California: A Critical Assessment of "Vocational Apportionment"

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Introduction.

It is important at the outset to acknowledge that the use of vocational evidence in the workers' compensation system is essential in determining permanent disability, consideration being given to an employee's diminished future earning capacity. (see Labor Code §4660 and Cal. Code Regs §10865, "Vocational Experts' Reports as Evidence").

A vocational expert is also tasked with assessing based on both medical and vocational evidence whether an applicant's diminished future earning capacity is attributable solely to an industrial injury or injuries or whether applicant's inability to compete in the open labor market or to participate in or benefit from vocational rehabilitation may also be attributable to nonindustrial contributing causal factors.

The purpose of this article is to critically assess the recently formulated concept and theory of "vocational apportionment" and to hopefully clarify under what limited circumstances it may serve as a valid basis or method to rebut a scheduled rating. Vocational apportionment is one form or subcategory of vocational evidence. Closely associated with vocational apportionment is "vocational disability" since it makes no sense to have vocational apportionment without corresponding vocational disability.

What needs to be addressed in greater depth is the issue of how vocational apportionment interfaces and interacts with substantial medical evidence of apportionment pursuant to Labor Code sections 4663 and 4664. The leading case related to the interaction of vocational evidence and medical evidence of apportionment is 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.

Based on the Court of Appeals decision in *Acme,* vocational apportionment should only be applicable in situations where there is no substantial medical evidence of apportionment.

As will be discussed in detail hereinafter, vocational apportionment should be strictly limited in application if there is substantial medical evidence of valid apportionment based on Labor Code sections 4663 and 4664 and applicable case law. Based on *Acme*, if there is substantial medical evidence of apportionment, it must not only be "considered" but also "applied" by vocational experts, WCJ's, and the Board in determining whether an applicant's current inability to compete in the open labor market and to participate in or benefit from vocational rehabilitation and any related loss of earning capacity is attributable to nonindustrial contributing causal factors.

If there is substantial evidence of medical apportionment it must be applied even in cases where there is also substantial vocational evidence that the applicant has rebutted the scheduled rating and has established a total loss of earning capacity or where vocational evidence combined with substantial medical evidence reflect that an applicant is permanently totally disabled but there is also substantial medical evidence of apportionment of applicant's permanent total disability. (see *Acme Steel v. Workers' Comp. Appeals Bd., (Borman)* (2013) 218 Cal.App.4th 1137, 78 Cal.Comp.Cases 751; see also, *City of Petaluma v. Workers' Comp. Appeals Bd. (Lindh)* (2018) 29 Cal.App.5th 1175, 83 Cal.Comp.Cases 1869, *County of Santa Clara v. Workers' Comp. Appeals Bd. (Justice)* (2020) 49 Cal.App.5th 605, *Winn v. O.G. Packing Company,* 2020 Cal. Wrk. Comp. P.D. LEXIS 160 (WCAB panel decision), *Nooner v. Workers' Comp. Appeals Bd.* (2009) 74 Cal.Comp.Cases 300 (writ denied).

Based on applicable case law, vocational apportionment cannot negate or nullify substantial medical evidence of apportionment and should **only** apply in limited circumstances where there is no substantial medical evidence of apportionment. In cases where there is no substantial medical evidence of apportionment, a vocational expert consistent with *Dahl, Ogilvie, and LeBoeuf* can use the concept of "vocational apportionment" or any other substantial vocational evidence to rebut a scheduled rating in determining whether all of the contributing causal factors related to applicant's loss of earning capacity based on an inability to compete in the open labor market can be apportioned on a vocational basis solely to industrial factors or whether there are nonindustrial vocational contributing causal factors related to an applicant's "vocational disability."

A good example is the recent case of *Brazil v. San Mateo County Transit District,* 2020 Cal.Wrk.Comp. P.D. LEXIS 400. In *Brazil* there was no substantial medical evidence of apportionment. On Reconsideration the WCAB affirmed an unapportioned award of permanent total disability based on a combination of medical and vocational evidence that the applicant was unable to participate in vocational rehabilitation solely due to her industrial injuries based on *Ogilvie, LeBoeuf, and Dahl*. However, the WCAB also indicated that if there had been substantial medical evidence under *Escobedo* to support apportionment, applicant's 100% permanent disability would be subject to reduction citing the Court of Appeal's decision in *Acme.*

The concept of vocational apportionment is complex.

It is not an overstatement to say that trying to explain the concept of vocational apportionment and its interaction with medical apportionment under Labor Code sections 4663 and 4664 is complex and challenging. For example, the recent case of *Bagobri v. AC Transit, PSI,* 2019 Cal.Wrk.Comp. P.D. LEXIS 384 (WCAB panel decision) is an eighteen-page decision dealing with the concept and application of vocational apportionment in a case where applicant was found to be permanently totally disabled and there was no substantial medical evidence of apportionment.

In *Bagobri* the WCJ relied on a vocational expert's opinion based on "vocational apportionment" and the purported dichotomy between a permanent disability rating

premised on work restrictions caused by the injury versus impairment. The WCJ found the medical evidence of apportionment did not constitute substantial evidence based on the *Hikida* decision.

With respect to *Bargobri* it is worth noting that in the WCJ's report on reconsideration that was adopted and incorporated by the WCAB there are two fundamentally flawed conclusions. First, based on "a corollary of the no-fault principles of worker's compensation is that an employer takes the employee as he finds him at the time of the employment." While this principle may be true with respect to AOE/COE determinations, it is totally inapplicable to causation of permanent disability subsequent to the enactment of SB 899 as reflected in Labor Code sections 4663 and 4664.

