins Inc.) **2018 Cal. Wrk. Comp. P.D. LEXIS 436, 46 CWCR 248 (November 2018) (WCAB Panel Decision)**

Issues: Whether the opinion, of an AME in orthopedics constituted substantial medical evidence where the AME in his deposition testified he could not apportion applicant's back disability between two specific injuries because the two injuries occurred close in time and the first injury was not yet permanent and stationary when the second injury occurred.

Holding: The WCAB rescinded the WCJ's Joint Findings Award and Order, for 100% permanent disability without any *Benson* apportionment on the basis that the AMEs opinion on *Benson* apportionment did not constitute substantial medical evidence. The mere fact the two injuries occurred close in time, and even when one injury was not yet permanent and stationary, when the second injury occurred is not a proper basis to find that the injuries cannot be rated and apportioned separately as required under *Benson*.

Factual and Procedural Overview: The applicant was employed as a sales person for a pest control company when he suffered two separate specific injuries on June 12, 2012 (neck, back, psyche), and on September 27, 2012 (back, psyche, left lower extremity). After the first injury of June 12, 2012, he received some medical treatment and returned to work. After the second injury on September 27, 2012, he received medical treatment which included surgery on March 7, 2014.

The reporting physician was an AME in orthopedics. The applicant was initially evaluated by the AME on June 16, 2014. With respect to the applicant's back injuries and related permanent disability, the AME indicated that even though the applicant was not MMI with respect to the his back permanent disability, 60% would be non-industrial related to pre-existing pathology and 40% would be industrial. Of the 40% industrial permanent disability, he indicated that under *Benson*, 50% would be apportioned to the June 12, 2012 specific injury, and 50% to the September 27, 2012 specific injury. After the Initial Evaluation of June 16, 2014, the AME indicated "that the apportionment issue is complex and wrought with speculation."

The AME reexamined the applicant almost two years later and indicated applicant's WPI was 60%. However, he also opined the applicant was unable to be gainfully employed in the open labor market and was 100% permanently totally disabled.

The AME in his MMI report indicated that with respect to the applicant's back permanent disability, 40% was non-industrial and 60% was industrial. As to the industrial back permanent disability, he opined that 80% of the 60% industrial back permanent disability was attributable to the June 12, 2012 injury and 20% to the September 27, 2012 specific injury.

The AME was deposed and he recanted his prior *Benson* apportionment and indicated it would be speculative to attempt to apportion the applicant's back permanent disability between the two specific injuries. He testified during his deposition that since the applicant's two specific injuries were only three months apart he would be unable to separately rate the disability to the back from the first injury because it would not have reached permanent and stationary status prior to the onset of the second injury. "He testified that it would be speculative to rate the back disability from the initial injury because it might have improved if it had not been impacted by the second injury…." He also stated there was synergy between the effects of both specific injuries and it was hard for him to separate the disability attributable to each specific injury.

The WCJ issued a Joint Findings Award and Order finding the applicant 100% permanent total disability without any *Benson* apportionment. Defendant filed a Petition for Reconsideration contending there should be two separate awards based on apportionment between the two specific injuries and that a Joint Award was not appropriate under *Benson*. Defendant also argued that the opinion of the AME was not substantial medical evidence to support a finding the applicant was permanently totally disabled.

The WCAB's Decision and Analysis: The WCAB in a split panel decision granted defendant's Petition for Reconsideration and rescinded the WCJ's 100% Findings Award and Order and remanded the case back to the trial level for further development of record and to issue a new decision.

The WCAB rejected the orthopedic AME's apportionment determination where he opined in his deposition that he could not apply *Benson* apportionment of the applicant's back disability between the two specific injuries, because the two injuries occurred close in time, and where the first injury was not yet permanent and stationary when the second injury occurred. The WCAB indicated this is not a proper basis to determine that the injuries cannot be separately rated.

The WCAB acknowledged that while the WCAB and the Court of Appeal in *Benson* indicated "[T]here may be "limited circumstances" when the evaluating physician cannot parcel out with reasonable medical probability, the approximate percentages to which each distinct industrial injury causally contributed to the employee's overall permanent disability." It is only in such limited circumstances, when the employer has failed to meet its burden of proof, that a combined award of permanent disability may still be justified.

The Court of Appeal in *Benson* affirmed the WCAB's en banc decision "wherein the Appeals Board held that when multiple industrial injuries combine to cause permanent disability, the permanent disability caused by each injury must be separately calculated - unless the evaluating physician cannot parcel out, with reasonable medical probability, the approximate percentages of the overall permanent disability caused by each industrial injury." In its en banc decision in *Benson*, the WCAB "held that if a physician renders an opinion that the approximate percentages

of disability caused by each industrial injury cannot reasonably be parceled out, then this constitutes an apportionment determination within the meaning of §4663 (b)." In essence "successive injuries must be rated separately except when physicians cannot parcel out the causation of disability." *(See State Comp. Ins. Fund v. Workers' Comp. Appeals Bd. (Dorsett)* (2011) 201 Cal.App. 4th 433, 453 [76 Cal.Comp.Cases 1138]).

As to the issue of whether there is some exception that would allow a joint award in a scenario where the first injury reaches permanent and stationary status, prior to the onset of the second injury, the WCAB rejected this as a viable basis for an exception to *Benson* stating:

> The determination of whether the *Benson* exception allowing a single joint award applies does not depend on whether the first injury reaches permanent and stationary status prior to the onset of the second injury. Prior to *Benson*, the Court in *Wilkinson v. Workers' Comp. Appeals Bd*. (1977) 19 Cal.3d 491 [138 Cal. Rptr. 696, 564 P.2d 848], allowed a single joint award, holding that when two separate work-related injuries become permanent at the same time, neither permanent disability is previous to the other and the employee therefore is entitled to a single permanent disability rating. (Id. At p. 497.) However, the court in *Benson* concluded that "the clear change in the statutory language" of sections 4663 and 4664 as a result of SB 899 indicates a legislative intent "to invalidate *Wilkinson*." (*Benson*, supra, 170 Cal.App.4th at p. 1550.) Now, "the plain language of §4663, subdivision (c), read in conjunction with the statutory scheme as a whole, specifically requires a physician to determine what percentage of disability was caused by each industrial injury, *regardless of whether any particular industrial injury occurred before or after any other particular industrial injuries*." (*Benson*, supra, at p. 1552 italics added.)

Tapia v. City of Watsonville, PSI **2017 Cal.Wrk.Comp P.D. LEXIS 50 (WCAB panel decision)**

Issue: Whether the AME where there were five separate and successive injuries consolidated for trial impermissibly combined and merged the disability from each separate injury into a single cumulative trauma without parceling out the approximate percentages to which each separate and distinct injury causally contributed to the applicant's overall permanent disability.

Holding: Both the AME and the WCJ in his decision and Award in the five consolidated cases, impermissibly merged separate and successive injuries into one cumulative trauma without parceling out the approximate percentages to which each separate and distinct injury causally contributed to the applicant's overall permanent disability contrary to Labor Code section 4663 and *Benson v. Workers'Comp.Appeals Bd*. (2009) 170 Cal App.4th 1535, 74 Cal.Comp.Cases 114).

Overview and Discussion: Applicant, a fire captain, filed five Applications for separate industrial injuries, including two cumulative traumas and three specific injuries. The parties agreed to use an AME. Following trial the WCJ awarded applicant 73% permanent disability without any apportionment and indicated that all of applicant's disability was attributable to a single cumulative trauma period ending in 2014. Defendant filed a petition for reconsideration.

The AME by way of a supplemental report was asked to explain his opinion that applicant had sustained only a single cumulative trauma injury through 2014. In essence he stated:

> The first question had to do with **apportionment** referable to the multiple dates of injury. As you can see from the information in the introductory portion of the report, the patient has a CT exposure through 2008 and then a CT exposure through 2014 with at least three dates of injury in between. The injuries in 2012 are only seven months apart. I had also noted on page 1 of my November 24, 2015 report that the situation of the patient's left hip worsening after his surgery as well as his findings of bilateral carpal tunnel syndrome (CTS) warranted looking at this as a CT exposure. The number of injuries involves speaks for itself. This is a very common finding in fireman, policeman, and transit bus drivers. Multiple injuries occur over the course of their career and when they are looked at in retrospect represent a CT exposure. As I have noted on page 1 of my last report, I would look at all of these events intertwined and feel that it is best looked at as a single CT event. I'm not able to break out individual dates and levels of impairment.

Defendant filed a Petition for Reconsideration raising a number of issues but primarily that both the WCJ and the AME had impermissibly merged multiple separate and successive injuries in violation of Labor Code §4663 and *Benson*. The WCAB granted defendant's Petition for Reconsideration and rescinded the 73% award and remanded the consolidated cases for further proceedings in the form of either supplemental reporting or a deposition of the AME on permanent disability and the *Benson* apportionment issue.

The WCAB noted pursuant to *Benson* that "The only instance in which a combined award a permanent disability may be justified is where the evaluating physician is unable, with reasonable medical probability, to parcel out the approximate percentages to which each distinct industrial injury causally contributed to the employee's overall permanent disability." Moreover, the WCAB indicated that the AME's opinion that all of applicant's disability should be attributable to a single cumulative trauma did not constitute substantial evidence since:

> Notwithstanding the clear evidence that applicant sustained three distinct industrial injuries …..Dr. Anderson does not assign specific levels of disability to these separate injuries or explain why he is unable to do so. Instead, he states, "I

am not able to break out individual dates and levels of impairment." The only attempt at an explanation is the suggestion that with police officers, firefighters and transit drivers it is common to find multiple injuries over the course of their careers that actually represent a cumulative trauma exposure. That commentary is insufficient to meet the requirements of section 4663(c). Dr. Anderson must either assign a specific level of disability to each of applicant's industrial injuries or expound as to the exact reasons he is unable to do so.

Editor's Comment: See also, *Guerrero v. Walker Corporation* 2017 Cal.Wrk.Comp. P.D. LEXIS 195 (WCAB panel decision) (WCAB affirmed WCJ's finding that applicant suffered two periods of cumulative trauma since there was a lengthy break in applicant's need for industrially-related medical treatment from 7/5/2011 to 12/26/2011, which the WCAB regarded as significant in separating the two distinct periods of cumulative trauma and is thus consistent with the *Coltharp* case and distinguishable from *Western Growers v. WCAB (Austin).*

Singh v. State of California **2017 Cal.Wrk.Comp. P.D. LEXIS 204 (WCAB panel decision)**

Issues: Whether the WCJ improperly calculated the permanent disability from applicant's four separate successive injuries under *Benson* by using a complicated mathematical formula to increase the permanent disability apportionment to each injury as well as the permanent disability apportioned to nonindustrial factors until the combined disability for three of the four injuries and nonindustrial disability under the Combined Values Chart totaled 100%.
Holding: The WCAB reversed the WCJ finding that the WCJ had erroneously calculated applicant's permanent disability under both *Benson* and under Labor Code §4663 and amended the joint Findings and Award to reflect that fact.

Overview and Discussion: Applicant, a heavy equipment mechanic, suffered and filed four separate successive injuries consisting of three specific injuries and one cumulative trauma injury. The WCAB noted that it was uncontested that the scheduled permanent disability ratings would have rendered an award of 53% for one specific injury, 47% for another specific injury, and 67% for the cumulative trauma injury. However, the WCJ elected not to employ the scheduled ratings because "combining the scheduled disabilities, before apportioning to each injury and to nonindustrial factors, yielded overall 95% permanent disability.

Also the WCJ found that the overall 95% permanent disability had been rebutted by applicant's vocational expert who had rendered an opinion that the applicant was unable to compete in the open labor market.

Defendant filed a Petition for Reconsideration indicating that the WCJ had committed error in making disability findings at variance with the scheduled disabilities and that applicant's vocational expert's opinion did not constitute substantial evidence.

The WCAB granted defendant's Petition for Reconsideration. At the outset the WCAB found that applicant's vocational expert's opinions did not constitute substantial evidence under either *Ogilvie* or *Dahl*.

With respect to the *Benson* and Labor §4663 issue, the WCAB indicated that even if the evidence supported a conclusion that applicant was unable to compete in the open labor market solely as a result of his various work injuries both Labor Code §4663 and *Benson* were applicable. Labor Code §4663 and *Benson* would require applicant's permanent disability to be apportioned among his various industrial injuries. The Board noted that "it is settled that disability is caused by separate injuries or non-industrial factors are separated by subtracting percentages of disability." (citations omitted).

As a consequence after applying *Benson* the WCAB indicated that the scheduled ratings with consideration of both apportionment and *Benson* equated to separate awards of 53% for one specific injury, 47% for the other specific injury, and 67% for the cumulative trauma injury, all to be awarded applicant separately.

Philpot v. Performance Dairy Services, Inc., et al. **2017 Cal.Wrk.Comp. P.D. LEXIS 174 (WCAB panel decision)**

Issue: In a situation where there are two separate and successive specific injuries related to multiple body parts and conditions does apportionment under *Benson* require apportionment for each body part and condition with the resultant disability for each body part and condition to be allocated or apportioned to the separate and successive specific injuries.

Holding: Where there are multiple separate and successive injuries, each reporting physician and their respective specialties must make an independent apportionment determination related to each and every body part and condition and then under *Benson* the resultant disability for each separate body part and condition should be apportioned between the separate and successive injuries unless in limited circumstances the evaluating physician or physicians cannot parcel out with reasonable medical probability the approximate percentage as to which each distinct industrial injury causally contributed to the employee's overall permanent disability.

Facts and Discussion: Applicant, while employed as a utility dairy service truck driver suffered two separate successive specific injuries. The first was on April 26, 2010, as a result of an industrial motor vehicle accident in which he suffered injury to his right shoulder, brain, left knee, left shoulder, right knee, and psyche. Applicant received extensive treatment, especially

with respect to his serious brain injury. Following treatment he did return to work, but with some physical restrictions and with simplified tasks. However, he did not have any driving restrictions.

On July 14, 2011, he suffered his second separate specific injury also as a result of an industrial motor vehicle accident with injuries to his brain, right shoulder, lumbar spine, left shoulder, right knee, and psyche. Following trial, the WCJ found that the solvent insurer's liability for one of the specific injuries was 70% and that CIGA's share was 30%. Both CIGA and the solvent insurer, Imperium Insurance Company, filed Petitions for Reconsideration.

CIGA argued that there should have only been a joint award rather than separate awards since the applicant's disability resulting from both separate and successive injuries was inextricably intertwined. In such a case there is joint and several liability between Imperium and CIGA, since under Insurance Code §1063.1(c)(9) there would be other insurance relieving CIGA of all liability.

The solvent insurer, Imperium, argued the WCJ should not have found the applicant to be 100% permanently totally disabled and that any resultant permanent disability is not inextricably intertwined or interwoven requiring separate awards under *Benson*.

There were multiple reporting physicians in the case, including multiple AMEs. There were AMEs in physical medicine, neuropsychology, and orthopedics as well as a PQME in psychology. The AME in orthopedics apportioned 25% of applicant's back disability as nonindustrial related to a preexisting disability, 65% to the 2010 specific injury, and 10% to the 2011 injury. The AME in neuropsychology apportioned 85% of the neuropsychological disorder to the 2010 injury and 15% to the 2011 injury. The SPQME psychology apportioned 70% of applicant's psychiatric disability to the 2010 injury and 30% to the 2011 injury. The AME in physical medicine failed to provide an opinion regarding apportionment after applicant reached maximum medical improvement.

The WCAB granted the Petition for Reconsideration and reversed the WCJ and remanded the case back for further development of the record with respect to *Benson* apportionment and other issues. The WCAB indicating that the WCJ failed to explain how permanent disability was allocated 70% to the solvent carrier, Imperium, and 30% to CIGA. In that regard the Board stated, "Given that applicant injured multiple body parts, it is unclear why the WCJ took the apportionment for a single body part (applicant's psyche) and determined that applicant's permanent disability should be apportioned or "allocated" 70/30).

The WCAB indicated that with respect to applicant's permanent disability from the two separate and successive specific injuries, if it can be parceled out, it "must be apportioned for **each** body part based on substantial medical evidence." (emphasis added).

Of significance is the fact that even though permanent disability needs to be allocated between separate and successive injuries because CIGA is involved, and even though the permanent disability can be allocated or apportioned between separate and successive injuries only the solvent carrier, Imperium, is solely liable for vocational costs, the EDD lien, and medical treatment since all of those cannot be apportioned, and under Insurance Code §1063.1(c) CIGA is relieved of liability.

Ibrahim v. California Dept. of Corrections and Rehabilitation **(2017) 45 CWCR 203 (WCAB panel decision)**

Holding: Medical reports from three Agreed Medical Examiners in different specialty fields were found by the WCAB to not constitute substantial medical evidence on apportionment since each of the AMEs failed to adequately explain why they could not apportion the applicant's permanent disability among several separate and successive injuries.

Overview and Discussion: Applicant filed twenty-one claim forms, but only filed Applications for Adjudication related to nine separate and successive dates of injury consisting of seven specific injuries and two cumulative trauma injuries.

Based on the reports and opinions of AMEs in orthopedics, internal medicine, and psychiatry, the WCJ issued a combined award related to only two specific injury claims with dates of June 27, 2007 and January 24, 2010. There was no finding by the WCJ of apportionment of the applicant's permanent disability for any of the nine dates of injury, let alone the two specific injuries of June 27, 2007 and January 24, 2010 under *Benson*. Defendant filed a Petition for Reconsideration that was granted by the WCAB who rescinded the combined Joint Findings and Award and remanded for further development of the record.

It appears the AME in orthopedics did find some apportionment under Labor Code §4663 related to industrial and nonindustrial contributing causal factors of the applicant's orthopedic PD, but failed to apportion any permanent disability between the two separate specific injuries.

The AME in internal medicine also found apportionment between industrial and nonindustrial contributing causal factors, but did not apportion applicant's permanent disability among any of the nine separate and successive injuries, indicating the permanent disability was "inextricably intertwined" from an internal medicine standpoint.

The AME in psychiatry while indicating that 65% of applicant's psychiatric disability was attributable to multiple and successive injuries also failed to apportion to any of the separate and successive injuries based on the rationale that the injuries were "inextricably intertwined" and it was not possible for him to apportion the psychiatric disability between the multiple and successive injuries.

The WCAB's Decision: In rescinding the WCJ's combined joint Findings and Award, the WCAB held that pursuant to *Benson*, permanent disability that is attributable to multiple injuries that cause permanent disability, the resulting permanent disability must be apportioned among the separate and successive injuries unless an evaluating physician cannot parcel it out within reasonable medical probability.

The WCAB noted that the AME in orthopedics while finding two separate and successive specific injuries on July 27, 2007 and January 24, 2010, failed to apportion the applicant's permanent disability between these two separate injuries and also failed to discuss the applicant's other seven injuries, including five other specific injuries and two cumulative traumas. Although the orthopedic AME did find some valid Labor Code §4663 nonindustrial apportionment he failed to take the second step and apportion any resulting industrial permanent disability between the two specific injuries.

With respect to the other AMEs in internal medicine and psychiatry, the WCAB indicated their opinions did not constitute substantial medical evidence since their opinions were incomplete and they both "merely" stated in a conclusory manner that the injury claims were "inextricably intertwined." Also, the AMEs failed to provide any plausible analysis or explanation of the basis for their respective opinions that the permanent disability from nine separate and successive injuries were "inextricably intertwined."

