

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, based on Labor Code 4663, apportionment should focus on the pathology itself and not the etiology of 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 etiology of the cochlear degeneration but on the pathology itself assessed by diagnostic testing as to severity of the hearing loss and causal components related to this worker at a particular 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 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, 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 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.

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 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 and not the percentage the underlying genetics caused the pathology itself.
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 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.