"For the purpose of determination of the causation of injury, employers take employees as they find them, including their pre-existing conditions. However, with respect to causation of disability from the aggravation of pre-existing conditions, it is anticipated that employers will be entitled to apportionment." (*Demond Person v. California Dept. of Corrections and Rehabilitation,* 2019 Cal.Wrk.Comp. P.D. LEXIS 389 (WCAB panel decision), citing *Reyes v. Hart Plastering* (2005) 70 Cal.Comp.Cases 223 (WCAB significant panel decision); see also *City of Petaluma v. Workers' Comp. Appeals Bd. (Lindh)* 29 Cal.App.5th 1175, 1193-1195 (No merit to applicant's claim that there can be no apportionment to a condition that caused no disability prior to the work-related injury. By definition, an asymptomatic preexisting condition has not manifested itself and, thus, by definition as not caused a prior disability); *E.L. Yeager Construction v. Workers' Comp. Appeals Bd.* (2006) 145 Cal.App.4th 922, 929 (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.)

Second, the WCJ in his report on reconsideration seemingly found persuasive the argument that there can be no apportionment of permanent disability related to work restrictions. However, apportionment pursuant to sections 4663 and 4664 relate to causation of all permeant disability no matter how it is measured or calculated. In fact,

there can be valid apportionment based on preexisting prophylactic work restrictions! In *Adamson v. Cendant Mobility, PSI,* 2009 Cal.Wrk.Comp. P.D. LEXIS 110 (WCAB panel decision) the Board cited to its en banc decision in *Escobedo:*

> In *Escobedo v. Marshalls* (2005) 70 Cal. Comp. Cases 604 [Appeals Board en banc]….. the Board held that because the language of section 4663 does not limit the types of "other factors" that may be considered as a non-industrial cause of permanent disability, then the "other factors" may include disability that was apportionable prior to SB 899, i.e., the natural progression of a non-industrial condition or disease, a preexisting disability, or a post-injury disabling event. In addition, the "other factors" now may include *pathology, asymptomatic prior conditions*, and retroactive prophylactic work preclusions, provided there is substantial medical evidence establishing that these other factors have *caused permanent disability.* (original emphasis).

Vocational apportionment is inconsistent with and antithetical to apportionment under Labor Code Sections 4663 and 4664.

Proponents of vocational apportionment characterize it an entirely different concept than medical apportionment. However, vocational apportionment is not just a different concept than medical apportionment. In both theory and application, it is totally inconsistent and antithetical to the legal principles of apportionment based on Labor Code sections 4663 and 4664 as enacted by SB899 and applicable controlling case law. Vocational apportionment is really a misnomer. A more apt descriptive should be "vocational non-apportionment" since there appears to be no reported case where an applicant's vocational expert has found any vocational apportionment based on nonindustrial contributing causal factors of an applicant's alleged vocational disability.

As will be discussed in detail hereinafter, unlike medical apportionment that is based on Labor Code sections 4663 and 4664, the concept of vocational apportionment and vocational disability are recently created subcategories of vocational evidence. Both are premised in large part on language found in the AMA Guides. In addition to the AMA Guides, proponents of vocational apportionment repeatedly cite as supporting legal authority the writ denied case of *Target Corporation v. Workers' Comp. Appeals*

Bd. (Estrada) (2016) 81 Cal.Comp.Cases 1192 (writ denied) and a WCAB panel decision *Samson v. State of California Department of Social Services,* 2018 Cal.Wrk.Comp. P.D. LEXIS 294.

Vocational apportionment reflects and embodies pre-SB 899 apportionment legal concepts and principles that were negated by the enactment of Labor Code Sections 4663 and 4664.

The primary reason the concept of vocational apportionment is antithetical to medical apportionment is that it reflects and embodies pre-SB 899 principles of apportionment that are no longer legally valid and were abrogated by the enactment of Labor Code sections 4663 and 4664 in 2004. Labor Code sections 4663 and 4664 reflect a radical and diametrical change in prior apportionment law that had been operative for the previous thirty-six years.

Based on excerpts from various vocational expert's opinions discussed and analyzed in a number of reported cases dealing with the issue of vocational apportionment, proponents of vocational apportionment essentially argue there cannot be any vocational apportionment related to applicant's vocational disability to non-industrial vocational contributing causal factors if prior to the current industrial injury or injuries one or more of the following factors existed:

1. The applicant had no significant work disability prior to the current industrial injury or injuries.
2. There is no indication of any degree of vocational apportionment that prevented the applicant from performing their job prior to the current industrial injury.
3. Applicant did not have any work disability that impeded his or her ability to perform their full job duties before the current industrial injury.
4. The applicant was able to cope with any symptoms they may have had and was able to function in the workplace without impediment before the current industrial injury. While there may have been medical impairment before the current industrial injury there was no related disability.
5. The applicant was able to perform all their regular duties in terms of performance and production demands and complied with all attendance per

company guidelines and lost minimal or no time from work due to any impairment or impairments before the current industrial injury or injuries.

6. The applicant's pre-existing nonindustrial factors did not contribute to their vocational impairment.

The following cases all contain examples based on actual reports from vocational experts in which they opine and elaborate upon the basic theories and rationale underlying the concept of vocational apportionment reflected in the six scenarios listed hereinabove. The cases are *Zmek v. State of California, Department of Corrections,* 2019 Cal.Wrk.Comp. P.D. LEXIS 552 (WCAB panel decision). In *Zmek* the reference to the *Estrada* decision is to the writ denied case in *Target Corporation v. Workers' Comp. Appeals Bd. (Estrada)* (2016) 81 Cal.Comp.Cases 1192 (writ denied); (*Bullard v. County of Los Angeles,* 2020 Cal.Wrk.Comp. P.D. LEXIS 104) (WCAB panel decision) (Both vocational rehabilitation experts found applicant had a 100% loss of earning capacity and met the criteria for total disability under *Leboeuf*.); *(Murillo v Royal Paper Box Company,* 2020 Cal.Wrk.Comp. P.D. LEXIS 155 (WCAB panel decision); In *Murillo,* the WCJ found that the AME's opinion that 15% of applicant's lumbar spine disability was nonindustrial and attributable to his pre-existent degenerative disc changes did not constitute substantial evidence; see also, *Culver v Initiative Foods,* 2020 Cal.Wrk.Comp. P.D. LEXIS 147 (WCAB panel decision). (WCAB affirmed the WCJ's award of permanent total disability based on IVE's opinion that applicant was not amenable to vocational rehabilitation and has lost her earning capacity. No explanation of why IVE did not apply what appeared to be valid 10% non-industrial apportionment of applicant's psychiatric disability contrary to *Acme*.).