Cruz v. California Hospital Medical Center **2016 Cal.Wrk.Comp. P.D. LEXIS 685 (WCAB panel decision)**

Issue: Whether the WCJ in a case with two separate successive specific injuries properly found a combined award versus separate awards under *Benson* based on the opinion of the AME in orthopedics. The focal issue was whether or not the orthopedic AME's opinion that the disability from the two separate successive specific injuries was "inextricably intertwined."

Holding: The WCAB in granting defendant's Petition for Reconsideration reversed the WCJ's determination that applicant should receive one combined award of 94% as opposed to two separate awards related to the two separate and successive specific injuries that occurred in 2002 and 2005. The WCAB remanded the case to the trial level, indicating that the parties should attempt to reach an agreement on the use of another orthopedic AME and if that was not possible, the judge should appoint a "regular physician" under Labor Code §5701. The basis for

the WCAB's reversal of the WCJ's combined award was based on the fact that the AME gave inconsistent and conflicting opinions on both the level of permanent disability and on whether or not the resulted disability should be apportioned to the two separate successive specific injuries. The WCAB found that the orthopedic AME's opinion that the permanent disability from the two specific injuries was "inextricably intertwined" did not constitute substantial medical evidence. Moreover, the orthopedic AME failed to provide an explanation related to these inconsistencies. As a consequence his opinions with respect to permanent disability and apportionment cannot be relied on.

Overview and Discussion: Applicant was employed as a certified nurse assistant and suffered two admitted specific injuries. One on January 1, 2002 and the other on May 23, 2005. Applicant also claimed injury to her internal system which was not found to be AOE/COE by the WCJ. The WCJ awarded applicant a combined award of 94% permanent disability for both separate and successive specific injuries. Both applicant and defendant filed Petitions for Reconsideration. Applicant argued that the WCJ should have found the applicant to be 100% permanently disabled based on the opinion of her vocational expert. In contrast, defendant argued that the judge impermissibly merged two separate distinct specific injuries into one award of permanent disability and failed to apportion permanent disability between the two specific injuries as required by Labor Code §4663 and *Benson*.

One of the reporting physicians was an AME in orthopedics. Over the course of ten years he issued sixteen reports and was deposed three times.

While the WCAB acknowledged that the opinion of an AME should ordinarily be followed unless there is good reason to find the opinion unpersuasive. With respect to the requirements of *Benson*, the WCAB stated:

> In the case of successive injuries to the same body part, we held that a combined award of permanent disability is inconsistent with the requirement that apportionment be based on causation. The "reporting physician is required to determine all of the causative sources of the employee's permanent disability, giving consideration not only to the current industrial injury, but also to any prior or subsequent industrial injuries, as well as any prior or subsequent non-industrial injuries or conditions." (*Benson, supra*, 72 Cal.Comp.Cases 1620 at 1631-1632.) If the physician cannot do so, he or she must state the reasons why, after an evaluation or consultation with at least one other physician. (*Id*., at p. 1632.) We did, however, acknowledge and leave room for a combined award in those rare instances where the physician, after complying with the mandates of section 4663, simply cannot "medically parcel out the degree to which each injury is causally contributing to the employee's overall permanent disability." (*Id*., at p. 1634.)

The reason the WCAB found the AME's opinions expressed in his reports and during the course of his deposition inconsistent and conflicting was that in one report he was able to apportion the disability between the two specific injuries and in other reports he claimed he could not because they were "inextricably intertwined." Moreover, the orthopedic AME failed to provide an explanation for various inconsistencies which would have required the Board to engage in speculation to determine which of the various opinions he offered was accurate.

The WCAB in finding the orthopedic AME's opinions did not constitute substantial medical evidence also indicated the AME "does not offer a sound method in assessing applicant's residual disability in view of the fact that permanent disability attributable to the 2002 injury is required to be determined pursuant to the 1997 PDRS, whereas permanent disability attributable to the 2005 injury is evaluated under the 2005 PDRS."

The WCAB found the AME's opinions contained numerous contradictions and inconsistencies in both his reports and deposition testimony. The WCAB was persuaded that overall his opinions did not constitute substantial evidence and as a consequence could not be relied upon.

Medical Treatment and Apportionment

County of Santa Clara v. Workers' Comp. Appeals Bd. (Justice) (2020) 49 Cal.App.5th 605, 2020 Cal.App. LEXIS 461

Issues and Holding: Whether applicant was entitled to an unapportioned award of 48% bilateral knee permanent disability notwithstanding the fact she had significant nonindustrial preexisting degenerative arthritis she suffered from for many years preceding her 2011 industrial specific left knee injury. The Court of Appeal annulled the WCAB's decision and remanded the matter back to the Board to make an award apportioning 50% of applicant's bilateral knee permanent disability to nonindustrial contributing causal factors and 50% to applicant's industrial injury. In doing so the Court of Appeal held that apportionment of the applicant's 48% bilateral knee disability was required and it was error for the WCJ and the Board to ignore unrebutted substantial medical evidence that nonindustrial factors, in part, caused applicant's permanent disability.

The Court of Appeal rejected both the WCJ's and WCAB's reliance on *Hikida v. Workers' Comp. Appeals Bd*. (2017) 12 Cal.App.5th 1249 *(Hikida)* indicating the *Hikida* court's conclusion that there should be no apportionment makes sense only because the medical treatment in *Hikida* resulted in a *new* compensable consequence injury, namely CRPS, which was *entirely* the result of the industrial medical treatment. It was the new compensable consequential injury that, in turn, led *entirely* to the injured workers' permanent disability." In *Hikida*, the AME determined the injured worker's "permanent disability was due entirely to the effects of the CRPS that she developed as a result of the failed carpal tunnel surgery."

The Court indicated there are parts of the *Hikida* opinion that can be read very broadly in the sense that there should be no apportionment when medical treatment increases or precedes permanent disability. But the Court expressly and unambiguously said that the rule or holding in *Hikida* is actually much narrower and that. "…..*Hikida* precludes apportionment only where the industrial medical treatment is the sole cause of the permanent disability." In the instant case the applicant's bilateral knee permanent disability was not caused entirely by the industrial knee replacement surgeries. "The medical treatment did not result in a new, unexpected compensable consequence injury." Since there were multiple contributing causal factors of applicant's bilateral knee disability both industrial and nonindustrial apportionment was required.

Factual and Medical Overview: Applicant was employed by the defendant as a workers' compensation claims examiner from 1991 until she retired in December of 2016. She fell at work and suffered a specific left knee injury on November 22, 2011. Following her left knee injury she developed right knee problems that were found to be a compensable consequence of the original left knee injury.

Diagnostic Studies: On November 28, 2011, six days after her specific left knee injury of November 22, 2011, an X-ray of applicant's knees showed marked osteoarthritis of both knees. An MRI done a few months later on January 18, 2012, also revealed significant preexisting degeneration which predated the specific knee injury of November 22, 2011. The MRI also revealed an old tear of the anterior cruciate ligament, "marked loss of articular cartilage in the medial compartment," as well as "moderate loss in the patellofemoral joint." There was also evidence of scar tissue on both knees indicating that applicant had undergone some sort of "significant open procedure" at some point in the past.

Knee Replacement Surgeries: Authorized medical treatment consisted of a June 2012 total knee replacement to applicant's right knee. She also had total knee replacement surgery on her left knee in September of 2013. The WCJ found both surgeries were successful in that they appeared to significantly increase applicant's "ability to walk and engage in weight-bearing activities."

Medical Reporting: The parties selected an orthopedic surgeon as the AME. He issued an initial report in March of 2016 followed by five supplemental reports and he was deposed twice. The AME indicated that based on the applicant's medical history there was significant degenerative arthritic joint disease in both knees that existed before the specific injury the applicant suffered to her left knee on November 22, 2011. The AME also opined that applicant's fall at work "hastened" the need for total knee replacement surgery by lighting up the underlying pathology." He also indicated that in the absence of the underlying pre-existing arthritis in both knees it was medically probable that the applicant would not have had the total knee replacement as she did when she did. The AME apportioned 50% of applicant's bilateral knee disability to the nonindustrial, extensive preexisting degenerative arthritis.

The WCJ's Decision: The WCJ found applicant suffered 48% PD ($59,110.00) and also found that prior to the 2011 industrial injury that applicant had suffered from degenerative arthritis. "The available medical evidence makes plain that this condition played a large role in making the effects of the industrial injury significantly worse than they would…otherwise have been, both in the need for treatment…and in the ultimate [permanent disability]." The WCJ also indicated the industrial injury precipitated the need for the bilateral knee replacement surgeries and the need for the surgeries was partially non-industrial.

In terms of the AME's apportionment determination that applicant's bilateral knee PD was 50% non-industrial, the WCJ stated the AME's opinion and conclusion on apportionment "was sound and in accordance with the law." However, the WCJ felt bound by the Court of Appeal's decision in *Hikida* and as a consequence applicant should receive an unapportioned award of 48% PD. The WCJ's interpretation and application of the holding in *Hikida* was based on the fact that applicant's medical treatment in the form of bilateral knee replacement surgery resulted in an increase in permanent disability and therefore any PD "should be awarded without apportionment." Defendant filed a Petition for Reconsideration.

The WCAB's Decision: On reconsideration, defendant argued the WCJ erroneously applied *Hikida* to the facts of the case. The WCJ's report on reconsideration while recommending the WCAB deny reconsideration, also noted that but for the holding in *Hikida* both parties agreed that the AME's opinion on apportionment constituted substantial medical evidence with respect to applicant's bilateral knee PD being 50% nonindustrial. The WCAB granted reconsideration only for the purpose of amending the award to correct a clerical error but with respect to the merits of the petition for reconsideration, adopted and incorporated the WCJ's decision to award applicant a 48% unapportioned award as its own decision.

The Court of Appeal's Decision: The Court of Appeal annulled the WCAB's decision since it was based on "the Board's erroneous interpretation of the law." In that regard the Court cited *City of Petaluma v. Workers' Comp.Appeals Bd.* (2018) 29 Cal.App.5th 1175, 1181-1182 *(Petaluma)*,) In annulling the WCAB's decision, the Court also cited several other significant decisions on apportionment including *Brodie v. Workers' Comp.Appeals Bd.* (2007) 40 Cal.4th 1313, 1329 *(Brodie); Escobedo v. Marshalls* (2005) 70 Cal.Comp.Cases 604; *Marsh v. Workers' Comp.Appeals Bd.* (2005) 130 Cal.App.4th 906; *E.L.Yeager Construction v. Workers' Comp.Appeals Bd*. (2006) 145 Cal.App.4th 922, and *Acme Steel v. Workers' Comp.Appeals Bd.* (2013) 218 Cal.App.4th 1137.

The Court also discussed and analyzed the Second District Court of Appeal's decision in *Hikida* at great length. In *Hikida*, the Court noted that following authorized unsuccessful carpal tunnel surgery, applicant developed an entirely new condition of chronic regional pain syndrome (CRPS) leaving her in a far more disabling condition that would never be alleviated. "The *Hikida* court reasoned that the employer was responsible for this new consequential injury based on longstanding case law requiring employers to pay for all industrial medical treatment without apportionment." The *Hikida* court also determined "that the consequences of such medical treatment were also within the ambit of the workers' compensation system…and "an employee is entitled to compensation for a new or aggravated injury which results from the medical or surgical treatment of an industrial injury." (citations omitted).

The Court of Appeal acknowledged these two principles in the *Hikida* decision are correct statements of the law but that it does not necessarily follow "that an employer is responsible for the consequences of medical treatment without apportionment when the consequence is permanent disability." The Court noted that in order for the *Hikida* court's conclusion to be properly understood and correctly applied it must be "understood in context." In terms of proper context the court stated:

> "…[T]he *Hikida* court's conclusion that there should be no apportionment makes sense only because the medical treatment in *Hikida* resulted in a *new* compensable consequential injury, namely CRPS, which was *entirely* the result of the industrial medical treatment. It was this new compensable consequential injury that, in turn, led *entirely* to the injured workers' permanent disability. The agreed medical

> examiner's findings underlined this point, as he determined that the injured worker's "permanent total disability was due *entirely* to the effects of the CRPS that she developed as a result of the failed carpal tunnel surgery." (original emphasis, citations omitted).

The Court stated that while parts of the *Hikida* opinion can be read in a manner that indicates a very broad rule "that there should be no apportionment when medical treatment increases or precedes permanent disability" in actuality the rule and holding are much narrower. "Put differently *Hikida* precludes apportionment only when the industrial medical treatment is the sole cause of the permanent disability."

Factually the instant case is clearly distinguishable from *Hikida* since "the permanent disability in this case was not caused entirely by the industrial medical treatment. Also in this case "the medical treatment did not result in a new, unexpected compensable consequential injury. Since the AME's opinion on apportionment constituted substantial evidence and was not rebutted the court stated, …"[i]t was error for the workers' compensation judge and the Board to ignore unrebutted substantial medical evidence that nonindustrial factors, in part, caused Justice's permanent disability."

Applicant's Argument that Notwithstanding *Hikida* the Unapportioned Award was Legally Correct: On appeal applicant argued that even assuming the *Hikida* opinion was not controlling, applicant was still entitled to an unapportioned award, because her total knee replacements were directly caused by the work injury and "because the total knee replacement provided the sole basis for the disability rating, Justice contends that it was appropriate to conclude that there should be no apportionment." In essence if applicant had not fallen at work neither of the knee surgeries would have occurred.

The Court of appeal characterized these arguments as "misplaced" since "[w]hether or not an asymptomatic preexisting condition that contributed to the disability would, alone, have inevitably become manifest and resulted in disability, is immaterial." (citation omitted). The real issue is whether there are multiple contributing causes of the permanent disability that can be described as "direct" (industrial) and "indirect"(nonindustrial). In that regard the Court stated:

> In this case, Dr. Anderson concluded that Justice had significant nonindustrial preexisting knee degeneration, which caused 50 percent of the postsurgical permanent disability. Whether or not the workplace injury "directly caused" the need for surgery, the apportionment statutes nevertheless demand that the disability be sorted among direct and indirect causal factors. In this case, there was unrebutted medical evidence that Justice's permanent disability was caused, in part, by extensive preexisting knee pathology. Apportionment was therefore required.

Comments: It should also be noted that prior to the Court of Appeal's decision in *Justice,* there were a number of WCAB panel decisions that rejected an expansive application of *Hikida* for many of the same reasons articulated by the Court of Appeal in *Justice.* In those cases the WCAB applied a narrow interpretation of *Hikida* that allowed nonindustrial apportionment where there were multiple contributing causes of the applicant's permanent disability and where the authorized medical treatment in question was not the sole cause of the applicant's permanent disability. (***Burr v. The Best Demolition & Recycling Co. Inc.*** (2018) 83 Cal.Comp.Cases 1300, 2018 Cal.Wrk.Comp. P.D. LEXIS 143 (WCAB panel decision); ***Rojas v. Gay and Lesbian Community Center*** 2018 Cal.Wrk.Comp. P.D. LEXIS 494 (WCAB panel decision); ***Fuller v Monterey Bay Aquarium*** 2018 Cal.Wrk.Comp. P.D. LEXIS 454 (WCAB panel decision); ***Hayden v. Pomona Unified School District*** 2019 Cal.Wrk.Comp. P.D. LEXIS 227; ***Diaz v. Reyes Masonry Contractors Inc.*** 2019 Cal.Wrk.Comp. P.D. Lexis 187 (WCAB panel decision).)

With respect to joint replacement cases, hopefully the Court of Appeal's decision in *Justice* will finally put an end to the argument there can be no valid apportionment in joint replacement cases based on either *Hikida* or alternatively on a few very questionable pre-*Hikida* cases that were premised on the theory there was no valid basis for apportionment since the underlying degenerative disease processes that necessitated the joint replacement surgery in the first place had been removed and therefore there was nothing left to apportion to. In two 2006 decisions, *Steinkamp* and *Kien,* the Board found there was no valid basis for Labor Code §4663 apportionment since the resultant permanent disability was caused by the knee replacement and there were no other factors causing permanent disability. In *Kien* since no degenerative arthritis remained after the total knee replacement there were no "other factors" contributing to applicant's disability existing and therefore there was no basis for apportionment under Labor Code §4663. (*City of Concord v. WCAB (Steinkamp)* (2006) 71 Cal.Comp.Cases (writ denied) and *Kien v. Episcopal Homes Foundation* (2006) 34 Cal. Workers' Comp. Rptr. 228.).

These two decisions were quickly discredited by the WCAB as wrongly decided and were followed by numerous subsequent decisions allowing nonindustrial apportionment in joint replacement cases. Notwithstanding a veritable tsunami of cases after 2006 finding valid nonindustrial apportionment in joint replacement cases as detailed hereinafter, the applicant's bar tried repeatedly to resuscitate and revive both *Steinkamp* and *Kien* both prior to and even more aggressively after the *Hikida* decision.

In *Markham v. WCAB* (2007) 72 Cal.Comp.Cases 265 (writ denied), (because the knee replacement surgery was necessitated by both the industrial injury and by "other factors" in the form of pre-existing pathology, apportionment was appropriate to the "other factors."); *Gunter v. WCAB* (2008) 73 Cal.Comp.Cases 1699 (writ denied), (50% valid apportionment to pre-existing osteoarthritis, when the medical evidence established that the combination of the industrial injury and the pathology, that was removed by the knee replacement surgery, caused applicant's need for surgery and permanent disability); *Malcom v. WCAB* (2008) 73

Cal.Comp.Cases 1710 (writ denied) (Valid apportionment to pre-existing pathology consistent with the medical reporting, because applicant's hip replacement surgery was a result of both her pre-existing osteonecrosis in her hip and her industrial injury); *Williams v. WCAB* (2009) 74 Cal.Comp.Cases 88 (Following the *Markham* reasoning that, "when the medical evidence establishes that a combination of factors results in the need for surgery and consequent permanent disability, causation of the permanent disability lies with all the factors, even pathology removed by the surgery; and Labor Code §4663 requires apportionment to those factors." *Campos v. The Vons Companies* 2010 Cal.Wrk.Comp. P.D. LEXIS 402 (WCAB panel overturned a WCJ's finding of no apportionment, and found applicant's knee replacement surgery did not preclude apportionment when the need for surgery was due, at least in part to pre-existing arthritis); See also, *Solano County Probation v. WCAB* (*Aguilar*) (2011) 76 Cal.Comp.Cases 1, in a case not certified for publication, the Court of Appeal reversed both a judge and the WCAB who erroneously determined there could be no apportionment in a joint replacement case; *Shadoan v. San Diego Community College, PSI* 2015 Cal.Wrk.Comp. P.D. LEXIS 448 (WCAB panel decision) On reconsideration the WCAB affirmed the WCJ's determination, finding valid Labor Code §4663 apportionment of 50% related to the applicant's preexisting degenerative conditions, notwithstanding the fact the actual joint replacement surgery removed the degenerative joint disease pathology which caused the need for the applicant's left knee replacement).

In *Gallegos v. Groth Brothers Chevrolet* 2016 Cal.Wrk.Comp. P.D. LEXIS 455 (WCAB panel decision), applicant suffered an 11/19/08 admitted right knee injury. However, he previously had two right leg surgeries. One related to a fractured right tibia with related surgery and then surgery to the right knee in February of 2008 related to an industrial slip and fall in December of 2008. Diagnostic studies consisting of an MRI in 2003 and an x-ray in 2007 disclosed and confirmed significant degenerative osteoarthritis in his right knee. Applicant had a total knee replacement. The WCJ awarded applicant 42% P.D. without apportionment. Defendants' Petition for Reconsideration was granted by the WCAB who rescinded the WCJ's award and found the orthopedic QME's opinion finding 50% nonindustrial apportionment constituted substantial evidence. The WCAB stated, "[c]ontrary to the WCJ's view, apportionment to pre-existing degenerative conditions that ultimately require total joint replacement is indicated where the medical evidence establishes the pre-existing condition results in the need for the surgery."