All of the vocational apportionment theories and concepts discussed in the cases cited hereinabove are antithetical to valid apportionment under Labor Code sections 4663 and 4664. Based on a legion of cases post SB 899, it is undisputable that valid apportionment can be established even if the applicant did not lose any time from work, did not receive any medical treatment, and did not suffer any impairment or disability prior to the current industrial injury or injuries. More importantly there can also be valid apportionment under sections 4663 and 4664 based on prophylactic work restrictions and also to pathology and preexisting asymptomatic conditions so

long as there is substantial medical evidence they are contributing causal factors of the applicant's present permanent disability.

Tracing the Genesis of "Vocational Apportionment".

Based on a review of numerous cases discussing "vocational apportionment", there are various sources cited by its proponents. The primary references cited in the cases are to the AMA Guides 5th Edition discussed in one writ denied case, and at least one panel decision both of which have been repeatedly cited to and relied upon as authority in subsequent decisions by WCJ's and in WCAB panel decisions as the underlying supporting legal authority for the concept of vocational apportionment.

The legal authority cited most frequently in cases dealing with vocational apportionment is the writ denied case of *Target Corp. v. Workers' Comp. Appeals Bd. (Estrada)* (2016) 81 Cal.Comp.Cases 1192, 2016 Cal.Wrk.Comp. LEXIS 131 (writ denied); see also, *Estrada v. Target, PSI,* 2016 Cal.Wrk.Comp. P.D. LEXIS 422 (WCAB panel decision) as well as *Samson v. State of California Department of Social Services,* 2018 Cal.Wrk.Comp. P.D. LEXIS 294 (WCAB panel decision). For other recent cases dealing with vocational apportionment citing *Estrada* as supporting authority for the concept, see *Boronda v. Dencil Bailey Building Contractors, Inc., SCIF,* 2020 Cal.Wrk.Comp. P.D. LEXIS 32 (WCAB panel decision) and *Zmek v. State of California, Dept. of Corrections and Rehabilitation,* 2019 Cal.Wrk.Comp. P.D. LEXIS 552 (WCAB panel decision).

The *Estrada* Case.

In the *Estrada* writ denied decision and the preceding *Estrada* panel decision, the WCJ and the WCAB found applicant to be 100% permanently disabled. In terms of medical reporting, there were two AME's, a PQME, and a treating physician. *It is important to stress that in Estrada the WCJ found there was no substantial medical evidence supporting non-industrial apportionment of applicant's permanent disability.* In finding the applicant suffered a 100% loss of earning capacity, the WCJ and the WCAB relied on the opinion of applicant's vocational expert. Additionally, the finding of permanent total disability "in accordance with the fact" per Labor Code 4662(b) was also based on applicant's credible testimony and on the opinions of the

AME in psychiatry and applicant's treating physician. Both physicians opined applicant was permanently totally disabled and unable to compete in the open labor market. The WCAB and the Court of Appeal in denying defendant's writ quoted extensively from the WCJ's Report on Reconsideration. In *Estrada,* the distinction between medical and vocational apportionment was articulated as follows:

> Even when it is found that an applicant is permanently, totally disabled and unable to compete in the open labor market in accordance with the fact under Labor Code § 4662(b), an apportionment analysis is required. Labor Code §4663 requires apportionment of permanent disability to be based upon causation, so when a finding of permanent disability is based upon applicant's vocational nonfeasibility, and not upon individual medical impairments, the apportionment analysis should be a separate vocational one, and should not rely exclusively on each medical cause of impairment criteria under the *AMA Guides to the Evaluation of Permanent Impairment*, 5th Edition ("AMA Guides").
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> The AMA Guides expressly state that impairment percentages are not the same thing a work disability. "The whole person impairment percentages listed in the Guides estimate the impact on the individual's overall ability to perform activities of daily living, excluding work" (AMA Guides, p.4, italics in original).
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> For example, an individual who receives a 30% whole person impairment due to pericardial heart disease is considered from a clinical standpoint to have a 30% reduction in general functioning as represented by a decrease in the ability to perform activities of daily living. For individuals who work in sedentary jobs, there may be no decline in their work ability although their overall functioning is decreased. Thus, a 30% impairment rating does not correspond to a 30% reduction to work capability. Similarly, a manual laborer with this 30% impairment rating due to pericardial disease may be completely unable to do his or her regular job and, thus, may have 100% work disability. (AMA Guides, p.5.)

> Accordingly, since it appears in this case that Mr. Estrada is permanently, totally disabled in accordance with the fact per vocational evidence, the apportionment analysis must not be limited to asking what each doctor thought was causing each underlying impairment under the AMA Guides, but must answer the ultimate question of what is causing a total loss of earning capacity and ability to compete in the open labor market.

With respect to the issues of applicant's permanent total disability and apportionment applicant's vocational expert in *Estrada* stated:

> Based on *Acme Steel* and other current case law, a discussion is necessary regarding vocational apportionment. Vocational apportionment is not the same as medical apportionment. Medical impairment may develop as we age or may involve long standing impairments that an individual may have had throughout much of their life. Many individuals that have medical impairments are able to function effectively in the workplace without impediment. We have noted in previous reports that Mr. Estrada started working at Target in 1989 as a stock clerk and worked his way up to Team Leader based on his good work performance. He worked continuously for nearly 20 years. On a vocational basis, we found no evidence that Mr. Estrada has any significant work disabilities prior to his industrial injury. Although he may have had some pre-existing medical impairment, these impairments do not seem to have resulted in any work disability. In fact, Mr. Estrada was capable of performing physically demanding work on a regular basis and did so successfully based on his progressive promotions within Target.