***Hikida v. Workers' Comp. Appeals Bd.*, (2017) 12 Cal.App.5th 1249, 82 Cal.Comp.Cases 679**

Issue: The issue in this case is whether an employer is entirely responsible for both medical treatment and permanent disability arising "directly" from unsuccessful medical intervention without apportionment even where the need for the surgery or medical intervention was necessitated by both industrial and nonindustrial factors.

Factual and Procedural Overview and Discussion: Applicant was a long-term employee. The WCJ found she suffered a number of industrial injuries and conditions including cervical spine, thoracic spine, upper extremities, carpal tunnel syndrome, psyche, fingers, elbows, headaches, memory loss, sleep disorder and deconditioning. In May of 2010, applicant stopped working and had carpal tunnel surgery. Due to a bad surgical outcome, she developed chronic regional pain syndrome (CRPS). The CRPS caused applicant debilitating pain in her upper extremities and severely impaired her ability to function. She never returned to work and became permanent and stationary in May of 2013.

One of the reporting physicians was an AME in Orthopedics. The AME indicated that with respect to the applicant's carpal tunnel syndrome the permanent disability was 90% Industrial and 10% nonindustrial. However, he also found applicant's permanent disability was due **entirely** to the effects of the CRPS applicant developed as a result of the failed carpal tunnel surgery. He determined applicant was permanently totally disabled from the labor market.

After the first trial, the WCJ found applicant's permanent disability was 90% industrial and 10% nonindustrial. Applicant filed a petition for reconsideration. In a split panel decision, the WCAB affirmed the WCJ's apportionment of 90% industrial and 10% non-industrial. In doing so, the WCAB reasoned there was a basis for nonindustrial apportionment because the CRPS was caused by the surgery to treat applicant's industrial carpal tunnel syndrome which itself was 10% non-industrial. In affirming the WCJ's apportionment determination the WCAB cited the California Supreme Court's decision in *Brodie.* However, based on other grounds, the WCAB remanded the case for further development of the record related to psychiatric permanent disability. Following remand the WCJ issued another decision finding applicant 98% permanently disabled but still apportioned applicant's orthopedic disability related to the carpal tunnel syndrome and resulting surgery to 90% industrial and 10% non-industrial. Applicant filed a second petition for reconsideration on a number of grounds asking the Board to revisit and reconsider the appropriateness of apportionment. Once again the WCAB in a split panel decision denied reconsideration finding 10% nonindustrial apportionment valid. Applicant filed a writ with the Court of Appeal.

Procedural Issue: Defendant argued that applicant's writ was untimely since applicant did not file a writ within 45 days of the WCAB's initial February 8, 2016 opinion which defendant characterized as a "final decision." However, the Court ruled that the WCAB's initial decision on apportionment was not final and did not involve a threshold issue that would have necessitated the filing of an immediate writ. "The fact that an issue is significant or important to the litigation is not sufficient to support a finding that it is a threshold issue." The Court held that the WCAB's February 8, 2016 decision was not a final order disposing of the case especially as it related to apportionment or other issues.

The Apportionment Issue: The court initially discussed the significant changes in the law of apportionment engendered by SB 899 and Labor Code section 4663 as discussed by the California Supreme Court in *Brodie*. The court noted that both Labor Code sections 4663 and 4664 eliminated the bar against apportionment based on pathology and asymptomatic conditions ushering in a new regime of apportionment based on causation. However, the court did not discuss in detail or at length that both Labor Code sections 4663 and 4664 also allow for apportionment where an industrial injury aggravates, accelerates or lights up an underlying disease process, condition, or injury. The court ruled that applicant's permanent total disability was caused not by her carpal tunnel syndrome but by the CRPS that was caused by the medical treatment the employer provided. They framed the issue as "….whether an employer is responsible for both the medical treatment and disability arising directly from unsuccessful medical intervention, without apportionment." They concluded the employer was responsible for both the medical treatment and the permanent disability in such a situation. The important caveat was the resulting permanent disability had to arise **directly** from the unsuccessful medical intervention.

Although the Court of Appeal indicated that when there is an aggravation of an industrial injury by medical treatment, it is a foreseeable consequence of the original compensable injury. Accordingly, "….an employee is entitled to compensation for a new or aggravated injury which results from the medical or surgical treatment of an industrial injury, whether the doctor was furnished by the employer, his insurance carrier, or was selected by the employee." The Court construed Labor Code sections 4663 and 4664 by stating "…the Legislature did not intend to transform the law requiring employers to pay for all medical treatment caused by an industrial injury including the foreseeable consequences of such medical treatment." The court stated: "Nothing in the 2004 legislation had any impact on the reasoning that has long supported the employer's responsibility to compensate for medical treatment and the consequences of medical treatment without apportionment."

Editor's Comment: There is no dispute that applicant is entitled to compensation for a new or aggravated injury which results from the medical or surgical treatment of an industrial injury (*South Coast Framing, Inc. v. WCAB* (2015) 61 Cal.4th 291, 300). Moreover, it is undisputed that reasonable medical treatment costs related to an industrial injury are also not subject to apportionment based on contributing industrial and nonindustrial causal factors. (Labor Code §4600) even if the need for medical treatment is partially caused by the industrial injury. The employer must pay for all of the injured worker's reasonable medical treatment (*Granado v. WCAB*) (1968) 69 Cal.2d 399). There is also no apportionment of temporary disability indemnity between industrial and nonindustrial causes. (*California Ins. Guarantee Assn. v. WCAB (Hernandez)* (2007) 153 Cal.App.4th 524. Both medical treatment and temporary disability are nonpermanent disability benefits. In contrast, permanent disability benefits must be apportioned in accordance with the medical evidence.

In *Hikida* due to the unsuccessful carpal tunnel syndrome surgery, applicant's industrial carpal tunnel syndrome was aggravated to the extent it evolved into a much more serious and disabling condition, chronic regional pain syndrome (CRPS). With respect to the Court of Appeals "aggravation" analysis, prior to SB 899 and Labor Code §§4663 and 4664 enactment in 2004, there was no basis for apportionment where an industrial injury aggravated or accelerated an underlying disease process or industrial injury. (*Brodie v. WCAB* 2007) 40 Cal.4th 1313). The question is whether any resulting increase in permanent disability based on an "aggravation" due to the failed carpal tunnel surgery causing CRPS is subject to apportionment under Labor Code §§4663 and 4664 which in the Supreme Court's decision in *Brodie* "were intended to reverse these features of former §§4663 and 4750" baring apportionment related to aggravation and acceleration. (*Brodie v. WCAB* (2007) 40 Cal.4th 1313, 1327).

The *Hikida* court's novel interpretation and construction of Labor Code §§4663 and 4664 seemingly negates any basis for apportionment of permanent disability directly and wholly attributable to the CRPS that developed as a result of the unsuccessful carpal tunnel surgery. The court's holding appears to be at odds with the Supreme Court's decision in *Brodie* construing Labor Code sections 4663 and 4664 as well as other cases finding a basis for valid legal apportionment in compensable consequence injury and aggravation scenarios even in unsuccessful surgery cases. It is also difficult to comprehend that all of applicant's permanent disability is "directly and wholly" attributable to the CRPS since the carpal tunnel surgery was not successful, applicant's carpal tunnel syndrome was not cured, or relieved and would appear to be either a factor or component of the CRPS with any resulting permanent disability attributable to both the CRPS and carpal tunnel syndrome. Since the carpal tunnel syndrome was 10% nonindustrial then some portion of the CRPS should also be nonindustrial.

In *Costa v WCAB* (2011) 76 Cal.Comp.Cases 261 (writ denied) Applicant suffered a specific lumbar spine injury. MRI diagnostic testing done shortly after the injury confirmed the existence of nonindustrial severe asymptomatic congenital lumbar spinal stenosis. Applicant's condition gradually worsened resulting in lumbar decompression surgery at multiple levels. There were serious adverse complications directly attributable to the surgery resulting in applicant being paralyzed from the waist down, complete loss of bowel and bladder control as well as impotence. Following surgery he was also diagnosed with cauda equina syndrome requiring emergency surgery. Both the applicant's treating physician and the QME in neurology found applicant to be 100% PTD, but also determined 20% of applicant's permanent disability was attributable to the preexisting nonindustrial asymptomatic congenital lumbar spinal stenosis.

In *Costa*, even though the lumbar surgery increased applicant's permanent disability, the WCAB and the Court of Appeal found a basis for valid legal apportionment of 20% since even taking into consideration the failed back surgery, the underlying nonindustrial congenital spinal stenosis made applicant's permanent disability more severe or worse than it would have been in the absence of the nonindustrial condition. It is also difficult to understand how the *Hikida* holding

would change the result or analysis on *Costa* and similar cases where a diagnostically confirmed nonindustrial factor that preexisted both the injury and the surgery is a contributing causal factor of the increased permanent disability even after an unsuccessful surgery.

In *Hikida* both applicant and amicus curiae, California Applicant's Attorneys Association (CAAA) cited and argued to the Court of Appeal a number of cases including *Steinkamp v. City of Concord* (2006) 71 Cal.Comp.Cases 1203 (writ denied) to support their argument there should not be any nonindustrial apportionment even where the need for the surgery in question was itself necessitated by both industrial and nonindustrial factors. However, it appears both applicant, CAAA and defendant failed to cite, discuss or distinguish a veritable legion of cases subsequent to *Steinkamp* where valid nonindustrial apportionment was found where the resultant surgery and permanent disability was caused by both industrial and nonindustrial factors. (see, *Gunter v. WCAB* (2008) 73 Cal.Comp.Cases 1699 (writ denied), *Malcom v. WCAB* (2008) 73 Cal Comp.Cases 1710 (writ denied), *Williams v. WCAB* (2009) 74 Cal.Comp.Cases 88, at 94, *Campos v. The Vons Companies* 2010 Cal.Wrk.Comp.P.D. LEXIS 402, *Shadoan v. San Diego Community College* 2015 Cal.Wrk.Comp.P.D. LEXIS 448, *Gallegos v. Groth Brothers Chevrolet* 2016 Cal.Wrk.Comp. P.D. LEXIS 455 (WCAB panel decision) (50% valid apportionment in a knee replacement case is indicated "where the medical evidence establishes the preexisting condition results in the need for surgery." but cf., *Burbank Unified School District v WCAB (Kline)* (2016) 82 Cal.Comp.Cases 98 (writ denied) (reporting physician's opinion on apportionment in a knee replacement case did not constitute substantial medical evidence since inadequate explanation of apportionment opinion based on *Gatten*.

Post *Hikida* but Pre-*County of Santa Clara v. Workers' Comp. Appeals Bd. (Justice)* Decisions

A review of a cross section of post *Hikida* decisions from the WCAB but before the Court of Appeal's decision in *Justice*, indicate the WCAB interpreted and applied *Hikida* in a much more conservative manner than was anticipated and hoped for by the applicant's bar. The *Hikida* related cases discussed and analyzed hereinafter are split into two distinct groups. The first group of cases reflects decisions from the WCAB where the Board based on the applicable facts and medical evidence applied *Hikida* resulting in an unapportioned award for the applicant.

The second group of cases reflects decisions from the WCAB where defendants authorized medical treatment that increased or caused new permanent disability and applicants argued that under *Hikida* there should be an unapportioned award of permanent disability. However, the Board determined *Hikida* was inapplicable and either found a basis for an apportioned award of permanent disability or remanded the case for further development of the record on apportionment.

What emerges from these two lines of cases is a suggested set of analytical guides at the end of this article that will hopefully assist the bench and bar as well as evaluating physicians to better understand in what particular situations the WCAB will strictly apply *Hikida* resulting in an unapportioned award and in what situations the Board will interpret and apply *Hikida* in a manner that does not negate apportionment of permanent disability related to authorized medical treatment.

Decisions by the WCAB Where Applicants Have Received Unapportioned Awards of Permanent Disability Based on *Hikida*

Estrada v Edge Sales and Marketing 2018 Cal.Wrk.Comp. P.D. LEXIS 451 (WCAB panel decision) The WCJ and WCAB found applicant to be 100% PTD without apportionment after undergoing medical treatment consisting of a two-level fusion surgery. Following the surgery applicant developed severe deep vein thrombosis ("DVT') requiring several surgical procedures and the implantation of a stent and vena cava filter. Although she was able to return to work for a period of time, the DVT and related conditions eventually caused her to stop working. Substantial medical evidence indicated that applicant's inability to return to work and 100% PTD was directly and entirely attributable to the fusion surgery and therefore under *Hikida* was entitled to an unapportioned award.

Mills v. American Medical Response 2019 Cal.Wrk.Comp. P.D. Lexis 84; 47 CWCR 84 (May 2019) (WCAB panel decision), the WCAB in a case that involved a multiplicity of issues including *Benson* apportionment, the *Kite* addition method and *Hikida*, found applicant to be 100% PTD without apportionment in part based on the fact that applicant had an unsuccessful authorized surgery with serious complications. Applicant suffered two cumulative trauma and two specific injuries. There were six AME's in the case. In April of 2016, the applicant had surgery to implant a spinal cord stimulator. However, as a consequence of the surgery, applicant developed a hematoma and paralysis necessitating another emergency surgery the next day to remove the spinal cord stimulator.

As a direct result of these two surgeries applicant suffered a new condition in the form of a urological disorder causing bladder control issues (neurogenic bladder) that required him to self-catheterize himself and also sexual dysfunction. Applicant had never been diagnosed with these conditions nor had any similar symptoms before the two surgeries. The AME in Urology found 60% WPI without apportionment. The orthopedic AME also opined that applicant's PTD was solely due to the effects of the two surgeries in April of 2016 and was 100% PTD as a result of the complications from the spinal cord implant and removal of the spinal cord stimulator, "the need for which could not be apportioned between specific and cumulative trauma injuries."

The WCAB in analyzing *Hikida* and applying it to the facts in *Mills* stated that "[t]he important caveat was the resulting permanent disability had to arise *directly* from the unsuccessful medical treatment." As in *Hikida*, applicant's PTD in *Mills* "arises directly from the effects of the surgery

to treat in (sic) his industrial and cannot be apportioned between them or to any other source." (original emphasis).

Chadburn v. Applied Materials, Inc., XL Specialty Insurance Company et al., 2019 Cal.Wrk.Comp. P.D. Lexis 235, 47 CWCR170 (August 2019) (WCAB panel decision)

Applicant suffered three industrial injuries to her neck, both upper extremities, and psyche. Both the WCJ and WCAB found applicant entitled to an unapportioned award of a 100% permanent total disability. From 2007 to November 2013 applicant treated with a primary treating physician (PTP) in defendant's MPN. In early 2013 there was evidence of inappropriate remarks and physical contact between the PTP and applicant during office visits.

In late 2013 the PTP visited applicant at her home and they engaged in sexual relations. Applicant testified she did not object due to her reliance on the PTP for treatment. Over the following several weeks the PTP and applicant had ongoing sexual relations. Applicant filed a complaint with the PTP's employer. Treatment was discontinued and applicant began treating with another PTP who found that applicant was significantly over medicated.

Two QME's opined that applicant with suffering from psychiatric sequelae from all three injuries. One of the QME's who examined the applicant prior to her having sexual relations with the PTP also examined her after she stopped treating with the PTP. Upon reexamination, the PTP in addition to his prior diagnosis, also found that the improper conduct engaged in by the PTP had severely affected the applicant and had produced a post traumatic stress disorder (PTSD) which the applicant had never been diagnosed with before, and this new condition alone resulted in applicant being permanently totally disabled.

On reconsideration, the WCAB affirmed the WCJ's finding that applicant was entitled to an unapportioned award of permanent disability stating that applicant "is permanently totally disabled from PTSD, which disability was caused **directly and entirely** by Dr. Massey's misconduct, and arose out of the medical treatment for all of applicant's industrial injuries. This is consistent with *Hikida v. Workers' Comp. Appeals Bd.* (2017) 12 Cal.App.5th 1249 [82 Cal.Comp.Cases 679], which held that an applicant is entitled to an unapportioned award of permanent disability where the permanent disability is directly caused by the medical treatment provided for an industrial injury."

McFarland v. Charles Abbott Associates 2019 Cal.Wrk.Comp. P.D. LEXIS 209 (WCAB panel decision).With respect to a petition to reopen for new and further disability both the WCJ and the WCAB found that applicant was entitled to a 100% permanent total disability award without apportionment relying primarily on the decision from the Court of Appeal in *Hikida*. Applicant suffered a back injury on September 20, 2005. The reporting physician was an AME in orthopedics. After the date of injury and before a Petition to Reopen was filed, applicant had two back surgeries authorized by a defendant. After the 1st back surgery the applicant had a second back surgery consisting of a lumbar re-exploration described as a "redo". Following the second

back surgery the AME indicated the applicant had 21% WPI with 60% industrial and 40% nonindustrial related to 2 prior back episodes.

Stipulations with request for award were issued on January 11, 2010. It was stipulated that applicant had 16% prominent disability after apportionment. On June 9, 2010 applicant filed a timely petition to reopen for new and further disability. He was re examined by the AME in orthopedics. In April of 2013 the AME determined applicant was 100% permanently totally disabled but that his previous opinion on apportionment had not changed.

The AME was deposed and indicated that applicant was 100% permanently totally disabled and was unable to compete in the open labor market. The AME also indicated that applicant's 100% permanent disability was the direct result of the authorized back surgery and the **new diagnosis of failed back syndrome. During the course of his deposition the AME also indicated that the diagnosis of failed back syndrome was the direct result of the spinal surgery**. Following trial on the petition to reopen, the WCJ found that applicant was entitled to an unapportioned award due to the fact that all of his permanent disability arose directly from the unsuccessful spinal surgery pursuant to *Hikida*.

Defendant filed a petition for reconsideration that was denied by the WCAB. The WCAB affirmed the WCJ's unapportioned award of 100% permanent total disability and that the WCJ had properly relied on the opinions of the AME in orthopedics. The fact that the parties may or may not have stipulated that there was 40% nonindustrial apportionment related to the January 11, 2010 stipulations with request for award does not preclude the applicant receiving a 100% PTD unapportioned award. In that regard the WCAB stated:

> The WCJ properly relied upon *Hikida* to determine that applicant was entitled to a permanent disability award without apportionment. Dr. Green repeatedly stated that the industrial injury caused applicant's need for surgery. Dr. Green also repeatedly stated that applicant was 100% disabled as a result of the surgery. Per *Hikida*, applicant's permanent total disability directly arose from the effects of the surgery to treat applicant's injury and cannot be apportioned to any other cause. Defendant's argument that the applicant's surgeon did nothing wrong technically, and that applicant's condition is a "common consequence of an instrumented spine fusion" does not change this analysis.

Decisions by the WCAB Finding Valid Apportionment or Ordering Development of the Record on Apportionment Even Though *Hikida* was Raised as an Argument for an Unapportioned Award of Permanent Disability.