There was one caveat applicant's vocational expert expressed with respect to her opinion that was pointed out by the WCAB. "[A]lthough Ms. Arbitz indicated that she would reconsider her opinion if a 'medical evaluator finds that non-industrial medical problems would have produced impairments that would have terminated or shortened his work life' the WCJ found no substantial medical evidence supporting nonindustrial apportionment."

The concept of "vocational apportionment" as currently formulated and applied by vocational experts in cases where there is substantial medical evidence of apportionment is inconsistent with and contrary to the Court of Appeal's Decision in *Acme Steel v. Workers' Comp. Appeals Bd.* (2013) 218 Cal.App.4th 1137; 78 Cal. Comp. Cases 751 as well as other recent decisions from the Court of Appeal.

A certain amount of background and history are essential in order to fully understand the significance of the Court of Appeal's decision in *Acme Steel v. Workers' Comp. Appeals Bd.* (2013) 218 Cal.App.4th 1137; 78 Cal. Comp. Cases 751. Prior to *Acme*, it was common for both WCJ's and the WCAB to rely solely and exclusively on expert vocational evidence to determine if an applicant was permanently totally disabled based on a 100 percent loss of earning capacity. In doing so, many WCJ's and the Board would simply ignore unrebutted substantial medical evidence of apportionment on the basis that the applicant had not suffered any earnings loss related to any alleged prior impairment or disability and continued to work up to the time of the current injury or injuries. It is important to stress that the flawed rationale and analysis expressly rejected by the Court of Appeal in *Acme* has simply been refined, transformed, and renamed as "vocational apportionment" by its proponents.

Before *Acme*, many WCJ's and the Board were of the opinion that substantial expert vocational evidence could negate unrebutted substantial medical evidence of apportionment. The Court of Appeal in *Acme* effectively put an end to the widespread unwarranted use of expert vocational evidence to nullify substantial medical evidence of apportionment based on Labor Code sections 4663 and 4664. It is important to stress that in *Acme,* there was both vocational and medical evidence that applicant was permanently totally disabled.

In *Acme*, the AME in hearing loss found the applicant was permanently totally disabled based on his total hearing loss but that 100% of applicant's total hearing loss could not be attributed solely to the applicant's current cumulative trauma. The AME found that 60% of applicant's hearing loss was industrially related to noise exposure but that 40% was attributable to nonindustrial factors based on an underlying degenerative

process of the cochlea most consistent with congenital degeneration. The AME's opinion on apportionment was unrebutted and constituted substantial evidence.

In addition to the medical evidence the WCJ based on the opinion of applicant's vocational expert also found that applicant effectively rebutted any diminished future earnings capacity (DFEC) establishing a 100% loss of earning capacity entitling him to permanent total disability and a showing that there was no job in the open labor market that could accommodate his disability. Defendant appealed arguing that the WCJ was bound to follow the opinion of the AME with respect to apportionment and could not find the scheduled rating could be rebutted by wage loss vocational testimony.

The WCJ in her Report on Reconsideration stated she was not bound by the findings of any of the AME's when there is convincing vocational testimony regarding loss of earning capacity and that the applicant's medical limitations combined with vocational evidence "renders the Applicant unemployable and thus he has a complete loss of earning capacity." The WCJ also stressed that applicant had not suffered any earnings loss related to a prior disability award and continued to work. The WCAB summarily denied defendant's petition for reconsideration based on the reasons stated by the WCJ in her Opinion and Report which they adopted and incorporated.

The Court of Appeal granted defendant's writ and annulled the WCAB's decision based on the Board's erroneous interpretation of Labor Code Sections 4663 and 4664. The Court did not disagree or take issue with the fact the applicant could rebut the rating schedule DFEC based on vocational expert testimony showing a 100 percent loss of earning capacity based on *Ogilvie*. However, the WCJ and the Board both erred by "failing to address the issue of apportionment." Citing to the Supreme Court's decision in *Brodie v. Workers' Comp. Appeals Bd*. (2007) 40 Cal.4th 1313 *(Brodie)* "Employers must compensate injured workers only for that portion of their permanent disability attributable to the current industrial injury, not for the portion attributable to previous injuries or to nonindustrial factors." The Court also emphatically stated that:

> "Therefore, evaluating physicians, the WCJ, and the Board *must* 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." (original emphasis)

The Court of Appeal in *Acme* stressed that the WCAB simply "ignored" unrebutted substantial medical evidence from the AME in hearing loss showing that applicant's 100 percent loss of hearing could not be attributed solely to the current cumulative trauma.

Pursuant to *Acme*, the fact an applicant is permanently totally disabled based on vocational evidence or a combination of vocational and medical evidence does not automatically negate the application of substantial medical evidence of apportionment.

In *Acme* even though the Court of Appeal agreed with the WCAB that applicant had rebutted the scheduled rating under *Ogilvie* based on expert vocational evidence and was determined to be 100% permanently disabled, that unrebutted medical evidence of apportionment of 40% still had to be **applied** to applicant's permanent total disability resulting in a reduction of his award from 100% to 60% permanent disability. There was no remand for applicant's vocational expert to consider or reconsider the medical evidence of apportionment. The Court of Appeal simply applied the 40% nonindustrial apportionment and reduced applicant's permanent total disability award accordingly.