Burr v. The Best Demolition & Recycling Co. Inc. (2018) 83 Cal.Comp.Cases 1300, 2018 Cal.Wrk.Comp. P.D. LEXIS 143 (WCAB panel decision) Applicant argued that apportionment of applicant's lumbar spine permanent disability was prohibited and that based on *Hikida*, his permanent disability was the result of authorized medical treatment in the form of lumbar

surgery in 2014. Both the WCJ and WCAB rejected applicant's *Hikida* argument. In *Burr*, applicant already had a lumbar spine injury, including one non-industrial and two industrial complex spine surgeries before the current industrial injury. He also had urinary incontinency and sexual dysfunction prior to the authorized surgery in 2014. Most importantly "unlike in *Hikida* where the surgery caused the entire new onset of chronic pain syndrome which standing alone rendered applicant permanently totally disabled, in Mr. Burr's case the 2014 surgery alone did not result in applicant being permanently totally disabled". As a consequence the WCAB indicated that applicant's lumbar spine disability was properly subject to apportionment pursuant to Labor Code §4663.

Rojas v. Gay and Lesbian Community Center 2018 Cal.Wrk.Comp. P.D. LEXIS 494 (WCAB panel decision) The WCAB rejected application of *Hikida* and that applicant was entitled to an unapportioned award since not all of applicant's permanent disability was directly and entirely caused by the cervical spine surgery authorized by defendant. The WCAB found there was a basis for valid apportionment since the AME determined applicant had pre-existing congenital stenosis before the surgery that contributed to applicant's cervical spine permanent disability.

In ***Fuller v Monterey Bay Aquarium*** 2018 Cal.Wrk.Comp. P.D. LEXIS 454 (WCAB panel decision). The Applicant suffered an admitted specific injury on October 21, 2010. As a result he had a series of nine knee surgeries including two total right knee replacements. Applicant had a history of a previous infection in his right leg following an auto accident in 1976, in which he sustained a fracture of his tibia. Also based on a 2013 MRI, applicant had documented advanced osteoarthritis with related anatomic changes associated with chronic and recalcitrant right knee symptomatology. With respect to the applicant's right knee, the AME in orthopedics initially apportioned 80% to a specific injury and 20% to pre-existing non-industrial degenerative arthritis. In a later report the orthopedic AME after having been sent a copy of the *Hikida* decision, changed his opinion and opined that the applicant's right knee disability was entirely attributable to the October 21, 2010 specific injury without apportionment.

However, the WCJ in issuing an Award of 91% PD **after** apportionment followed the orthopedic AME's original apportionment determination/opinion of 80% industrial and 20% non-industrial. Applicant filed a Petition for Reconsideration and argued that *Hikida* precluded apportionment and applicant was 100% PTD. In his report on reconsideration the WCJ distinguished *Hikida* stating that "*Hikida* had nothing to do with apportionment to factors that pre-existed the industrial injury." The WCJ also stated that the AME was misled as to the holding in *Hikida*. The WCAB granted Reconsideration and remanded the case back to the trial level for the orthopedic AME to clarify his apportionment determination by way of deposition or supplemental report. In that regard the WCAB indicated that in *Hikida* "[t]he important caveat was the resulting permanent disability had to arise *directly* from the unsuccessful medical treatment." The WCAB also stated "Here, it is not clear from the existing medical record whether applicant's right knee impairment as described by Dr. Gravina is due to the effects of his nine knee surgeries, as was the case in *Hikida*."

Hayden v. Pomona Unified School District 2019 Cal.Wrk.Comp. P.D. LEXIS 227 involved an applicant who suffered a minor right ankle sprain related to a specific injury on 10/13/16. Defendant authorized treatment at a clinic and applicant was given a boot to wear. She was then referred to a podiatrist who had her continue to wear the boot and then later the ankle was casted. However, applicant experienced severe swelling and was sent to an orthopedist. He had the applicant undergo a Doppler ultrasound that indicated a lump that was a sarcoma. Applicant was then sent to see an oncologist at the City of Hope and was advised the sarcoma was too far advanced for any effective oncological treatment. Applicant's right leg was amputated 2 inches above the knee.

A later report from a QME in internal medicine indicated that what caused the need for the amputation was not the minor right ankle sprain at work but rather it was a malignant peripheral nerve sheath tumor that was caused by a congenital autosomal-dominant mutation of a specific gene that affects people in the same family. Applicant's son had been diagnosed with the same condition. The QME opined that the applicant's industrial right ankle sprain was minor and healed without complications. Her persistent complications were due entirely to the nonindustrial nerve sheath tumor and that her right ankle injury did not aggravate or accelerate the complications from the nerve sheath tumor. It was the nonindustrial tumor that was the sole cause of the need for the amputation.

Following trial, the WCJ found that applicant sustained injury only to her right ankle as a result of the 10/13/16 specific injury and not to her entire right lower extremity. He awarded no PD and no need for future medical treatment. Applicant filed a Petition for Reconsideration which was denied by the WCAB who adopted and incorporated the WCJ's Report on Reconsideration in its entirety.

Applicant raised *Hikida* claiming she was entitled to an unapportioned permanent disability award based on her post-amputation condition of her right lower extremity. The WCAB found that *Hikida* was not applicable since "[n]o evidence was offered to indicate that the applicant's non-industrial condition was caused or aggravated by any of the treatment she received for the industrial injury to her right ankle."

Diaz v. Reyes Masonry Contractors Inc. 2019 Cal.Wrk.Comp. P.D. Lexis 187 (WCAB panel decision). WCJ's award of 93.75% permanent disability after apportionment was affirmed by the WCAB on reconsideration. The WCJ's apportionment of 30% was based on applicant's prior industrial low back injury. One of applicant's arguments on reconsideration was based on *Hikida*. Applicant argued that he should receive an unapportioned award since the alleged loss of the use of his upper extremities was the direct result of the multiple surgeries he had for his 1992 industrial injury.

The WCAB rejected applicant's *Hikida* argument and stated:

> Applicant further cites to *Hikida v. Workers' Comp. Appeals Bd*. (2017) 12 Cal.App.5th 1249 [82 Cal.Comp.Cases 679], to argue that apportionment to pre-existing disability is precluded where all of applicant's current disability was directly caused by the medical treatment provided for his industrial injury. In *Hikida*, the court held an applicant is entitled to an unapportioned award of permanent disability where the permanent disability arises "directly" from unsuccessful medical treatment, even though the need for the surgery or medical treatment was necessitated by both industrial and nonindustrial factors. As noted by the WCJ, applicant has not presented medical opinion that states that his current permanent disability is the direct result of the medical treatment he received to treat his industrial injury, rather than from the effects of his injury.

PRACTICE POINTER: Some Suggested Analytical Guides for Assessing Authorized Medical Treatment and *Hikida* Related Apportionment Issues

1. Was the medical treatment authorized or has there been a final judicial determination that the treatment should have been authorized?

2. Did the medical treatment result in or cause a completely new diagnosis or condition that did not exist prior to the authorized medical treatment? In *Hikida,* before the carpal tunnel surgery, applicant had never been diagnosed with nor did she experience any symptoms related to complex regional pain syndrome (CRPS).

3. Is the permanent disability directly related to the medical treatment from a basic causational standpoint?

4. Is the permanent disability related to the entirely new condition or diagnosis caused by the medical treatment the "direct", sole", "entire" and "exclusive" cause of **all** of the applicant's permanent disability with no other nonindustrial contributing causal factors?

5. Is there a medical report that constitutes substantial evidence that there may be multiple contributing causal factors either industrial or nonindustrial of applicant's permanent disability other than the medical treatment that directly caused the entirely new diagnosis or new condition?

6. In *Hikida* it is extremely important to remember that the AME opined that **all** and not a portion of applicant's permanent disability was directly and solely attributable to the complex regional pain disorder (CRPS) that was caused by the unsuccessful carpal tunnel surgery authorized by the defendant. In *Hikida* the sole cause of **all** of applicant's PD was industrial. According to the AME, there were no multiple contributing causal factors of her CRPS permanent disability that would have required apportionment.

Medical Evidence of Apportionment and Vocational Evidence

Hennessey v. Compass Group and National Fire Ins. Company of Pittsburgh **(2019) 84 Cal.Comp.Cases 756, 2019 Cal.Wrk.Comp. P.D. LEXIS 121 (WCAB panel decision)**

Issue and Holding: The WCAB affirmed the WCJ and held consistent with the Court of Appeal's decision in *Acme Steel v. Workers' Comp. Appeals Bd. (Borman)* (2013 218 Cal.App.4th 1137, 78 Cal.Comp.Cases 751, that when a vocational expert is attempting to rebut a permanent disability rating he or she must consider substantial medical evidence of apportionment and explain whether or not medical evidence of apportionment was considered and how it affected his or her conclusions.

Factual & Procedural Overview: Applicant while employed as a cook suffered a specific injury on August 14, 2013. Following trial the WCJ awarded applicant 25% permanent disability after apportionment related to his left wrist, left hand, left arm, left elbow, left shoulder and left knee.

Applicant obtained a report from a vocational expert for purposes of rebutting the permanent disability raining schedule. Applicant's vocational expert concluded the applicant was not qualified to return to any unskilled sedentary occupation in the open labor market and was therefore 100% permanently disabled.

In terms of medical reporting, applicant was evaluated by an AME who examined the applicant 3 times, issued 5 reports and was deposed. With respect to apportionment, the AME apportioned 20% to 2 prior upper extremity injuries the applicant suffered in 1992 and 2000. He apportioned 80% of the applicant's disability to the specific injury of August 14, 2013.

Following trial the WCJ awarded the applicant 25% permanent disability after apportionment based on the AME's opinion. Both applicant and defendant filed Petitions for Reconsideration raising several issues.

Discussion: The WCAB indicated the AME's opinion on permanent disability including apportionment constituted substantial medical evidence. The WCAB also affirmed the WCJ's determination that applicant's vocational expert's opinion did not constitute substantial evidence based on the fact the vocational expert failed to consider substantial medical evidence of apportionment in opining that applicant was 100% permanently disabled.

Citing the Court of Appeal's decision in *Acme Steel v. Workers' Comp. Appeals Bd. (Borman)* (2013) 218 Cal.App 4th 1137, 78 Cal.Comp.Cases 751, the Board stated:

> The First District Court of Appeal has determined that in a case in which a vocational expert is rebutting a permanent disability rating, the vocational expert must explain whether or not apportionment, as identified in the medical evidence, was considered and how it affected his or her conclusions. (citation omitted) In *Borman*, the Appeals Board found that based on the vocational expert testimony, the injured worker was 100% disabled but the Court annulled the decision because it did not address apportionment as described by the AME. (*Borman*, supra.) Here, Mr. Gonzales did not explain why he did not apply the apportionment described by Dr. Lundeen. For this reason, Mr. Gonzales' report and deposition testimony do not constitute substantial evidence.

Labor Code Section 4662(a)

Fraire v. California Department of Corrections and Rehabilitation and State Compensation Insurance Fund, 2020 Cal.Wrk.Comp. P.D. LEXIS 60 (WCAB panel decision)

Issues and Holding: In as split panel decision, the WCAB rescinded the WCJ's three decisions including two separate awards of 100% permanent total disability without apportionment. The WCJ based the two separate awards of PTD on Labor Code section 4662(a)(1), "Loss of both eyes or the sight thereof." The WCJ also failed to apportion any of the applicant's disability under *Benson* to any of the three separate consolidated specific injuries.

In rescinding all three decisions, including the WCJ's two total permanent disability awards, the WCAB held that the Labor Code Section 4662(a) conclusive presumption of permanent total disability does not preclude apportionment based on Labor Code section 4663 and under *Benson.* At the heart of the WCAB's decision is the "....clear and unambiguous language of section 4662(a) established that the disability in question-loss of sight in both eyes in this case-must be conclusively presumed to be *"total in character"* (emphasis added). That is, the "character of the **overall** permanent disability must be conclusively deemed to be "total," i.e., 100%."

The WCAB also stated that "....section 4662(a)'s conclusive presumption that certain specified disabilities are "total in character" does not establish that such conclusively presumed 100% permanent disabilities entirely resulted from industrial causation."

In remanding the case back to the trial level, the WCAB indicated that with respect to applicant's loss of sight in both eyes rendering her legally blind was apportionable based on 60% industrial (aggravation of her underlying diabetes) and 40% nonindustrial related entirely to her pre-existing diabetes. The WCAB in returning the matter back to the WCJ indicated the need for new decisions applying "apportionment to causation principles under sections 4663 and 4664(a)."

Addressing *Benson* apportionment, the WCAB indicated that with respect to the 60% industrial causation of applicant's disability, 30% should be apportioned to the specific injury of September 11, 2006 and 30% to the specific injury of June 28, 2012.

Factual & Medical Overview: The facts were essentially undisputed. Applicant suffered three specific injuries on May 23, 2005, September 11, 2006 and June 28, 2012. The WCJ awarded two separate permanent total disability awards related to the specific injuries of September 11, 2006, and June 28, 2012. Moreover "...the WCJ found that although the medical evidence established that only half of applicant's permanent disability was caused by her June 28, 2012 industrial injury, the conclusive presumption of section of section 4662(a)(1) precludes the apportionment of applicant's total disability."

The Medical Evidence: There were four Agreed Medical Examiners in internal medicine, ophthalmology, psychiatry, and neurology. There was also a QME in orthopedics. Regarding apportionment, the AME in ophthalmology opined that the applicant was "legally blind." He also indicated applicant's visual/ophthalmic disability was "proportional to the industrial causation of the underlying diabetes and/or hypertension, if present." In doing so he deferred to the AME in internal medicine. In response the AME in internal medicine reiterated his prior opinion on apportionment that 60% of the applicant's visual disability was industrial and 40% nonindustrial. With respect to the 60% industrial causation, 30% was attributable to the specific injury of September 11, 2006 and 30% to the specific injury of June 28, 2012.

Discussion: In their analysis the Board majority began with the basic legal principles related to statutory construction. There is an initial acknowledgement that the clear and unambiguous language of 4662(a) that loss of sight in both eyes "...must be conclusively presumed to be "*total in character*" (original emphasis). That is, the "character" of the ***overall*** permanent disability must be conclusively deemed to be "total," i.e., 100%."The Board then qualified that statement by stating:

> Nevertheless, section 4662(a)'s conclusive presumption that certain specified disabilities are "total in character" does not establish that such conclusively presumed 100% permanent disabilities entirely resulted from industrial causation."
>
> Significantly, the language of section 4662(a) is silent on the question of whether an industrially injured employee's conclusively presumed 100% *overall* permanent disability is subject to apportionment. When a statute is completely silent on a point, the Appeals Board must construe it in the context of the entire statutory scheme, with the goal of harmonizing it with related sections and promoting the legislative objective (citations omitted).

The WCAB referenced sections 4663 (a) and (b), as well as 4664(a). The Board also summarized several key apportionment cases related to the legal principles governing apportionment of permanent disability based on causation, specifically the California Supreme Court's decision in *Brodie v. Workers' Comp. Appeals Bd*. (2007) 40 Cal.4th 1313 (72 Cal.Comp.Cases 565); as well as *Benson v. Workers' Comp. Appeals Bd.* (2009) 170 Cal.App.4th 1535, 1556 (74 Cal.Comp.Cases 113); and *Escobedo v. Marshalls* (2005) 70 Cal.Comp.Cases 604, 616 (Appeals Board en banc). Based on what the WCAB characterized as the clear and unambiguous language of sections 4663 and 4664(a) and interpretive case law the Board stated:

> Therefore, the clear and unambiguous language of section 4663 and 4664(a) requires that the apportionment of permanent disability-be it permanent total disability or permanent partial disability-"shall" be based on causation. (See *Acme Steel v. Workers' Comp. Appeals Bd. (Borman)* (2013) 218 Cal.App.4th 1137 [78 Cal.Comp.Cases 751] [apportionment to non-industrial causation applies even when effects of injury result in

> total loss of earning capacity and 100% permanent disability].) This plain language does *not* exempt permanent disability that is conclusively presumed to be total pursuant to section 4662(a).

The Significance of section 4664: The Board noted that when the Legislature enacted section 4664 in 2004, there was an express reference to disabilities that are conclusively presumed to be total in nature pursuant to 4662(a). Specifically, the reference in 4664 to section 4662 was included only in section 4664(c)(1) which relates to "...the accumulation of all permanent disability awards issued with respect to one region of the body." This was significant to the WCAB's analysis since:

> "...[t]he fact that the Legislature did not concurrently exclude conclusively presumed disabilities under section 4662(a) from the apportionment to causation provision of section of section 4664*(b)* (original emphasis)-or from the apportionment to causation provision of section 4664(a) that was enacted by the same bill at the same time (citation omitted)-strongly suggests that the Legislature did not intend to exclude conclusively presumed total disabilities under section 4662(a) from those apportionment to causation provisions. (Cf. *Pasquotto v. Hayward Lumber* (2006) 71 Cal.Comp.Cases 223, 236-237 (Appeals Board en banc) (the principle that statutes relating to the same subject matter must be harmonized to the extent possible "applies with particular force when the two statutes relating to the same subject matter were enacted by the same bill and chaptered at the same time") (citations omitted).

Avoiding Absurd Results and Promoting Employers to Hire Disabled Workers: With respect to apportionment of permanent disability based on causation, he Board could not find a reasonable rationale or logical basis "...for distinguishing between permanent disabilities that are conclusively presumed to be total in character pursuant to section 4662(a) and 4660."

In responding to an argument in the concurring and dissenting opinion of Chairwoman Zalewski, the Board noted that with respect to the Legislative intent in enacting SB 899 and sections 4663 and 4664 there was intent to encourage employers to hire disabled workers. (citations omitted). "Yet under the dissent's interpretation of section 4662(a), an employer who hired an employee with a pre-existing loss of the use of one arm or one eye would be liable for the employee's entire 100% permanent disability if a workplace injury caused the loss of the use of the other arm or other eye.

Labor Code Section 4662(a) and the Phrase "total in character": The WCAB discussed the fact that the Legislature must have "...had some purpose in mind when it used the phrase "total *in character*" in section 4662(a) (original emphasis.) (citations omitted).

The WCAB's Conclusion and Holding: The Board concluded as follows:

> We conclude that section 4662(a)'s language that certain specified permanent disabilities "shall be conclusively presumed to be total *in character* (original emphasis) simply signifies that the "one of the attributes," but not the sole attribute, of permanent disabilities under section 4662(a) are that they are presumed to be total "*in character"* (original emphasis) does not mean that these disabilities cannot also have other characteristics such as being caused by non-industrial factors."

Editor's Comments: Given what is at stake in this case for the applicant, i.e., two separate 100% PTD awards, it is almost a certainty the case will end up at the Court of Appeal even after the WCJ issues a second decision following remand. If it does end up at the Court of Appeal it is safe to assume the case will attract a host of amicus petitions from CAAA, CWCI and many others. Applicant's counsel on appeal will no doubt expand upon the arguments and analysis in the concurring and dissenting opinion of Chairwoman Zalewski.

Another Suggested Analytical Perspective: There may be a very significant threshold issue in this case that was not fully developed. Is the applicant's disability described by the AME in ophthalmology as "legally blind" as opposed to being "totally blind" medically and factually sufficient to trigger or establish the 4662(a)(1) required definitional criteria for the conclusive presumption of 100% permanent disability "total in character" that requires "....[l]oss of both eyes or the sight thereof."