"*In sum, the WCAB's failure to apportion the hearing loss portion of the current cumulative trauma is contrary to the law, and, as a consequence, the award must be annulled."* (emphasis added). The Court of Appeal's order on remand directed the Board to make an award to applicant consistent with the Court's opinion on apportionment by *applying* the 40% nonindustrial apportionment found by the AME. By applying medical apportionment in this way, the Court in *Acme* held that

notwithstanding the fact applicant was 100% permanently disabled based on expert vocational evidence, that based on unrebutted substantial medical evidence of apportionment, 40% of his inability to compete in the open labor market and to benefit from vocational training was non-industrial. The holding in *Acme* simply stated is that substantial medical evidence of apportionment must be considered and applied, and an applicant's award reduced accordingly even in cases where there is substantial vocational evidence of any kind that applicant has a 100% loss of future earning capacity.

Two recent decisions from the Court of Appeal in *City of Petaluma v. Workers' Comp. Appeals (Lindh)* (2018) 29 Cal.App.5th 1175 and *County of Santa Clara v. Workers' Comp. Appeals Bd. (Justice)* (2020) 49 Cal.App.5th 605 also annulled decisions by the WCAB based on the Board's failure to correctly interpret and apply principles of apportionment pursuant to Labor Code sections 4663 and 4664. "[w]here there is unrebutted substantial medical evidence that nonindustrial factors played a causal role in producing permanent disability, the Labor Code demands that the permanent disability *'shall'* be apportioned." (*Petaluma*, supra, 29 Cal.App. 5th at p. 1184. In both *Lindh* and *Justice*, the Court of Appeal cited *Acme* for the application of the correct legal principles related to apportionment under sections 4663 and 4664.

In the recent case of *Hennessey v. Compass Group* (2019) 84 Cal.Comp.Cases 756, 2019 Cal.Wrk.Comp. P.D. LEXIS 121 (WCAB panel decision), the WCAB affirmed the WCJ and 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, held 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 both considered and applied in terms of applicant's current ability or inability to participate in vocational rehabilitation and to compete in the open labor market and how it affected his or her conclusions.

In *Hennessey,* the applicant while employed as a cook, suffered a specific injury. He obtained a report from a vocational expert for purposes of rebutting the permanent disability rating schedule. Applicant's vocational expert concluded he was not qualified

to return to any unskilled sedentary occupation in the open labor market and was therefore 100% permanently disabled.

With respect to apportionment, the AME apportioned 20% to 2 prior upper extremity injuries the applicant suffered in 1992 and 2000. He also apportioned 80% of the applicant's permanent disability to a 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.

On reconsideration 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 and explain why he did not apply substantial medical evidence of apportionment in opining that applicant on a vocational basis was 100% permanently disabled.

Citing the Court of Appeal's decision in *Acme,* the Board in *Hennessey* 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.*** (emphasis added).

There are also two recent WCAB panel decisions subsequent to *Hennessey* that applied substantial evidence of medical apportionment in cases where there was

expert vocational evidence both applicants were not amenable to vocational rehabilitation. (see *Colvin v. Inner Circle Investments, Inc.,* 2020 Cal.Wrk.Comp. P.D. LEXIS 136 (WCAB panel decision) and *Johnson v. California State Department of Corrections,* 2020 Cal.Wrk.Comp. P.D. LEXIS 57 (WCAB panel decision).

Alternatively, as reflected in the WCAB's panel decision in *Bagobri supra*, if there is no substantial evidence of medical apportionment, then a vocational expert unconstrained by *Acme* and Labor Code sections 4663 and 4664 is free to apply whatever alternative persuasive analysis and opinion under the *Ogilvie, Dahl,* and *LeBoeuf* line of cases that constitutes substantial evidence to support the rebuttal of a standard rating based on a loss of earning capacity analysis.

Labor Code sections 4663 and 4664 define permanent disability apportionment determinations without reference to the AMA Guides.

As discussed previously, one of the primary arguments that "vocational apportionment" is a valid and viable concept is premised upon repeated and extensive references to the AMA Guides based on the fact that Labor Code 4660(b)(1) refers to the AMA Guides. However, what has been overlooked in many of the decisions dealing with vocational apportionment is that the AMA Guides, whether by examples or textual references to apportionment do not and cannot control the interpretation or application of what constitutes valid apportionment in California under Labor Code sections 4663 and 4664.

Chapter 1.6 of the Guides is entitled "Causation, Apportionment Analysis, and Aggravation." The Guides "Apportionment Analysis" in section 1.6b acknowledges that as is true in California, "[m]ost states have their own customized methods for calculating apportionment." Many California medical-legal evaluators have erroneously determined medical apportionment based solely on examples in the Guides without first determining whether the apportionment example(s) in the AMA Guides they relied upon in formulating their opinions were consistent with Labor Code sections 4663 and 4664 and applicable case law construing these sections.

In *Caires v. Sharp Healthcare,* 2014 Cal.Wrk.Comp. P.D. LEXIS 145 (WCAB panel decision), a SPQME's opinion on apportionment was based solely on an example in

the AMA Guides. On reconsideration the WCAB found the SPQME's apportionment determination did not constitute substantial evidence since the SPQME relied exclusively on an apportionment example in the Guides as the basis for his opinion on apportionment as opposed to rendering an opinion on apportionment in accordance with Labor Code sections 4663 and 4664 which the Board stated *"…defines apportionment without reference to the AMA Guides."* (emphasis added). The Board also specifically referenced section 1.6b of the Guides acknowledging that most states have their own customized methods for calculating apportionment independent of the methods used by the Guides.

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).

The reporting SPQME in *Caires* failed to provide any explanation or analysis of how or why the apportionment example he used from the AMA Guides to formulate his opinion on apportionment was consistent with Labor Code 4663 and applicable case law.

In a similar case, *Pini v. WCAB* (2007) 73 Cal.Comp.Cases 160, 2007 Cal.Wrk.Comp. LEXIS 410 (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 *Hosino v. Xanterra Parks & Resorts,* 2016 Cal.Wrk.Comp. P.D. LEXIS 351 (WCAB panel decision), 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)."

Consequently, 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.)