Is being diagnosed as "legally blind" the "total in character" equivalent to, or synonymous with, the loss of both eyes which clearly equates to total blindness or the total loss of sight? It can be argued that the plain meaning of the statute and the underlying Legislative intent requires total blindness as opposed to being "legally blind." There is a very strong argument that can be made that being legally blind as opposed to being totally blind is insufficient both medically and factually to establish the definitional criteria required to or trigger the 4662(a)(1) conclusive presumption. Chapter 12.2b, page 281 of the AMA Guides 5th Edition, indicates that the term "legal blindness" is patently ambiguous in noting "....that the term *legal blindness* is a misnomer because 90% of individuals who have 20/200 or less visual acuity are not blind. The term *severe vision loss* as used in ICD-9-CM should replace the term *legal blindness*."

Total Blindness Compared to Legally Blind: Being legally blind generally refers to people that have less than 20/200 vision in the better eye or a limited field of vision that is 20 degrees or less at its widest point. *People who are legally blind may in many circumstances have some useful vision.* In some situations corrective eyewear or contacts can provide legally blind individuals with some degree of visual acuity. Individuals who are legally blind may qualify for disability benefits under Social Security even though they are only partially blind. Total blindness i.e., the absence of both eyes is an automatic qualification for Social Security disability benefits. However, in the California Workers' Compensation system, qualifying for federal Social

Security benefits is not a basis factually or legally to automatically establish an applicant is 100% permanently totally disabled let alone entitled to invoke the conclusive presumption of 100% permanent total disability based on any of the permanent disabilities set forth in section 4662(a),(1)-(4)

In comparison to legally blind individuals, totally blind or clinically blind individuals have a complete loss of vision and corrective eyewear such as eyeglasses or contact lenses cannot reverse or ameliorate the effects of complete vision loss. Totally blind and clinically blind individuals need Braille, audio recordings, raised line drawings, and other non-visual media as accommodation for accessing the content of visually presented materials.

Cases Related to the "Total in Character" Threshold Requirements Necessary to Establish or Trigger any of the Conclusive Presumptions of 100% PTD under 4662(a) (1)-(4): With respect to the issue of the Labor Code §4662(a) conclusive presumption of total disability foreclosing apportionment, much of the litigation focuses on whether the injured worker meets the definitional criteria or conditions for injuries resulting in "loss of both hands or the use thereof" (Labor Code §4662(a)(2)), or "an injury to the brain resulting in permanent mental incapacity. (Labor Code §4662(a)(4)) and "an injury resulting in a practically total paralysis." (Labor Code §4662(a)(3)).

In *Farren v. State of California, Dept. of General Services* 2015 Cal.Wrk.Comp. P.D. LEXIS 589 (WCAB Panel Decision). The WCAB reversed a WCJ's award of 100% permanent disability under the Labor Code §4662(a)(3) conclusive presumption based on "an injury resulting in practically total paralysis without apportionment on the basis that applicant was dependent upon the use of a wheelchair when she leaves her home, but used a walker in her home. The WCAB found that applicant's condition as a whole did not equate to "practically total paralysis. As a consequence the WCAB found valid non-industrial apportionment related to applicant's low back disability to a pre-existing condition found by the AME.

Instead of a 100% permanent disability award, in *Farren*, applicant received three awards of 80.75%, 7%, and 9.75%. (see also, *Alvarez v. American International Group* 2017 Cal.Wrk.Comp. P.D. LEXIS 209 (WCAB panel decision) where the WCAB affirmed a WCJ's award of 62% PD, after apportionment and that applicant was not "practically totally paralyzed" for purposes of the conclusive presumption of permanent total disability, without apportionment under Labor Code §4662(a)(3). The medical evidence did not reflect that applicant was diagnosed with paralysis. She was able to stand independently and to transfer independently from her wheelchair to her bed. Applicant was also able to stand a short time and walk two or three steps. She also did not lose her ability to feel her legs and retained the ability to move her lower extremities.

In *Winnigham v. State of California Department of Corrections* 2016 Cal.Wrk.Comp. P.D. LEXIS 251, the WCAB affirmed a WCJ's award of 84% PD after apportionment. The WCAB also rejected applicant's contention he was entitled to the conclusive presumption of permanent disability based on "an injury to the brain resulting in permanent mental incapacity" for purposes of Labor Code §4662(a)(4). Applicant had significant cognitive residuals including a GAF of 45 and other serious psychological symptoms and impairments as a result of an injury to his brain and other systems and conditions. The Board stated "[h]owever, given the legislative history of Labor Code §4662(a)(4), when viewed the partial cognitive impairments sustained as a result of the injury were not enough to raise the Labor Code §4662(a)(4) presumption." The WCAB cited *Schroeder v. WCAB* 78 Cal.Comp.Cases 506 in support of its decision.

In a writ denied case, *Kloeckner USA Holdings v WCAB (De La Rosa)* (2019) 84 Cal.Comp. Cases 1020, 2019 Cal.Wrk. Comp. LEXIS 99 affirmed the WCAB's award of 100% PTD without apportionment based on the conclusive presumption in 4662 (a)(4) an injury to the brain resulting in permanent mental incapacity. In *De La Rosa*, applicant's industrial head injury aggravated or lit up applicant's pre-existing neurodegenerative disorder which resulted in applicant suffering profound cognitive dysfunction. In addition the Court of Appeal remanded the case to the WCAB for the purpose o making a supplemental award of attorney's fees to applicant since the Court of Appeal determined there was no reasonable basis for defendant's petition for Writ of Review.

In *Kloecker*, in contrast to the cases cited hereinabove, there was substantial medical evidence that applicant met or satisfied the threshold definitional criteria necessary to establish an injury to the brain resulting in permanent mental incapacity warranting application of the 4662(a)(4) conclusive presumption of 100% PTD.

In Hirschberger v. Stockwell, Harris, Wolverton, and Muehl/SCIF 2018 Cal.Wrk.Comp. P.D. LEXIS 482 (WCAB panel decision), a case cited in the concurring and dissenting opinion of Chairwoman Zalewski in *Fraire*, applicant was awarded 100% PTD on the basis of the conclusive presumption set forth in 4662(a)(4) "an injury to the brain resulting in permanent mental incapacity." In *Hirschberger* there was evidence that applicant's brain was already damaged as a result of the progressive nature of his Parkinson's disease that existed prior to the industrial injury.

One of the key aspects of the case was the fact that the parties stipulated to applicant's underlying pre-existing Parkinson's disease was industrial and also that his "Parkinson's disease involved "sequelae" of high blood pressure, lung injury, sleep disturbance, and psyche, brain and back problems."

Without the critical early stipulation that applicant's Parkinson's disease was industrial and was by its very nature an insidious progressive disease directly effecting the brain, it is questionable whether there would have been substantial medical evidence to support that applicant's brain

injury resulted in permanent mental incapacity to the degree and severity necessary to invoke or trigger the 4662(a)(4) conclusive presumption of 100% PTD.

Burr v. The Best Demolition & Recycling Co., Inc., State Compensation Insurance Fund **(2018) 83 Cal.Comp.Cases 1300, 2018 Cal. Wrk. Comp. P.D. LEXIS 143 (WCAB Panel Decision)**

Issues & Holding: Both the WCJ and WCAB held that applicant was not entitled to a 100% permanent total disability Award under the conclusive presumption set forth in Labor Code §4662(a)(3) since he did not meet the definition of "practically total paralysis." Applicant was also not entitled to a 100% permanent total disability Award under Labor Code §4662(b) "in accordance with the fact." Both the WCJ and WCAB also held that the holding in *Hikida* was not applicable and therefore, even though defendant provided medical treatment in the form of surgery, the medical treatment and surgery was not the sole cause of applicant being functionally paralyzed in his lower extremities.

Factual & Procedural Overview: The applicant was employed as an Estimator related to demolition work and oversight of contracted demolition work. Approximately four months after he started working for the employer in February of 2008, he was hospitalized for a number of serious medical conditions. The medical history indicated the applicant had two prior non-industrial right shoulder surgeries, as well as chronic back pain and a number of significant non-industrial medical conditions and issues. While he was in the hospital in June and July of 2008, he also underwent thoracic/lumbar spine surgery. He also had osteoporosis.

He returned to his usual and customary job duties with the employer in September of 2008. On December 1, 2008, a little less than three months after he returned to work, he fell backwards injuring his back at work. Two months later he returned to his treating physician complaining of severe back pain. The applicant was hospitalized and underwent a spinal fusion on January 27, 2009. Six weeks later he was hospitalized again and underwent a revision fusion. Although the claim was initially denied, the parties at some point agreed to use an AME in orthopedics.

From a procedural standpoint there was a trial in March of 2013 solely on the issue of whether applicant sustained a compensable injury. A Findings and Award issued in June of 2013, finding that applicant did sustain a compensable injury as alleged. Subsequent to June of 2013, the applicant continued to treat for his thoracic lumbar condition as well as compensable consequence injuries to his psyche, gastrointestinal system, urologic system as well as aggravation of preexisting diabetes and hypertension. He also experienced anxiety and depression and received psychiatric treatment commencing in 2015.

The applicant underwent an additional spinal surgery in April 2014 that resulted in a fusion from T8–L5. The surgery was complicated by osteomyelitis. Applicant developed a post-surgery

infection, which resulted in numerous additional surgeries as well as hospitalization for approximately four months. He experienced a loss of lower extremity strength sensation and pain, resulting in his having to use a wheelchair. Conservative treatment failed to alleviate severe pain symptoms and he underwent additional surgery for the placement of a pain pump. There was also a veritable cornucopia of non-industrial contributing causal factors that were listed in detail by the WCJ under the title of "relevant medical/social/litigation history." Following trial, the WCJ issued a Findings of Fact & Award on February 6, 2018, finding the applicant was entitled to permanent disability of 88% after apportionment. The applicant filed a Petition for Reconsideration.

The Applicant was not entitled to a conclusive presumption of 100% Permanent Total Disability: Pursuant to Labor Code §4662(a)(3) based on the finding of both the WCJ and WCAB, applicant's injury did not result in "practically total paralysis."

The AME in orthopedics opined that the applicant was medically a paraplegic based upon his bilateral lower extremity leg weakness, lack of sensation, and high levels of pain, all of which result in his need to use a wheelchair. However, there were no such findings made with respect to the applicant's upper extremities and applicant testified at trial that we was able to transfer from his wheelchair to the toilet, or to the shower, utilizing a board.

The WCJ in his report on reconsideration that was adopted and incorporated by the WCAB indicated that based on prior case law, that "practically total paralysis", requires a finding that functionally equates to "near quadriplegia." The WCJ indicated the applicant was not totally paralyzed in his bilateral lower extremities, but clearly suffers from functional or "near paraplegia". The judge did not believe applicant's industrial injury resulted in "practically total paralysis" as used in Labor Code §4662(a)(3). (see also, *Dawson v. San Diego Transit* 2015 Cal. Wrk. Comp. P.D. LEXIS 745 (WCAB Panel Decision) (WCAB ruled that with respect to "practically total paralysis", this standard by definition was met only if the injured worker was functionally "near quadriplegia.").

There was no substantial evidence to support applicant's claim, that he had no earning capacity and therefore was 100% permanently totally disabled "in accordance with the fact.": Applicant's vocational expert opined that applicant was unable to return to employment based upon industrial factors only. However, the WCAB indicated that applicant's vocational expert's report and opinion did not constitute substantial vocational evidence. The WCJ characterized the opinion as cursory and it failed to adequately address the fact there were significant non-industrial contributing causal of factors of applicant's inability to compete in the open labor market or participate in vocational rehabilitation.

Whether the Court of Appeal's Holding in *Hikida* prohibits apportionment to non-industrial contributing causal factors: The WCAB distinguished the facts in the instant case from the facts in *Hikida*. In *Hikida,* applicant had medical treatment authorized by defendant, in the form of carpal tunnel surgery. As a result of the surgery, applicant developed a new condition that had not existed before the authorized carpal tunnel surgery specifically a complex regional pain disorder. The medical evidence in *Hikida* indicated that applicant developed the complex regional pain syndrome entirely and solely because of the medical treatment authorized by the defendant. The chronic pain syndrome rendered applicant permanently totally disabled and no apportionment was allowed.

However, in the instant case, the applicant already had a lumbar spine injury, including one non-industrial and two industrial complex spine surgeries. He also had urinary incontinency and sexual dysfunction prior to the authorized surgery in 2014. Most importantly "unlike in *Hikida* where the surgery caused the entire new onset of chronic pain syndrome which standing alone rendered applicant permanently totally disabled, in Mr. Burr's case the 2014 surgery alone did not result in applicant being permanently totally disabled". As a consequence the WCAB indicated that applicant's lumbar spine disability was properly subject to apportionment pursuant to Labor Code §4663.

Editor's Comment: With respect to the issue of the Labor Code §4662(a) conclusive presumption of total disability foreclosing apportionment, much of the litigation focuses on whether the injured worker meets the definitional criteria or conditions for injuries resulting in "loss of both hands or the use thereof" (Labor Code §4662(a)(2)), or "an injury to the brain resulting in permanent mental incapacity. (Labor Code §4662(a)(4)) and "an injury resulting in a practically total paralysis." (Labor Code §4662(a)(3)).

In *Farren v. State of California, Dept. of General Services* 2015 Cal.Wrk.Comp. P.D. LEXIS 589 (WCAB Panel Decision). The WCAB reversed a WCJ's award of 100% permanent disability under the Labor Code §4662(a)(3) conclusive presumption based on "an injury resulting in practically total paralysis without apportionment on the basis that applicant was dependent upon the use of a wheelchair when she leaves her home, but used a walker in her home. The WCAB found that applicant's condition as a whole did not equate to "practically total paralysis. As a consequence the WCAB found valid non-industrial apportionment related to applicant's low back disability to a pre-existing condition found by the AME. Instead of a 100% permanent disability award, applicant received three awards of 80.75%, 7%, and 9.75%. (see also, *Alvarez v. American International Group* 2017 Cal.Wrk.Comp. P.D. LEXIS 209 (WCAB panel decision) where the WCAB affirmed a WCJ's award of 62% PD, after apportionment and that applicant was not "practically totally paralyzed" for purposes of the conclusive presumption of permanent total disability, without apportionment under Labor Code §4662(a)(3). The medical evidence did not diagnose applicant with paralysis. She was able to stand independently

and to transfer independently from her wheelchair to her bed. Applicant was also able to stand a short time and walk two or three steps. She also did not lose her ability to feel her legs and retained the ability to move her lower extremities.

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Applicant had significant cognitive residuals including a GAF of 45 and other serious psychological symptoms and impairments as a result of an injury to his brain and other systems and conditions. The Board stated "[h]owever, given the legislative history of Labor Code §4662(a)(4), when viewed the partial cognitive impairments sustained as a result of the injury were not enough to raise the Labor Code §4662(a)(4) presumption." The WCAB cited *Schroeder v. WCAB* 78 Cal.Comp.Cases 506 in support of its decision.

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Hirschberger v. Stockwell, Harris, Woolverton, and Muehl/SCIF **2018 Cal. Wrk. Com. P.D. Lexis 482, 46 CWCR 238 (November 2018) (WCAB Panel Decision)**

Issues and Holding: Whether apportionment of the applicant's 100% permanent total disability award found on the basis of the application of the conclusive presumption set forth in Labor Code § 4662(a)(4) "an injury to the brain resulting in permanent mental incapacity," precluded apportionment even though the applicant's brain was already damaged as a result of the progressive nature of Parkinson's disease that existed prior to the industrial injury.

The WCAB rescinded the WCJ's award of 66% permanent disability after apportionment and awarded applicant 100% permanent total disability based on the conclusive presumption set forth

in Labor Code § 4662(a)(4) related to "an injury to the brain resulting in permanent mental incapacity."

Factual and Procedural Overview: Applicant was employed as an attorney and filed a cumulative trauma for the period of November 30, 2007 through April 22, 2009. It appears in May of 2010 there was a stipulation between the parties in which the applicant was found to have sustained industrial injury "in connection with high blood pressure, Parkinson's disease and lung injury." The parties also stipulated at that time that applicant's "Parkinson's disease involved "sequelae" of high blood pressure, lung injury, sleep disturbance, and psyche, brain, and back problems."

There appeared to be no dispute based on the medical evidence that applicant was 100% permanently totally disabled. The critical question was whether or not there was a basis for valid legal apportionment or whether pursuant to Labor Code § 4662(a)(4) applicant was entitled to the conclusive presumption of permanent total disability which precluded non-industrial apportionment of any kind.

The WCJ in awarding the applicant 66% Permanent Disability after apportionment determined that applicant was not entitled to the conclusive presumption related to brain injury causing permanent mental incapacity under Labor Code § 4662(a)(4) because the applicant's brain was already damaged as a result of the progressive nature of Parkinson's that existed prior to the industrial injury and also the WCJ concluded that the damage to the applicant's brain was not a brain injury "resulting in permanent mental incapacity" pursuant to 4662(a)(4). The WCJ further elaborated in her report on reconsideration that it was her opinion the brain injury referred to in 4662(a)(4) must come within one or more of the categories of being either a specific injury, occupational disease injuries and cumulative injuries. She felt that applicant's Parkinson's as a brain injury did not come within the parameters of those categories.

Applicant filed a Petition for Reconsideration that was granted by the WCAB. The WCAB relied on a number of cases all dealing with the conclusive presumption under 4662 (a) and rejected the WCJ's failure to apply the conclusive presumption under 4662(a)(4). The other factor that supported the WCAB's holding that the Labor Code 4662(a)(4) conclusive presumption applied was that applicant's Parkinson's disease had already been found industrial back in May 10, 2010. The WCAB also indicated that the medical evidence indicated that applicant's permanent total disability was the result of mental incapacity caused by the Parkinson's disease. The Board stated as follows:

> Nothing in the statute or case law precludes application of the section 4662(a)(4) conclusive presumption when the brain malfunction causing mental incapacity is a result of the progression of an insidious disease, as

> in this case. The impact of the industrially aggravated disease on applicant's brain is an injury to the brain, and the consequence of that brain injury is permanent mental incapacity that is conclusively presumed to be total in character under 4662(a)(4).

The WCAB also rejected the WCJ's reliance on *Fruehauf Corp. v. WCAB* (Stansbury) (1968) 62 Cal.2nd 569, 33 Cal.Comp.Cases 300 on the basis that case did not discuss or deal with Labor Code § 4662 and there was nothing in that decision that would support the WCJ's view that conclusive presumptions in section 4662(a) do not apply when an industrial injury has latent effects on multiple body parts. The Board instead relied on several cases including *Yamaha Corp. v. WCAB* (Olbrantz) (1997) 62 Cal.Comp.Cases 1003 (writ denied).

In applying the conclusive presumption of Labor Code § 4662(a)(4) the Board stated:

> The medical evidence establishes that applicant's current total permanent disability is the result of mental incapacity caused by the effect of the Parkinson's disease on his brain. Nothing in the statute or case law precludes application of the section 4662(a)(4) conclusive presumption when the brain malfunction causing mental incapacity as a result of the progression of an insidious disease, as in this case. The impact of the industrially aggravated disease on applicant's brain is an injury to the brain, and the consequence of that brain injury is permanent mental incapacity that is conclusively presumed to be total in character under § 4662(a)(4)."

Editors Comment: The editor wonders whether there would have been an entirely different result if defendant had not stipulated that the applicant's progressive Parkinson's disease was industrial back in May of 2010. Since the Parkinson's disease was stipulated to be industrially related and was an insidious progressive disease directly effecting the brain and the medical evidence indicated that applicant was permanently mentally incapacitated, it triggered the conclusive presumption of Labor Code § 4662(a)(4). Therefore, any non-industrial apportionment was precluded.