In terms of the apportionment mandates of Labor Code sections 4663 and 4664, the opinions of vocational experts and whether they constitute substantial evidence should be treated no differently than the opinions of medical evaluators when it comes to a vocational expert's consideration and application of substantial medical evidence of apportionment and whether the nonindustrial contributing causal factors of applicant's permanent disability are related to applicant's inability to compete in the open labor market and not being amenable to vocational rehabilitation and training. For example, in the *Acme* case 40% of applicant's inability to compete in the open labor market and to participate in vocational rehabilitation was nonindustrial and 60% was industrial.

References to examples and selected portions of the AMA Guides by vocational experts in their reports that are inconsistent with Labor Code sections 4663 and 4664 and that attempt to negate or minimize valid medical apportionment cannot provide a valid legal alternative or parallel legal basis for assessing substantial evidence of medical apportionment under Labor Code sections 4663 and 4664.

A vocational evaluator's opinion on whether an applicant can or cannot compete in the open labor market or participate in vocational rehabilitation that is based on examples or language in the AMA Guides that is inconsistent with the mandates of Labor Code sections 4663 and 4664 should not constitute substantial evidence. A vocational expert's opinion like a medical expert's opinion must also set forth the basis for their opinion in a non-conclusory manner as to whether the vocational expert is

correctly considering and applying medical apportionment under correct legal principles pursuant to Labor Code sections 4663 and 4664 and applicable case law.

"Vocational apportionment" in at least one case has been interpreted in a manner that if followed would nullify substantial medical evidence of apportionment under Labor Code sections 4663 and 4664 in direct contradiction to the Court of Appeal's decision in *Acme.*

In many cases the use of "vocational apportionment" to attempt to nullify and abrogate valid medical apportionment under Labor Code Sections 4663 and 4664 is not expressly stated but is clearly the desired result when it is applied by vocational experts attempting to rebut a scheduled rating. However, there are a few cases where that purpose is clearly articulated. In *Zmek v. State of California, Dept. of Corrections and Rehabilitation,* 2019 Cal.Wrk.Comp. P.D. LEXIS 552 (WCAB panel decision), the WCAB in adopting and incorporating the WCJ's Report on Reconsideration and Opinion affirmed the WCJ's finding that applicant rebutted the scheduled rating pursuant to *Ogilvie* and *LeBoeuf* and was entitled to an unapportioned award of permanent total disability.

In *Zmek,* the WCJ found that the AME's opinion that 40% of applicant's disability was attributable to non-industrial factors did not constitute substantial evidence and therefore did not have to be considered by the vocational expert. The WCJ's decision to disregard any of the non-industrial apportionment found by the AME was based on the WCJ's opinion that the AME's apportionment analysis confused causation of injury with causation of disability and by improperly assigning apportionment percentages to non-cardiac compensable consequence conditions by simply mirroring applicant's underlying heart disease.

Independent of rejecting the AME's apportionment opinion as not constituting substantial evidence, the WCJ implied in dicta that even if the AME's 40% non-industrial apportionment was valid "…*that applicant's vocational expert had appropriately considered and ruled out non-industrial apportionment, essentially rendering irrelevant the substantiality of the AME's opinion on that subject."* (emphasis added).

In discussing the analysis and opinion of applicant's vocational expert in various reports admitted into evidence the WCJ referencing the *Estrada* and *Samson* decisions states:

> He finds therein that applicant has no employment or self-employment prospects, is not amenable to vocational rehabilitation, and consequently has sustained a total loss of future earning capacity. Mr. Linder discusses apportionment in this same report, as well as his first supplemental report. Asked to consider the facts of this case in view of the holding in *Target Corporation v. Workers' Comp. Appeals Bd. (Estrada)* (2016) 81 Cal.Comp. Cases 1192, the expert writes in applicant's exhibit 2,
>
> Vocational apportionment and medical apportionment are entirely different concepts. … In my previous report, I noted how Ms. Zmek had worked effectively as a nurse at San Quentin for approximately 2 years before experiencing the cardiac event which has now renders [sic] her unemployable. In addition, she has a continuous work history as a nurse working in a variety of hospital and clinic settings, stretching back 40 years before she took the job with CDCR. On a vocational basis, I found that Ms. Zmek had no significant work disabilities prior to her industrial injury. Although she may have had some medical impairments that pre-date her 9/11/09 injury date, those impairments did not result in any noticeable work disability. Following review and analysis of the Estrada decision, I again conclude that 100% of Ms. Zmek's loss of future earning capacity is the direct result of her 9/11/09 work injury. If a medical evaluator finds that non-industrial medical problems have produced impairments that were likely to adversely affect Ms. Zmek's future earning capacity, I would be happy to revisit my vocational opinions.

The WCJ also quotes extensively from the defense vocational expert's discussion and analysis of apportionment in which the defense expert applied the AME's 40% nonindustrial apportionment as follows:

> Simply because an individual is working in their usual and customary assignment, it does not mean there is no medically based apportionment. If that were true, virtually every injured worker in the State of California who is in fact working in their usual and customary job at the time of injury would bear with them no apportionment. Apportionment is a more complex metric. As a vocational expert, we typically look at two predominant measures. First of all, we look at the individual's earning capacity prior to and at the time of the industrial injury… Secondly, and more relevant in this case, we are to look at an injured workers' [sic] access to their labor market both pre- and post-injury. In this case,…if we strictly apply a sedentary work criterion to this case, we would…come up with a 79% loss of her access to the labor market…
>
> …In this case, when the applicant was working as an ICU nurse and performing related functions, I have little doubt in my mind that this job would have been more physically demanding than the job that she held only briefly for the Department of Corrections. Her predominant work history reflects the capacity to lift into the heavy exertional range…, whereas the job at San Quentin Prison, alternately, reflects a "drop down" in physical capacities to the medium exertional level. … In this regard, we would then find that she had a diminished access to her labor market prior to her actual assignment at San Quentin Prison. As a vocational expert, I have no reason to disagree with Dr. Anderson's assignment of 40% in this regard. It flies in the face of reason that with all of these multiple impairments the applicant brought with her to San Quentin that there would not have been a progressive deterioration in her work capacities prior to the industrial event. In fact, she was only at the prison for slightly over two years when the heart condition developed and, without trying to read anyone's mind here, Dr. Anderson took this factor, amongst others when he assigned the medical apportionment.