Labor Code Section 4662(b)

Rodriguez v. YRC Worldwide **2017 Cal.Wrk.Comp. P.D. LEXIS 177 (WCAB panel decision)**

Issue: Whether WCJ's determination that applicant was 100% permanently totally disabled without apportionment pursuant to Labor Code §4662(b) ("in accordance with the fact") based on expert vocational evidence constituted substantial medical evidence.

Holding: The WCAB reversed the WCJ's determination that applicant was permanently totally disabled in accordance with the fact under Labor Code §4662(b) since the vocational evidence the WCJ relied upon did not constitute substantial medical evidence since it did not consider that applicant's alleged inability to compete in the open labor market was based on the effects of medication, some of which were for nonindustrial conditions and were taken before the industrial injury.

Applicant, a dock worker, suffered a January 5, 2010, admitted injury to his back and knees: There was an AME in orthopedics as well as a vocational expert reporting on behalf of applicant. The parties stipulated that a strict rating of the AME's report would be 67% permanent disability before apportionment and 53% permanent disability after 10% nonindustrial apportionment related to applicant's lumbar spine. At trial applicant testified as to his inability to perform any type of gainful employment on either a part time or full time basis. He also testified he was taking a number of medications. The WCJ indicated in her Opinion on Decision the applicant was not taking any of the medications prior to his industrial injury and the WCJ also indicated that both medical and vocational evidence indicated the side effects from these medications prohibited applicant from sustaining any type of gainful employment.

As a consequence, the WCJ found applicant to be 100% permanently totally disabled in accordance with the fact under Labor Code §4662(b) and ignored the 10% nonindustrial apportionment attributable to applicant's lumbar spine disability.

Defendant filed a Petition for Reconsideration that was granted by the WCAB. The WCAB rescinded the WCJ's Findings of Fact related to permanent disability and attorney fees. They also remanded the case to the trial level for development of the record related to supplemental reporting from the vocational expert and the AME on the issue that while applicant was taking prescribed medications some of it was prescribed for nonindustrial conditions, including his diabetes and some of these medications were prescribed prior to the industrial injury in question.

While the Board acknowledged that the effects of medication used by an injured worker are properly considered in evaluating the level of compensable permanent disability the WCJ's

analysis was flawed in this case. The reason the WCJ's analysis was flawed is that her finding of total permanent disability pursuant to Labor Code §4662(b) addressed the combined effects of all the medications taken by applicant, including medications prescribed for non-industrial conditions before he sustained his industrial injury, and not just the effects of the medications he used to treat his industrial condition.

It is permissible to consider lay testimony of the effects of medication, notwithstanding the absence of medical reporting concerning the effects of the medication. However, in this particular case the WCAB indicated the medications taken by applicant is complicated because they include medicine that was prescribed before he sustained an industrial injury contrary to the understanding and findings of the WCJ.

At trial applicant testified he was taking Lyrica for his nonindustrial diabetes before he sustained his industrial injury and that he may also have been prescribed Gabapentin. The WCAB in rescinding the WCJ's findings and remanding the case stated: "The contribution of applicant's non-industrial medications and conditions upon his overall level of permanent disability needs to be addressed in the medical reporting and record in order to assure a proper decision."

Labor Code Section 4663

Hernandez v. TS Staffing Services and California Insurance Guarantee Assoc., (CIGA) 2020 Cal.Wrk.Comp. P.D. LEXIS 11 (WCAB panel decision)

Issues and Holding: This case deals with apportionment under both 4663 and also 4664(b) related to a prior stipulated award of 33% PD issued on January 4, 2010, related to a prior specific injury of July 1, 2008. Applicant suffered a subsequent specific injury on June 21, 2013. Under Labor Code 4663, the combined orthopedic disability was 42% before apportionment The WCAB affirmed the WCJ's award of 24% overall orthopedic PD after apportionment of 60% of applicant's cervical spine and 80% of applicant's lumbar spine PD based solely on Labor Code 4663. In an interesting twist, it was applicant's counsel on reconsideration who tried to establish apportionment under Labor Code §4664(b), since in this particular case it would have resulted in a more favorable award for the applicant as opposed to the substantial apportionment under 4663.

Both the WCJ and the WCAB on reconsideration found there was a lack of substantial medical evidence based on the AME's opinion to support apportionment under Labor Code 4664(b) due a speculative opinion from an AME on that issue and also a failure to prove overlapping disabilities related to applicant's lumbar and cervical spine PD as required under the Court of Appeal's decision in *Kopping v. Work. Comp. App. Bd.* (2006) 142 Cal.App.4th 1099, 71 Cal.Comp.Cases 1229. However, the WCJ and the WCAB did find the AME's opinion related to apportionment based on Labor Code 4663 did constitute substantial evidence.

Factual & Procedural Overview: Applicant a loader/unloader suffered a specific injury on June 21, 2013 to his lumbar spine, cervical spine and right shoulder. He also sustained a prior injury on July 1, 2008 to his lumbar spine, cervical spine and right knee. On January 4, 2010 he received a Stipulated Findings and Award for the July, 1, 2008 injury for 33% PD. The stipulated award of January 4, 2010 was silent with respect to what medical evidence was relied on as the basis for the 33% PD finding.

Medical Reporting: The reporting physician for the June 21, 2013 injury was an AME in Orthopedics. The reporting physician for the old July 1, 2008 injury that resulted in the stipulated award of 33% PD was a PQME in orthopedics. The AME in orthopedics submitted a report dated October 12, 2015 and was also deposed. The AME indicated that before apportionment, applicant suffered industrial injuries to his lumbar spine resulting in 27% PD, cervical spine PD of 20% and 0% PD to the right shoulder.

The AME's Opinion on Apportionment: The AME was provided with a copy of the prior 33% PD Award related to the previous July 1, 2008 injury. With respect to the applicant's permanent disability related to the June 21, 2013 specific injury and the lumbar spine PD of 27%, the AME

apportioned 50% to moderate to severe degenerative changes confirmed by MRI studies, 30% attributable to previous low back injuries and 20% due to the current June 21, 2013 date of injury. As to the applicant's cervical spine PD, the AME attributed 50% to degenerative changes, 10% to the prior July 1, 2008 specific injury and 40% to the current June 21, 2013 specific injury. The AME was deposed and with respect to apportionment under 4664(b). During the deposition the AME was advised by applicant's counsel that the prior award of 33% PD was based on the medical reporting of the SPQME and was asked whether the 33% PD related to the prior award should be subtracted from the current WPI to calculate apportionment under 4664(b). Based on the information provided by applicant's counsel including a hypothetical question, the AME agreed with the subtraction method for calculating apportionment under 4664(b).

The WCJ's and WCAB's Opinion and Analysis of 4664(b): Both the WCJ and the WCAB on reconsideration rejected the AME's analysis and application of apportionment under 4664(b) on the basis that it was not supported by substantial medical evidence. First, the AME was misinformed that the prior 33% PD award was based on the medical reporting of the SPQME. In that regard the Board stated there was neither a stipulation by the parties to the SPQME's report being the basis for the prior award, "nor any stipulation contained within the award itself that it was based" on the SPQME's report.

Second, with respect to the prior specific injury of July 1, 2008, the actual assessment of PD by the SPQME in his reporting did not actually result in 33% PD, and therefore the simple subtraction method proposed to the AME by applicant's counsel during the deposition and relied on by the AME in her opinion was incorrect.

Third, and in the WCAB's analysis and opinion the most important was the fact that the AME "....was given a hypothetical based on incorrect facts and not provided with sufficient information regarding the legal principles under Labor Code §4664(b)." The WCAB and the WCJ indicated that WPI is just one factor in determining whether there is overlapping permanent disability. The mere fact that a subsequent injury involved the same body parts as the prior injury does not automatically establish or prove overlapping disabilities. (citations omitted). The party claiming apportionment under 4664(b) related to a prior award of permanent disability has the burden of proving overlap which requires "consideration of the factors of disability resulting from the two injuries, not merely the body part injured." (see, *Kopping v. Workers' Comp. Appeals Bd.* (2006) 142 Cal.App.4th 1099, 71 Cal.Comp.Cases 1229, *Mercier v. Workers' Compensation Appeals Bd.* (1976) 16 Cal.3d 711, 41 Cal.Comp.Cases 205.)

With respect to any apportionment determination including section 4664(b) based on alleged overlap it "...must be predicated on substantial evidence. In this regard, a medical opinion is not substantial evidence if it is bases on facts no longer germane, on inadequate medical histories or examinations, on incorrect legal theories, or surmise, speculation, conjecture, or guess. (*Escobedo v. Marshalls* (2005) 70 Cal.Comp.Cases 604,620 (Appeals Board en banc).)

Discussion & Comments: This is an interesting case for a couple of reasons. First, the WCJ and the WCAB found that the AME's report related to significant apportionment under section 4663 constituted substantial medical evidence, but the AME's opinion on 4664(b) apportionment did not. Second, that it was applicant's counsel on reconsideration to the WCAB who argued that the AME's opinion on apportionment under 4664(b) did constitute substantial medical evidence. If one does the math, it is easy to understand why applicant's counsel faced with two different unfavorable apportionment determinations by the AME and the WCJ, argued for apportionment only under 4664(b) which was much more favorable to the applicant than apportionment under 4663.

With respect to the interplay of apportionment between Labor Code sections 4663 and 4664(b) see *Barnes v. City of Fullerton* (2018) 47 CWCR 5. In *Barnes* there was a stipulated award of 0% PD related to a 2004 back injury. Applicant suffered a subsequent back injury in 2013. The WCJ relying on the opinion of a QME, and based on section 4663 found valid apportionment of 50% PD to the prior 2004 back injury and 50% to the 2013 back injury. The WCJ rejected applicant's argument that under 4664(b) the prior stipulated award of 0% PD related to the 2004 back injury was conclusive and that none of the current back PD could be apportioned to the 2004 injury with the 0% award. On reconsideration the WCAB affirmed the WCJ's apportionment determination under section 4663 since defendant based on the medical record, was able to establish that the 2004 back injury was still a contributing causal factor of 50% of the applicant's overall current back PD of 18%.

Person v. California Department of Corrections and Rehabilitation **2019 Cal. Wrk. Comp. P.D. LEXIS 389 (WCAB panel decision 10/8/19)**

Issues & Holding: WCJ's award of 4% permanent partial disability after apportionment was upheld by the WCAB on reconsideration based on substantial medical evidence where the orthopedic QME opined that applicant's specific injury aggravated or lighted up applicant's preexisting patellofemoral degenerative joint disease in his left knee. QME found that applicant's left knee disability was one third (33.4%) industrial based on a specific left knee injury of July 16, 2017 and two-thirds (66.6%) attributable to applicant's preexisting patellofemoral joint disease.

Factual and Procedural Overview: Applicant a correctional officer suffered an admitted specific left knee injury on July 16, 2017. Applicant had left knee surgery eleven months later on June 7, 2018. The operative report indicated that with respect to applicant's left knee indicated a Grade IV chondral defect with very little cartilage and bone-on-bone and applicant's left knee chondromalacia was also confirmed during the surgery.

The orthopedic QME took a careful history and opined that applicant's ground level slip and fall injury to his left knee on July 16, 2017 aggravated his preexisting left knee degenerative joint disease and apportioned one third of applicant's left knee disability to the specific injury and two-thirds to the severe preexisting degenerative joint disease. The QME was deposed by applicant's counsel and issued a supplemental report and did not change his opinion on apportionment. The WCJ in his report on reconsideration indicated the QME testified during his deposition that:

> "[T]he progression from normal x-rays to relatively mild fraying on MRI to a severe condition observed during surgery was probably not the result of rapid changes after the specific trauma but instead reflects the different "apples and oranges" measured by the different tests. X-rays image bone but will not show severe tears on cartilage except as joint space narrowing. The degeneration noted during Petitioner's left knee surgery would not have come four or five months after a direct impact. Thus, he opined that Petitioner had aggravated pre-existing conditions.

The orthopedic QME in his supplemental report after his deposition and after reviewing a formal job analysis reiterated his expert opinion that the specific injury of July 16, 2017 occurred and aggravated a pre-existing Patellofemoral Degenerative joint disease.

The WCJ in his Report on Reconsideration that was adopted and incorporated by the WCAB stated:

> The present case presents a "lighting up" scenario wherein a work-related injury aggravated a pre-existing condition. In such cases, the causation of injury and the causation of disability are different things. For the purpose of determination of the causation of injury, employers take employees as they find them, including their pre-existing conditions. But with respect to causation of disability from the aggravation of pre-existing conditions, it is anticipated that employers will be entitled to apportionment. See, *Reyes v. Hart Plastering* (2005) 70 CCC223 (WCAB Sign. Panel).

Editor's Comment: It is important to note that prior to the enactment of SB899 in 2004 as a general rule apportionment was prohibited when an industrial injury aggravated, accelerated or lit up an underlying disease process or condition. [*Zemke v. WCAB* (1968) 68 Cal. 2d 794, 796-799, 33 Cal. Comp. Cases 358] [no apportionment of back disability between industrial back injury and nonindustrial arthritis]; *Berry v. WCAB* (1968) 68 Cal. 2d. 786, 788-790, 33 Cal. Comp. Cases 352] [no apportionment of knee disability where industrial knee injury triggered "advancement" of previously dormant nonindustrial fungal disease].

For a detailed discussion of how SB 899 and Labor Code sections 4663 and 4664 diametrically changed and overruled prior case law prohibiting apportionment where an industrial injury aggravated, accelerated or lit up an underlying condition or disease process see, ***Brodie v. WCAB*** (2007) 40 Cal. 4th 1313, 72 Cal Comp. Cases 565 discussing in detail the new "regime" of apportionment based on causation. The ***Brodie*** Court discussed the distinction and differences in pre-SB 899 Labor Code Section 4663 apportionment and post-SB 899 Labor Code Section 4663 apportionment as follows:

> Until 2004, former section 4663 and case law interpreting the workers' compensation scheme closely circumscribed the basis for apportionment. Apportionment based on causation was prohibited. (*Pullman Kellogg v. WCAB* (1980) 26 Cal. 3d 450, 454, 45 Cal. Comp. Cases 170)

In *City of Petaluma et al., v. WCAB (Lindh)* 29 Cal. App. 5th 1175, 83 Cal. Comp. Cases 1869 (Petition for Review denied 3/13/19) the Court of Appeal also discussed how SB 899 abrogated prior case law that had prohibited apportionment in situations where an industrial injury aggravated, accelerated or lit up a preexisting condition or disease process. See also *Marsh v. Workers' Compensation Appeals Bd.* (2005) 130 Cal.App. 4th 906, 70 Cal. Comp. Cases 787, *Mills v. Workers' Compensation Appeals Bd*. (2008) 73 Cal. Comp. Cases 812, 2008 Cal. Wrk. Comp. LEXIS 187, 36 CWCR 138 (writ denied); *Koeplin v. Nella Oil Company, PSI* 2011 Cal. Wrk. Comp. P.D. LEXIS 35 (WCAB panel decision); and *Vaira v WCAB* (2007) 72 Cal.Comp. Cases 1586, 35 CWCR 307 (not certified for publication).

Maxton v. Lefiell Manufacturing 2019 Cal.Wrk.Comp. P.D. LEXIS 150 (WCAB panel decision)

Issues and Holding: Whether an Independent Medical Evaluator's (IME) opinion that 20% of applicant's lung disability of 60% was nonindustrial based on applicant living in the Los Angeles area and being exposed to related air pollution constituted substantial evidence. The WCJ followed the IME's nonindustrial apportionment of 20% of the applicant's lung disability based on applicant's exposure to ambient air exposure in the Los Angeles Basin and 80% due to the inhalation exposures from the metals at applicant's place of employment.

Holding: The WCAB granted applicant's Petition for Reconsideration finding that the IME's opinion on apportionment did not constitute substantial medical evidence and therefore applicant was entitled to an award of 100% permanent disability with no legal apportionment.

Factual and Procedural Overview: Applicant was employed as a lead heat treated. Filed a CT for the period of October 24, 1975 to November 19, 2007 to his lungs and heart (hypertension). The WCJ awarded applicant 80% PD, after 20% apportionment to non-industrial factors related

to exposure to air pollution in the Los Angeles area. During the course of the litigation the WCJ appointed an IME in internal medicine in 2011. (Technically "IME's" were statutorily eliminated as part of the 1991 reform legislation. However, the term is still used although the correct legal descriptive is a "regular physician" under LC 5701 and 5906). The IME was deposed multiple times and issued numerous reports. He diagnosed the applicant with industrially caused pulmonary fibrosis, and hypertension with chronic kidney disease proteinuria and mild heart failure as partially industrially related. He also opined that applicant was likely to need a lung transplant. The IME opined that applicant had two parts to his lung condition. "One part is the lung fibrosis due to the metals. The other part is the overall lung function which includes some lung destruction which occurs when breathing polluted air in the Los Angeles Basin." He also indicated that he considered applicant to be 100% disabled (before 20% nonindustrial apportionment) with no reasonable future earnings capacity.

When the IME was initially deposed in testified that in reaching his apportionment determination he relied on literature dealing with Los Angeles area air quality and its impact on lung function along with the pulmonary chapter from the AMA Guides Causation Book. He did acknowledge that the geography of the LA Basin would result in geographically different levels of pollution which would be relevant to apportionment. He also testified that the studies he relied upon were generalized and not related to a specific city or community. In a supplemental report he attempted to clarify the basis for his 20% nonindustrial apportionment. He reviewed and discussed records from the Air Quality Management District for the period of 2000 to 2013. However, he indicated that no location in the LA Basin exceeded federal or state standards, even as the standards were increased over time. The only exceptions were lead monitoring sites immediately downwind of stationary lead sources. His supplemental report did not offer any discussion of how the air quality records supported his findings on causation and apportionment of applicant's lung condition. He was also unaware of where applicant had lived for the previous 32 years other than the city of La Habra in Orange County.

In a second deposition he acknowledged that he found nothing in the literature or documents that he reviewed that showed that federal standards were exceeded. He also could not recall whether he had any training with regard to interpreting the air quality reports he cited. He also testified that he chose the 20% nonindustrial apportionment level for the effects of applicant's exposure to air pollution on his lung function based upon his training and experience.

Notwithstanding that the WCJ prior to trial characterized some of the medical reporting from the IME as questionable regarding apportionment, following trial the WCJ concluded that the IME's nonindustrial apportionment determination constituted substantial evidence and issued an award that reduced applicant's 100% PD by the 20% apportionment to applicant's exposure to air pollution in the Los Angeles Basin.

The WCAB's Decision: Applicant filed a Petition for Reconsideration that was granted by the WCAB who reversed the WCJ's award and awarded applicant 100% PTD without apportionment. In essence the WCAB concluded that the IME made "an apportionment determination that was essentially a conclusion, based upon unidentified scientific studies and air quality reports that show the air in the Los Angeles basin did not violate federal and state air quality standards between 200 and 2013, and fails to articulate how applicant's lung disability was 20% caused by the air pollution in the Los Angeles basin." The WCAB also indicated that while the air pollution in the Los Angeles basin may have contributed to applicant's lung disability, the IME's reporting did not provide an adequate basis to support his conclusion and did not constitute substantial medical evidence to apportion applicant's lung permanent disability as articulated by the IME and accepted by the WCJ.