The WCJ was not persuaded by defendant's vocational expert's opinion and instead relied on applicant's vocational expert's opinion as substantial evidence for rebuttal of the AMA Guides-based impairment ratings in Dr. Anderson's reports as to applicant

being permanently totally disabled. “As to non-industrial apportionment, I was not persuaded of the sufficiency of Dr. Anderson’s analysis, and, in any event, I found that Mr. Linder had effectively considered the issue and ruled out any non-industrial apportionment on a vocational basis.”

The WCJ citing both *Estrada* and *Samson* also candidly acknowledged that “vocational apportionment” is inconsistent with Labor Code sections 4663 and 4664 and the Court of Appeal’s decision in *Acme.* In *Zmek* the WCJ in dicta opined that vocational evidence alone even in the face of unrebutted substantial medical evidence of apportionment may be sufficient to “invalidate” and “eviscerate” medical apportionment under Labor Code 4663. The WCJ states in his report on reconsideration a section from his Opinion on Decision:

> More importantly, *even if* Dr. Anderson’s apportionment opinion were to be found substantial, Mr. Linder found that, on a vocational basis, non-industrial apportionment is not a factor. I concur in Mr. Simon’s critique of Mr. Linder’s rationale, as expressed in his supplemental report in defense exhibit F. If the fact that an injured worker was able to work without limitation prior to the industrial injury is sufficient to invalidate apportionment, section 4663 may eventually be eviscerated, along with the notion of a non-labor-disabling preexisting condition being grounds for apportionment. Nevertheless, the *current state of the law* is such that we recognize the notion of “vocational apportionment” and, here, Mr. Linder’s explanation is as persuasive as any I have encountered. See *Estrada, supra,* 81 Cal.Comp. Cases 1192, see also *Samson v. State of California* (2018) 2018 Cal.Wrk.Comp. P.D. LEXIS 294 (emphasis added).
>
> To sum up, the evidence supporting apportionment consists of medical reports of questionable validity and the defense vocational expert’s opinion that effectively critiques one aspect of the notion of “vocational rehabilitation”[sic] but not otherwise explain why non-industrial factors are applicable to the *LeBoeuf*-based total disability here; the evidence against apportionment is a considered professional opinion from applicant’s expert that appears to be consistent with the *state of the law.* Since defendant bears

> the burden of proof on apportionment, and particularly considering the liberal construction mandate of section 3202, I am compelled to reject the medical evidence of apportionment and issue an unapportioned award. (emphasis added).

The fact applicant's vocational evidence successfully rebuts a strict scheduled rating due to an applicant's loss of future earning capacity based on an inability to compete in the open labor market and inability to benefit from vocational training and is found permanently totally disabled does not preclude apportionment based on substantial medical evidence.

Permanent total disability can be apportioned even when it is based on expert vocational evidence that the applicant cannot benefit from vocational rehabilitation and is unable to compete or participate in the open labor market. (*Acme Steel v. Workers' Comp. Appeals Bd., (Borman)* (2013) 218 Cal.App.4th 1137, 78 Cal.Comp.Cases 751). The Court in *Acme* annulled the WCAB's unapportioned award of permanent total disability because the both the WCJ and WCAB *ignored and refused to apply* unrebutted medical evidence of apportionment based on an AME's opinion that 40% of applicant's 100% hearing loss was nonindustrial. Consequently, the WCAB without remanding the case for a supplemental report from applicant's vocational expert simply annulled the WCAB's unapportioned PTD award and ordered the WCAB to issue a 60% PD Award reflecting the AME's nonindustrial apportionment of 40%.

In a writ denied case that preceded *Acme,* the Court of Appeal affirmed the WCAB's decision that a finding of permanent total disability based on *LeBoeuf v. Workers' Comp. Appeals Bd*.,(1983) 34 Cal.3d 234, 48 Cal.Comp.Cases 587 where the applicant was unable to compete in the open labor market does not preclude or negate apportionment under Labor Code §§ 4663 and 4664. (*Nooner v. Workers' Comp. Appeals Bd.* (2009) 74 Cal.Comp.Cases 300). In *Nooner* the unrebutted testimony and reporting of applicant's vocational expert reflected that applicant was precluded from competing in the open labor market because of the effects of his industrial injury. The WCJ refused to apportion any of applicant's disability even though he had received a prior award of 29% for hypertension that admittedly overlapped the

applicant's current disability related to stress and hypertension. The rationale for the WCJ's refusal to recognize or apply any apportionment related to applicant's prior award was the WCJ's erroneous belief that he was prohibited from apportioning applicant's 100-percent PTD because a finding of PTD was based on vocational evidence of applicant's inability to compete in the open labor market.

Defendant's Petition for Reconsideration was granted and the WCAB remanded the case for further proceedings "…in which it found that contrary to the WCJ's determination, the application of the principles enunciated in *LeBoeuf* did not preclude apportionment under Labor Code §§ 4663 and 4664." Following remand, the judge issued a second F&A finding that applicant's injuries caused PD of 66% percent after apportionment of applicant's 100% PD under Labor Code sections 4663 and 4664. Applicant's petition for reconsideration was denied by the Board as was applicant's Petition for Writ of Review.