Klaus v. Antelope Valley School District **2018 Cal. Wrk. Comp. P.D. LEXIS 381 (WCAB panel decision)**

Issues and Holding: Whether the orthopedic PQME's medical opinion that applicant suffered 50% non-industrial apportionment related to her cervical spine injury, 50% non-industrial apportionment related to her left shoulder injury, 75% non-industrial apportionment to her right knee, and 50% non-industrial apportionment to her left knee as well as *Benson* apportionment for two of the four body parts constituted substantial medical evidence.

Both the WCJ and the WCAB found that the orthopedic SPQME's opinion on apportionment constituted substantial medical evidence with respect to non-industrial apportionment and apportionment under *Benson.*

Factual and Procedural Overview: Applicant filed two claims, one for a specific injury that occurred on May 19, 2015, where the judge found that she sustained injury to her neck, bilateral shoulders, elbows, forearms, wrists, and hands. She also filed a cumulative trauma injury for the period of May 9, 2013 to May 19, 2015, to her bilateral shoulders, elbows, forearms, wrists, hands, neck, low back and knees. All of these body parts were found to be industrial.

The medical reporting from the SPQME in orthopedics with respect to apportionment indicated that based on the applicant's history and diagnostic studies, she had suffered a skiing accident in 1972 wherein she tore the ligaments in her right knee and underwent surgery. She provided a history to the PQME that the pain resolved in less than one year and that she had no residuals until the specific injury in 2015. In terms of degenerative disease conditions, the SPQME indicated with respect to the applicant's cervical spine, she had cervical spine disc disease, cervical spine spondylosis without radiculopathy. With respect to her right knee, she had patellofemoral chondromalacia as well as right knee osteoarthritis. With respect to her left shoulder, she had impingement, left rotator cuff strain, and left shoulder adhesive capsulitis.

Cervical Spine Disability: The SPQME in orthopedics indicated that as to applicant's cervical spine permanent disability, 50% was non-industrial based on the natural history and progression of organic degenerative disc disease and degenerative spondylosis of the cervical spine. With respect to the remaining 50% industrial permanent disability to the cervical spine, the SPQME under *Benson* apportioned 25% permanent disability to the specific injury of May 19, 2015, and 25% to the cumulative trauma.

Left Shoulder Disability: The SPQME found 50% non-industrial apportionment related to degenerative joint disease and degenerative partial thickness tearing of her rotator cuff described on a MRI. He also indicated that 50% of the non-industrial apportionment was related to the naturally progressive organic condition of degenerative joint disease and degenerative rotator cuff tendinosis. With respect to the remaining 50% industrial permanent disability, 25% related to the specific injury of May 19, 2015 and 25% to the cumulative trauma injury under *Benson*.

Bilateral Knee Disability: As to applicant's knees, the SPQME indicated that 75% of the applicant's right knee permanent disability was non-industrial and related back to the applicant's 1972 non-industrial right knee injury she suffered skiing and had surgery for torn ligaments. The SPQME found that the 75% non-industrial apportionment of applicant's right knee permanent disability was also supported by the fact that even though applicant's right knee had been asymptomatic for many years, the old 1972 ski injury had resulted in ligamentous reconstruction and there was a natural progression of knee degenerative changes as a result of that injury over many years. With respect to the remaining 25% industrial permanent disability to the right knee, the orthopedic SPQME apportioned that to the cumulative trauma injury.

Lastly, with respect to the applicant's left knee permanent disability, the SPQME opined that 50% of the applicant's left knee disability was non-industrial and was apportionable to the naturally progressive organic condition of degenerative joint disease and chondromalacia of the patella as evidenced by the PQME's physical examination. The remaining 50% of the left knee permanent disability which was industrial was apportioned to the cumulative trauma injury under *Benson*.

Discussion: Applicant filed a Petition for Reconsideration contending that the orthopedic SPQME's failure to adequately explain the reasons for his apportionment determination, especially with respect to the previous 1972 non-industrial ski injury to the right knee as well as to the neck and low back. Applicant further argued that the PQME's apportionment determination was speculative and based upon guess work and therefore did not constitute substantial medical evidence. The WCAB denied applicant's Petition for Reconsideration and adopted and incorporated the WCJ's report and reconsideration in its entirety as their own.

The WCAB's Analysis: The Board did an extensive review of both Labor Code § 4663 and significant case law especially the California Supreme Court's decision in *Brodie v. WCAB* (2007) 40 Cal. 4th 1313, 72 Cal.Comp.Cases 565. The Board noted that Labor Code § 4663(a) *requires* apportion of permanent disability based on causation. With respect to the interpretation and application of Labor Code § 4663, the Board noted that the California Supreme Court in *Brodie* described Labor Code § 4663 as "the new regime of apportionment based on causation and enacted in Senate Bill 899 and effective on April 19, 2004. The Court noted under former section 4663 and case law interpreting the statute, apportionment based on causation, including pathology, was prohibited."

However, the Board held that in *Brodie*, the Supreme Court stated that "[t]he plain language of new sections 4663 and 4664 demonstrates they were intended to reverse these features of former sections 4663 and 4750" (citations omitted). More importantly, the California Supreme Court citing the Court of Appeals decision in *E.L. Yeager Construction v. WCAB* (2006) *(Gatten)* 145 Cal.App. 4th 922, 926-927, 71 Cal.Comp.Cases 1687 as well as *Escobedo v. Marshalls* (2005) 70 Cal.Comp.Cases 604, 617 (en banc) held that "new sections 4663, subdivision (a) and 4664, subdivision (a) eliminate the bar against apportionment based on pathology and asymptomatic causes." The Supreme Court in *Brodie* indicated that "[t]his explains the Legislature's purpose in adopting a revised section 4663 and a new section 4664."

Citing the California Supreme Court in *Brodie*, the Board indicated that "…under Senate Bill No. 899…., the new approach to apportionment is to look at the current disability and parcel out its causative sources-non-industrial, prior industrial, current industrial-and decide the amount directly caused by the current industrial source. This approach requires thorough consideration of past injuries not disregard of them." The WCAB in applying law to the facts of the instant case and based on the medical evidence, "shows there is a legal basis for apportionment under Labor Code § 4663." The Board indicated the applicant's contentions to the contrary were without merit.

In terms of substantial medical evidence, the Board noted that the PQME fully examined the applicant as well as taking a complete history of the injury and reviewed all of the prior medical records and diagnostic testing reports as well as the treating physician reports and a number of other hospital records. The PQME also reviewed extensive diagnostic studies.

The Board noted that in *Gatten, supra* the WCAB had erroneously rejected an IME's 20% non-industrial apportionment of Mr. Gatten's permanent disability due to chronic degenerative changes in the lumbar spine based upon an MRI. The WCAB noted that the Board's unapportioned award was determined to be erroneous and reversed by the Court of Appeal. The WCAB stated the Court of Appeal in *Gatten*:

> [R]eversed, and explained that the absence of a history of medical treatment or lost time due to an asymptomatic pre-existing condition does not necessarily preclude apportionment under the new apportionment standards. As noted above, the Supreme Court in *Brodie* cites with approval the appellate decision in *Gatten* and in analyzing the new apportionment as it applies post-SB 899.

The WCAB found the orthopedic SPQME's opinions on apportionment to constitute substantial medical evidence and denied applicant's Petition for Reconsideration. As a consequence, applicant received 7% permanent disability after apportionment related to the specific injury of May 19, 2015, and 10% permanent disability after apportionment related to the cumulative trauma injury.

Editor's Comments: This is a textbook example of a reporting SPQME who clearly understood the basic core legal concepts and principles of apportionment as reflected in numerous cases including *Brodie, Escobedo and Gatten.* As a consequence his medical-legal report constituted substantial evidence to support his opinion on apportionment. The WCJ in relying on the SPQME's opinion, also issued a lengthy, detailed and well reasoned analytical decision setting forth the mandates of apportionment under SB 899 and applicable case law and why the SPQME's opinion constituted substantial medical evidence.

Labor Code Section 4664

Hom v. City and County of San Francisco **2020 Cal.Wrk.Comp. P.D. LEXIS 124 (WCAB panel decision)**

Issues & Holding: The primary issue in this case is whether under the Court of Appeal's decision in *Kopping v. WCAB* (2006) 71 Cal.Comp.Cases 1229, defendant met their dual burden of proof under Labor Code §4664(b) to permit subtraction of applicant's prior 20% lumbar spine permanent disability award which was calculated using the DRE method under the AMA Guides from his current permanent disability level of 30% which was calculated using the ROM method in the AMA Guides pursuant to the 2005 permanent disability rating schedule.

The WCAB admitted their prior decision upholding an unapportioned award of 30% PD related to applicant's spine was in error (see, *Hom v. City and County of San Francisco 2018 Cal.Wrk.Comp. P.D. LEXIS 431*). In their new decision, the Board found that defendant did meet their dual burden in proving the existence of a prior award to the same body part and also overlap of applicant's current and previous lumbar spine disabilities. As a consequence, they rescinded their prior decision and issued a new decision that applicant's current lumbar spine injury caused compensable PD of 10% after subtraction under L.C. 4664(b) of 20% PD from a prior award from the stipulated current lumbar spine permanent disability of 30%.

Procedural Overview: The case has somewhat of a complex procedural history. The WCAB issued their initial decision upholding the WCJ's decision that applicant was entitled to an unapportioned award of 30% related to his lumbar spine PD. Defendant then filed a writ with the Court of Appeal contending the prior award of 20% PD related to applicant's lumbar spine should be subtracted from the overall 30% lumbar spine PD under L.C. 4664(b). While the writ was pending, the WCAB on its own motion granted reconsideration of its own decision to study legal and factual issues in light of the arguments made by defendant in its Petition for Writ of Review.

Factual Overview: The applicant, a San Francisco Police Officer suffered a specific lumbar spine injury on July 29, 2012. That case settled pursuant to Stipulations with Request for Award in the amount of 20% permanent total disability. The date of the award was July 2, 2013. The lumbar spine disability in that case was determined by a primary treating physician who used the DRE metric of the AMA Guides to determine WPI. The applicant suffered a subsequent admitted injury to his lumbar spine on November 16, 2013. With respect to the November 16, 2013 injury, the reporting physician was an AME. In evaluating the applicant's lumbar spine disability related to the November 16, 2013 injury, the AME used the AMA Guides, but used the ROM method, as opposed to the DRE method to rate applicant's WPI. After adjustment for age

and occupation the final rating for applicant's lumbar spine injury of November 16, 2013 was 30%. The AME opined that there appeared to be a basis for apportionment under L.C. 4664(b).

Discussion: Under Labor Code §4664(b) and the Court of Appeal's decision in *Kopping*, the defendant's dual burden consists of proving that a prior award to the same body part exists, which they were able to do in this case. With respect to the second component of applicant's burden of proof under Labor Code §4664(b), a defendant must also prove there is "overlap" of permanent disability between both the initial and subsequent injury.

Citing Section 2.5h of the AMA Guides as well as the opinion of the AME, the Board stated that their prior decision was in error since "[o]verlap between injuries in not precluded merely because different AMA Guides methodologies were utilized in formulating whole person impairment." In this case the second injury to applicant's lumbar spine on November 16, 2013, was a recurrent injury and in such situations the AMA Guides direct a different rating methodology for the subsequent injury. The same edition of the AMA Guides, the Fifth Edition was used for both dates of injury so there was no need to "convert" the ratings as is required when different editions of the Guides apply to each date of injury.

The mere fact that different lumbar spine methodologies (DRE and ROM) under the same Edition of the AMA Guides were used to assess applicant's lumbar spine impairment from the first and subsequent lumbar spine injuries did not preclude overlap of the prior lumbar spine disability and the subsequent lumbar spine disability.

With respect to applicant obtaining credit for the prior 20% lumbar spine PD award under L.C.4664(b), the Board stated that pursuant to *Kopping, supra*:

> Here, the first prong is met as the parties stipulated to a prior Award of permanent disability of 20% to the lumbar spine. We find that defendant also proved overlap since the AMA Guides do not preclude a finding of overlap even though different ratings methodologies are used (AMA Guides, § 2.5h, *supra*) and, by stating that section 4664 apportionment was appropriate, AME Dr. Pang necessarily opined that overlap existed. Additionally, as argued in defendant's Petition for Writ of Review, the finding of overlap is especially merited in this case, where the Guides direct a different ratings method for the subsequent injury by virtue of it being a recurrent injury.

Milazzo v. State of California, Department of Fish and Wildlife **2019 Cal.Wrk.Comp. P.D. LEXIS 354 (WCAB split panel decision)**

Issues & Holding: WCAB in split panel decision affirmed a WCJ's award of 14% permanent disability related to a July 23, 2013 specific right shoulder injury where the applicant had right shoulder surgery. Both the WCJ and WCAB rejected defendant's argument that there was a basis for apportionment under 4664(b) of 6% WPI related to a prior right shoulder specific injury of March 22, 2003 where applicant had the same surgical procedure he had related to the later July 23, 2013 specific right shoulder injury. There was a prior stipulated award dated January 20, 2005 of 0% PD related to the first March 22, 2003 specific right shoulder injury. The July 23, 2013 specific injury was rated under the AMA Guides 5th Edition and the March 22, 2003 specific right shoulder surgery was rated under the 1997 PDRS.

On Reconsideration defendant also claimed a dollar credit of $4,400.00 for a PD overpayment based on a joint stipulation that was part of the February 3, 2005 stipulated award against the PD awarded to applicant related to the July 23, 2013 specific right shoulder injury that was denied by the WCJ. On the credit issue the WCAB rescinded the WCJ's denial of defendant's claim for a credit for further proceedings consistent with Labor Code 4909 and related case law.

Factual Overview and Discussion: Applicant first suffered an admitted right shoulder injury on March 22, 2003. He had right shoulder surgery consisting of a Mumford procedure. The treating physician in his P&S report indicated applicant had full range of motion and no objective factors of disability and could return to work without restrictions. The DEU rating found no ratable factors of disability under the 1997 PDRS. With respect to the March 22, 2003 right shoulder injury, the case was resolved by a stipulated Award of 0% PD on January 20, 2005. The stipulated Award also reflected a joint stipulation that defendant could assert a credit of $4,400.00 against permanent disability benefits owed to applicant due to an injury to "any body part' in the future.

A little over ten years later, applicant suffered another right shoulder injury on July 23, 2013, and had exactly the same right shoulder surgery including a Mumford procedure. The evaluating PQME for the July 23, 2013 right shoulder injury indicated the applicant had 6% WPI based on the AMA Guides. With respect to apportionment the SPQME opined that all of applicant's 6% WPI was attributable to the earlier March 22, 2003 right shoulder injury and related surgery that pre-existed the July 23, 2013 right shoulder injury and related surgery and therefore there was no WPI attributable to the 2013 right shoulder injury.

The WCJ rejected the SPQME's apportionment opinion and found that applicant's PD following the July 23, 2013 injury and surgery was 14% after adjustment for age and occupation with no apportionment of PD to the March 22, 2013 right shoulder injury primarily based on the prior

stipulated Award of 0% and section 4664(b) that it should be conclusively presumed that applicant had 0% preexisting disability. The WCJ also denied defendant's assertion of a $4,400.00 credit for permanent disability payments related to applicant's March 23, 2003 injury.

Defendant filed a Petition for Reconsideration arguing that all of applicant's PD should be apportioned to the 2003 injury and none to the 2013 injury and that they were entitled to the credit. The WCAB affirmed the WCJ's finding of 14% PD attributable solely to the 2013 injury without apportionment to the 2003 right shoulder injury. Citing both *Brodie* and *Benson*, the WCAB stated "Here, defendant has not carried its burden of proving that any portion of applicant's post-July 23, 2013 right shoulder and bicep injury permanent disability was *caused*, in whole or in part, by his prior March 22, 2003 right shoulder injury." The WCAB also cited *Kopping v. Workers' Comp. Appeals Bd.* (2006) 142 Cal.App.4th 1099, [71 Cal.Comp.Cases 1229], with respect to no overlapping disabilities under the facts and circumstances of this case:

> Moreover, although *Kopping, supra*, establishes that apportionment of overlapping permanent disabilities is permissible under some circumstances, there is no overlap under the particular circumstances of this case because each of applicant's Mumford procedures is *independently ratable* under the AMA Guides. Again, under the Guides, any Mumford procedure, in and of itself, warrants 6% WPI, whether or not the applicant had any prior Mumford procedure. Therefore, under *Kopping*, the 6% WPI arising from applicant's Mumford procedure after his July 23, 2013 right shoulder injury does not overlap and is not attributable to his prior March 22, 2003 right shoulder injury.

The Credit Issue: The WCJ did not allow credit for the $4,400.00 in PDA's defendant advanced in the 2003 right shoulder injury notwithstanding the express joint stipulation language in the Stipulated Award issued on January 20, 2005. The WCJ said the credit was not enforceable and void on its face. The WCAB disagreed with the WCJ's reasoning and conclusion that the prior stipulation related to the credit was void and unenforceable but also indicating that even with the joint stipulation related to the credit in the prior Award, the credit was not "automatic."

In rescinding the WCJ's denial of the credit and remanding this issue back to the WCJ, the WCAB stated the WCJ in assessing whether to allow or deny the credit should be guided and determined under Labor Code section 4909, related case law, and applicable equitable principles. "In remanding to the WCJ, we observe that because the issue of credit involves an assessment of the equities and of whether or not a credit would be disruptive, there is no absolute standard for determining whether a credit for overpayments of disability benefits in one case may be allowed against a defendant's liability in a different case." (citations omitted).

Ojoko v. State of California, Department of State Hospitals/Patton, State Compensation Insurance Fund **2019 Cal.Wrk.Comp. P.D. LEXIS 319 (WCAB panel decision)**

Issues & Holding: Whether defendant in the current cumulative trauma case involving an Award of 27% psychiatric permanent disability was to receive a total dollar value credit versus a subtraction of the percentage of permanent disability from the current award of 27% based on two prior separate Stipulated Findings and Awards of 1% and 19% permanent disability that were final and not subject to being reopened. The WCJ found that defendant was entitled to receive a total dollar value credit related to the two prior psychiatric PD awards of 1% ($690.00) and 19% ($13,782.75) to be applied against the current psychiatric PD award of 27% ($32,697.50) and less an additional credit for $7,084.29 in PD advances made in the current case.

The WCAB **reversed** the WCJ and held that with respect to the current CT Award of 27%, defendant was entitled to a credit based on subtracting the percentages of 1% PD and 19% PD related to the two prior final non-reopened separate psychiatric PD Stipulated Findings and Awards dated December 15, 2010, and not the dollar value of the previous awards. As a consequence applicant was awarded 7% PD ($6,090.00) with defendant to also receive credit of $7,084.29 for permanent disability advances resulting in no accrued on unpaid PD indemnity owed to the applicant.

Factual Overview & Analysis: Applicant was employed as a registered nurse by defendant. Her employment and medical history indicated she was assigned to high violence units or wards. The current injury that was found compensable by the WCJ was a cumulative trauma for the period of January 1, 2011 through January 5, 2015. The WCJ awarded the applicant 27% PD based upon medical reporting diagnosing applicant with PTSD, anxiety, and depression and after nonindustrial apportionment of 20% related to applicant's nonindustrial health problems (diabetes and hypertension) as well as outside stressors (being separated from her family, financial problems, and a pending civil lawsuit). Applicant suffered two prior specific injuries on July 23, 2006 and December 27, 2006 for which she received separate stipulated Awards of 1% and 19% related to psychiatric permanent disability. Both Awards were final and never reopened. There was no apportionment of the 27% PD to the current CT to any other injuries based on the reporting of the psychiatric SPQME. Also the WCAB noted that Benson apportionment was not strictly applicable since in Benson the applicant suffered two successive industrial injuries, neither of which as in the instant case, had been the subject of a final award. (see footnote 12).

The Credit Issue: In reversing the WCJ's erroneous use of a credit methodology based on a dollars value versus a subtraction of the percentages of the prior PD of 1% and 19% awarded to applicant related to the two prior Stipulated Awards, the WCAB quoted extensively from the

California Supreme Court's decision in *Brodie v. WCAB* (2007) 40 Cal. 4th 1313, 72 Cal.Comp.Cases 565 as well as the Court of Appeals decision in *Kopping v. Workers' Comp. Appeals Bd.* (2006) 142 Cal.App.4th 1099, [71 Cal.Comp.Cases 1229]. With respect to *Brodie* the WCAB stated:

> *Brodie* held that where there are two or more separate injuries to the same body part, one or more of which is the subject of a final permanent disability award that has not been reopened (as here), the pre-SB 899 method of calculating benefits in multiple injury cases described in *Fuentes* was not changed by the by the new apportionment "regime" enacted by the Legislature as part of SB 899 and the old *Fuentes* formula (i.e., Formula A) remains the correct one to apply in apportioning compensation between causes of disability." (*Brodie, supra,* 40 Cal.4th at p.1317.) Therefore under *Brodie* and Formula A of *Fuentes,* the percentage of disability attributable to the new injury is calculated by subtracting the final permanent disability rating(s) for the prior injury or injuries from the new permanent disability rating and then consulting the table for the award due this difference. (*Brodie, supra,* 40 Cal.4th at pp. 1321-1322; *Fuentes, supra,* 16 Cal.3d at p. 5.)

The WCAB indicated that the WCJ methodology of deducting the total dollar value of the applicant's two prior PD awards for the psychiatric components of the two prior specific injuries was erroneous and inconsistent with the Supreme Court's decision in *Brodie.* "This approach by the WCJ was essentially an erroneous application of Formula C of *Fuentes,* which was rejected by the Supreme Court in *Brodie*." (citations omitted).

With respect to the Court of Appeals decision in Kopping and the application of Labor Code 4664(b), the WCAB stated:

> Under section 4664(b) and *Kopping,* these prior awards of 19% and 1% psychiatric permanent disability, respectively, are conclusively presumed to still exist. (Lab. Code, 4664(b); *Kopping, supra*, 142 Cal.App.4th at p. 1106.) Therefore, as discussed above, *Brodie* and *Fuentes* Formula A mandate that these pre-existing, unreopened 19% and 1% psychiatric permanent disability findings……must be subtracted from applicant's undisputed current overall industrial psychiatric disability of 27%. Accordingly, the WCJ should have found that applicant's new psychiatric injury in Case No. ADJ9962832 caused 7% permanent disability.

The WCAB also held that the defendant failed to meet their burden with respect to establishing a basis for apportioning applicant's remaining 7% permanent disability since that was "…..taken

care of by the subtraction of applicant's final and unreopened 19% and 1% psychiatric permanent disability findings in those cases from her current overall industrial psychiatric disability of 27% in accordance with *Brodie* and *Fuentes* Formula A."

Also since there was no accrued and unpaid PD indemnity payable to applicant there was an additional issue since there was nothing unpaid to the applicant from which to deduct a reasonable attorney's fee. The WCAB held that defendant was still liable to pay applicant's attorney a reasonable attorney's fee in the amount of $913.50 for two reasons. First, "……it has long been settled that an attorney's appearance in a matter is tantamount to the filing of a lien claim and puts the defendant on notice that a fee will be claimed." (citations omitted). In addition, "[w]here a defendant pays out all indemnity, without withholding any monies for a reasonable attorney's fee, the defendant may become directly liable to the applicant's attorney for the fee." (citations omitted).

Editor's Comment: **A**nother recent case on this same 4664 (b) *Kopping*, *Brodie* and *Fuentes* issue, is *Pappas v. County of Santa Barbara, PSI* 2019 Cal.Wrk.Comp. P.D. LEXIS 249 (WCAB panel decision). WCAB reversed and rescinded a WCJ's unapportioned award of 80% PD related to applicant's cervical spine disability. The WCJ did however give defendant credit for the dollar value of the applicant's prior 48% PD award in the amount of $56,540.00. WCAB in rescinding the WCJ's award and dollar credit for the prior award of 48%, instead the WCAB awarded applicant 32% cervical spine PD after apportionment of 48% to the prior award and instead of a dollar credit and applied the *Brodie* and *Fuentes* Formula A methodology holding that the 48% cervical spine PD percentage applicant received by virtue of the prior award must be subtracted from applicant's overall 80% PD in the current case regardless of whether or not any of applicant's 32% remaining PD should also be apportioned.

Jordan v. California Department of Corrections, et al. **2018 Cal. Wrk. Comp. P.D. LEXIS 243 (WCAB Panel Decision)**

Issues: Whether the WCJ's award of 162% permanent disability consisting of 100% permanent total disability for a cumulative trauma, where all of the 100% permanent disability was attributable to the applicant's heart condition and an additional 62% permanent disability award for two specific injuries, constituted a violation of Labor Code §4664(c)(1), which prohibits the accumulation all lifetime permanent disability with respect to any statutorily defined "region of the body" from exceeding 100%.

Holding: The WCAB in granting defendant's Petition for Reconsideration agreed that the WCJ's award of 100% permanent total disability on the cumulative trauma injury and 62% permanent disability on the specific injuries, technically violated Labor Code §4664(c)(1), but only in the amount of permanent disability the applicant was to receive on the specific injury. As a consequence, the WCAB awarded applicant 100% permanent total disability on the cumulative

trauma heart case and reduced the applicant's 62% award on the specific injury case to 60%. The applicant still received two awards of 100% and 60%.

Factual & Procedural Overview: Applicant a Correctional Officer suffered three injuries, including a cumulative trauma ending on March 18, 2013, and also specific injuries on March 2, 2009 and October 27, 2010. With respect to the cumulative trauma injury, the WCJ awarded applicant 100% permanent total disability with all permanent disability related to the heart.

With respect to the two specific injuries, the WCJ awarded the applicant 62% permanent disability and the applicant sustained the same injuries to various body parts and conditions including lumbar and cervical spine, left knee, psyche, and in the forms of headaches, and cognitive disorder.

Defendant filed a Petition for Reconsideration arguing that the two awards of permanent disability violated Labor Code §4664(c)(1), which prohibits the accumulation of all lifetime permanent disability with respect to any statutorily defined "region of the body" from exceeding 100%.

Defendant argued that Labor Code §4664(c)(1)(G) lists the "head" and "face" as part of the same "region of the body" as the "cardiovascular system." As a consequence defendant argued that the cognitive disability and the headache disability caused by applicant's head injury cannot be awarded in addition to the 100% heart disability because the 100% limit for that region of the body would be exceeded.

Defendant argued that in order to remedy the violation of Labor Code §4664(c)(1), applicant should receive the full 62% permanent disability award with respect to the specific injuries, but 28% should be deducted related to the combined headache and cognitive disabilities from the cumulative trauma case where the applicant received 100% permanent total disability. Defendant argued the applicant should receive two awards of 72% permanent disability and 62% permanent disability as opposed to 100% permanent total disability and 62% permanent disability.

Whether Applicant's Cognitive Disability is Properly Characterized as a Mental & Behavioral Disorder falling under subsection (c)(1)(C) rather than "head" disability that would fall under subsection (c)(1)(G). The WCAB agreed with the WCJ and applicant that based on the reporting of the medical evaluator in neuropsychology that under the AMA Guides the applicant's "cognitive disorder" impairment came under the "mental status, cognition, and Highest Integrative Function" section of the AMA Guides. The neuropsychologist rated applicant's impairment as "15% impairment due to mental status." This led the WCAB to conclude that "it is thus clear to us that this is mental disorder, and the 24% permanent disability awarded for this mental disorder does not count towards the 100% aggregate limit for disabilities to the "head", "face" and "cardiovascular system."

Applicant's headaches: The WCAB indicated defendant was correct and that with respect to headaches, as it refers to physical pain in a person's head, would constitute a disability that would fall under subsection (c)(1)(G), and therefore, making an award that includes headache permanent disability in addition to the 100% award for heart/cardiovascular disability would be a violation of the 100% limitation set forth in subsection 4664 (c)(1)(G).

The WCAB's methodology in not reducing applicant's 100% permanent total disability award and reducing the specific injury award from 62% to 60%: Based on a combination of what appears to be policy and Labor Code §3202 which indicates that for "the purpose of extending benefits for the protection of persons injured in the course of their employment" the WCAB refused to subtract any percentage from the applicant's 100% permanent disability award in the cumulative trauma case.

As an additional reason for not reducing the applicant's 100% permanent disability award, the WCAB noted the applicant's heart disability in the cumulative trauma case became permanent and stationary eight months before the applicant's injury in the specific injury case that occurred on October 27, 2010. The Board indicated it was just happenstance that the permanent disability for the cumulative trauma and the specific injury was awarded at the same time, and that in reality the applicant was entitled to a separate award of 100% permanent disability in the cumulative trauma claim before his entitlement to the 60% permanent disability in the specific injury case of October 27, 2010. "Had applicant brought ADJ8844526 (cumulative trauma claim) to trial as soon as applicant had achieved permanent and stationary status, applicant would have received a permanent total award in that case, uncomplicated by any Labor Code §4664(c)(1) issues."

Therefore, the WCAB awarded applicant 100% permanent total disability in the cumulative trauma claim related to his heart and reduced the 62% permanent disability awarded by the WCJ to 60% in the specific injury case of October 27, 2010 in ADJ7523422.

Range of Evidence

Viray v. Pacific Gas & Electric **2017 Cal.Wrk.Comp. P.D. LEXIS 400 (WCAB panel decision)**

Issue: Whether a WCJ has the authority to make an apportionment determination and finding based upon a "range of the medical evidence" that conflicts with different apportionment determinations made by multiple reporting physicians in different medical specialties.

Holding: If the apportionment opinions and determinations of multiple reporting physicians in different specialty areas constitute substantial medical evidence, a WCJ does not have the authority to make a different apportionment determination based on a "range of the medical evidence."

Procedural and Factual Overview and Discussion: Applicant was employed by defendant as a field clerk who suffered an admitted cumulative trauma injury related to his cervical spine, lumbar spine, and psyche for the period of March 1, 2010 through March 1, 2011. The reporting physicians consisted of an AME in psychiatry and a Panel QME in orthopedics. In terms of impairment, the AME in psychiatry determined applicant's psychiatric disability was 70% industrial and 30% nonindustrial. The psychiatric nonindustrial apportionment was based on applicant's nonindustrial vision loss and the effect of his family's relocation to the Philippines. With respect to applicant's orthopedic disability, the Panel QME in orthopedics concluded that applicant's lumbar spine injury and related disability was not subject to apportionment. However, with respect to the applicant's cervical spine disability, the orthopedic QME determined that 80% was industrial and 20% related to the applicant's prior industrial injury to his upper extremities. The WCJ found that the report and opinions of both physicians constituted substantial medical evidence.

However, notwithstanding the fact the medical reports from the AME in psychiatry and the orthopedic QME constituted substantial medical evidence, the WCJ rejected the physician's permanent disability ratings including apportionment. In essence, the WCJ concluded applicant had rebutted the scheduled rating found by both reporting physicians and applicant's admitted cumulative trauma injury caused permanent total disability in "accordance with the fact pursuant to Labor Code §4662(b)."

With respect to apportionment, the WCJ indicated applicant's 100% permanent disability was subject to apportionment, but rather than applying the apportionment determinations of the respective reporting physicians, the judge without citation to any authority, concluded he had the authority to apportion according to the "range of evidence."

The WCJ's apportionment determination was based on a split between the apportionment determinations made by the two physicians, which resulted in 75% of applicant's permanent disability being industrial related to the cumulative trauma and 25% nonindustrial related to preexisting factors.

Applicant's counsel filed a Petition for Reconsideration contending the medical and vocational evidence supported a finding of 100% permanent total disability without apportionment. Applicant's counsel also alleged defendant failed to prove up apportionment pursuant to either Labor Code §§4663 or 4664. The WCAB granted reconsideration and rescinded the Findings of Fact and Award and returned the matter to the trial level to correct the record both procedurally and substantively.

In rescinding the WCJ's award of 75% industrial and 25% nonindustrial, the Board stated as follows:

> The WCJ does not cite to the source of his authority to apportion based upon a "range of evidence" that supersedes the findings of the AME and QME. Labor Code section 4663 requires that an apportionment determination be made by the reporting physicians, not a WCJ, and it is the responsibility of each medical evaluator to parcel out apportionment for the body parts within his area of expertise.

The WCAB noted that each of the reporting physicians in their respective specialties had considered different nonindustrial contributing causal factors of the permanent disability in their respective specialty fields. The Board also noted that, "It is incongruous to find the basis for apportionment of the psyche disability to be readily compared to the basis for apportionment of the neck disability especially where there is no connection between the non-industrial and pre-existing factors of disability. The "range of evidence" cannot be used to determine apportionment between reports addressing different body parts."

In remanding the case back to the trial level the Board indicated that the best approach would be for the WCJ to prepare formal rating instructions and obtain an expert rating from the DEU for a formal rating consistent with the medical reporting of the respective reporting physicians. The WCAB also noted that contrary to applicant's attorney's contention and argument the judge did not apply apportionment pursuant to Labor Code §4664 related to a prior award. Apportionment was only based on Labor Code §4663.

Discovery

Nadey v. Pleasant Valley State Prison, PSI and administered by State Compensation Insurance Fund **(2017) 2017 Cal.Wrk.Comp. P.D. LEXIS 446 (WCAB panel decision)**

Issues: Pursuant to Labor Code §4663(d), must an employee who claims an industrial injury disclose all previous permanent disabilities or physical impairments upon request by defendant without the necessity of formal discovery by way of a deposition.

Holding: The WCAB on removal reversed the WCJ and held the express language of Labor Code §4663(d) requires an employee who claims an industrial injury shall disclose all previous permanent disabilities or physical impairments upon request of the defendant without the necessity of formal discovery by way of a deposition. The WCAB noted there is no requirement for a defendant to formally depose an applicant if a defendant wishes to obtain information about applicant's prior disabilities or impairments. The WCAB indicated it made little sense that the disclosures required under Labor Code §4663(d) be accomplished via the more costly and time consuming method of taking applicant's deposition.

Factual Overview and Discussion: On March 18, 2015, applicant, a nurse, submitted a DWC-1 claim form to defendant employer alleging a right shoulder injury that occurred on November 11, 2014. Shortly thereafter on March 30, 2015, the defendant sent a letter to the applicant which stated, "Pursuant to Labor Code §4663(d), we hereby request disclosure of ALL permanent disabilities or physical impairments that existed prior to the injury." Defendant sent a second letter on the same day requesting the applicant list all medical treatments applicant had received during the last ten years and that the applicant sign the enclosed medical release form and return the form and medical releases to defendant within ten days. Applicant was unrepresented at the time the letters were mailed and received and did not respond.

Applicant became represented on or about May 7, 2015, and filed an Application for Adjudication alleging injuries to her bilateral shoulders and lower extremities. Almost two years after applicant became represented, defendant on February 3, 2017, sent applicant's counsel what appeared to be an identical version of the second letter sent to the applicant on March 30, 2015, requesting a list of all of her prior medical treatment and medical releases. Defendant then resent the same letter to applicant's counsel on March 16, 2017. Applicant's counsel did not respond. On April 18, 2017, defendant filed a Motion to Compel applicant to respond to both the initial March 30, 2015, request for disclosure of permanent disabilities or permanent impairments and also the request for information on medical treatment received during the last ten years, sent in 2015 and twice in 2017.

On April 26, 2017, the WCJ denied defendant's Motion to Compel. The basis for the denial by the WCJ was that, "Defendants have other avenues of discovery available short of an Order Compelling." Defendant then filed a Petition for Removal, which was granted by the WCAB, holding that disclosure of the applicant's prior permanent disabilities or physical impairments should be ordered pursuant to Labor Code §4663(d).

The WCAB's Decision: The WCAB noted the express language of Labor Code §4663(d), which states: "An employee who claims an industrial injury shall, upon request, disclose all previous permanent disabilities or physical impairments."

The WCAB was careful to distinguish the two letters that were sent to applicant and later to applicant's counsel. The initial letter to the applicant on March 30, 2015, essentially tracked the requirements of Labor Code §4663(d). However, the March 30, 2015, letters re-sent twice in 2017, did not fall under Labor Code §4663(d) or any other statute and sought past medical treatment received by the applicant over the previous ten years. In that regard, the Board stated, "We observe that these requests for disclosure of past medical treatment were not pursuant to Labor Code §4663(d).

Focusing solely on the express language of Labor Code §4663(d), the Board indicated that, "…to the extent that the Motion to Compel seeks disclosure of previous permanent disabilities or physical impairments…, we believe the WCJ erred in denying the motion." The WCAB rejected the WCJ's reasoning and rationale in the Report on Reconsideration that suggested defendant should be required to depose the applicant if defendant wished to obtain information about applicant's prior disability.

The Board held there is no support for this contention of a required deposition in the language of §4663(d). The WCAB noted that §4663(d), "…states clearly and unequivocally that applicant "shall" disclose such information "upon request." Moreover, the WCAB indicated if the Legislature intended that information related to the applicant's prior permanent disabilities and permanent impairments was only discoverable at a deposition it would not have worded the statute in the manner that it did.

The WCAB did note there were some essential defects in defendant's Petition to Compel based on the fact it did not include a specific timeframe for response nor did it mandate any particular method of response. Therefore, the Board remanded the case back to the trial level for further proceedings.

Editor's Comment: In terms of suggested litigation and practice pointers with respect to this issue, there appears to be three primary issues.

First, as the WCAB noted, there was no statute or regulation cited by defendant related to their request for the applicant to informally disclose without a deposition the medical treatment she had received during the ten years preceding the date she filed her DWC-1 claim form and later Application for Adjudication.

Second, there was an issue not addressed by the WCAB which no doubt will be the focus of future litigation related to §4663(d); that being the applicant's duty to disclose prior permanent disabilities or impairments versus medical privacy. The wording of Labor Code §4663(d) does not limit applicant's duty to disclose prior permanent disabilities or prior permanent impairments to just the body parts and conditions at issue as set forth in either a DWC-1 claim form or Application for Adjudication. The literal and express wording of §4663(d) would appear to mandate disclosure over all permanent disabilities or permanent impairments related to any and all body parts and conditions, not just those related to the body parts and conditions the applicant has put at issue in the case. This sets up a direct conflict with statutes and case law related to medical privacy, which suggests that appropriate discovery in workers' compensation cases is limited to body parts and conditions placed at issue by the employee when filing a claim. (*Britt v. Superior Court* (1978) 20 Cal.3d 844, 15 Cal.Rptr. 90; and (*Allison v. Workers' Comp. Appeals Bd.* (1999) 72 Cal.App.4th 654, 64 Cal.Comp.Cases 624).

Third, with respect to a defendant's request by letter or petition or Motion to Compel under Labor Code §4663(d) that applicant disclose all prior permanent disabilities and physical impairments, defendant should specify an exact timeframe for applicant to respond and also specify the method of response, i.e. in writing, etc. The defendant in *Nadey* failed to do this, which required the remand from the WCAB.