In a more recent decision from the WCAB in *Winn v. O.G. Packing Company,* 2020 Cal. Wrk. Comp. P.D. LEXIS 160 (WCAB panel decision), even though the Board was persuaded that both the vocational and medical evidence justified a finding that applicant "is precluded from participating in the open labor market, which supports a finding of permanent total disability, *but for apportionment to the non-industrial factors of disability."*(emphasis added). The WCAB emphatically stated that "[a] finding that applicant is not amenable to participate in vocational rehabilitation does not preclude consideration of the principles of apportionment as defendant is only liable for disability that is caused by the industrial injury." Citing *Nooner v. Workers' Comp. Appeals Bd.* (2009) 74 Cal.Comp.Cases 300 (writ denied).

In *Winn,* the Board applied the 20% nonindustrial apportionment found by the AME in orthopedics reducing the applicant's 100% permanent total disability to an 80% award after apportionment. In support of their decision to apply nonindustrial apportionment the WCAB cited both *City of Petaluma v. Workers' Comp. Appeals Bd. (Lindh)* (2018) 29 Cal.App.5th 1175, 83 Cal.Comp.Cases 1869, and *City of Jackson v. Workers' Comp. Appeals Bd. (Rice)* (2017) 11 Cal.App.5th 109, 82 Cal.Comp.Cases 437. "In *Lindh,* the court held that apportionment to an asymptomatic underlying condition or risk factor is required, even if the condition or risk factor alone might never cause

disability, providing there "is substantial medical evidence that established that the asymptomatic condition or pathology was a contributing cause of the disability." (*Lindh*, 83 Cal.Comp.Cases at 1882). (see also, *Colvin v. Inner Circle Investments, Inc.,* 2020 Cal.Wrk.Comp. P.D. LEXIS 136 (WCAB panel decision). (WCJ found applicant was 100% permanently totally disabled based on persuasive vocational and medical evidence but applied 50% non-industrial apportionment to applicant's lumbar spine disability as required by *Acme Steel*); *Johnson v. State of California Department of Corrections,* 2020 Cal.Wrk.Comp. P.D. LEXIS 57 (WCAB panel decision) (The WCAB on reconsideration rejected the WCJ's reliance on applicant's vocational expert's opinion finding applicant permanently totally disabled based on applicant not being amenable to vocational training and inability to return to the labor force. Applicant's vocational expert failed to note the orthopedic AME's apportionment of applicant's right knee disability to nonindustrial arthritis as required by *Acme.*).

Further support for the application of substantial medical evidence of apportionment even in cases where the applicant is found to be permanently totally disabled based either on vocational evidence alone or a combination of vocational evidence and medical evidence can be found in the Court of Appeal's decisions in *City of Petaluma v. Workers' Comp. Appeals Bd. (Lindh)* (2018) 29 Cal.App.5th 1175, 83 Cal.Comp.Cases 1869 and *County of Santa Clara v. Workers' Comp. Appeals Bd. (Justice)* (2020) 49 Cal.App.5th 605. In *Lindh,* the Court of Appeal stated emphatically that "[u]nder the current law, the salient question is whether the disability resulted from both nonindustrial and industrial causes, and if so, apportionment is required." (citing both the Supreme Court's decision in *Brodie* as well as *Acme.*).

Key Points to Consider in Assessing Vocational Apportionment and Substantial Medical Evidence of Apportionment.

1. Even in cases where there is substantial vocational evidence that applicant has a 100% loss of earning capacity and is permanently totally disabled, substantial medical evidence of apportionment must not only be considered but also applied by vocational experts, WCJ's, and the WCAB based on 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; *Hennessey v. Compass*

Group (2019) 84 Cal. Comp.Cases 756, 2019 Cal.Wrk.Comp. P.D. LEXIS 121 (WCAB panel decision). This also includes cases where expert vocational evidence is used to rebut a strict scheduled rating under the *Dahl, Ogilvie, and LeBoeuf* line of cases.

2. The application of vocational apportionment and vocational disability should be strictly limited to cases where there is no substantial medical evidence of apportionment based on Labor Code Sections 4663 and 4664 and applicable case law. (*Acme Steel v. Workers' Comp. Appeals Bd., (Borman)* (2013) 218 Cal.App.4th 1137, 78 Cal.Comp.Cases 751; *City of Petaluma v. Workers' Comp. Appeals Bd. (Lindh)* (2018) 29 Cal.App.5th 1175, 83 Cal.Comp.Cases 1869, *County of Santa Clara v. Workers' Comp. Appeals Bd. (Justice)* (2020) 49 Cal.App.5th 605, *Winn v. O.G. Packing Company,* 2020 Cal. Wrk. Comp. P.D. LEXIS 160 (WCAB panel decision), *Nooner v. Workers' Comp. Appeals Bd.* (2009) 74 Cal.Comp.Cases 300 (writ denied).
3. Vocational apportionment as a sub-category of vocational evidence is essentially an alternative parallel theory or method of apportionment that embodies pre-SB 899 concepts of apportionment that are inconsistent with Labor Code sections 4663 and 4664 and applicable case law and therefore should have very limited if any application in any case where there is substantial medical evidence of apportionment.
4. Even though Labor Code section 4660 references the AMA Guides, it is important to reiterate that Labor Code sections 4663 and 4664 and applicable case law define permanent disability apportionment determinations without reference to the AMA Guides. A vocational expert's opinion that is based on apportionment examples or language in the AMA Guides must be consistent with Labor Code sections 4663 and 4664 and applicable case law. (*Caires v. Sharp Healthcare,* 2014 Cal.Wrk.Comp. P.D. LEXIS 145 (WCAB panel decision); *Pini v. WCAB* (2007) 73 Cal.Comp.Cases 160, 2007 Cal.Wrk.Comp. LEXIS 410 (writ denied); *Hosino v. Xanterra Parks & Resorts,* 2016 Cal.Wrk.Comp. P.D. LEXIS 351 (WCAB panel decision); 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 and 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.)

5. The salient question in all cases is to determine whether the permanent disability resulted from both nonindustrial and industrial causes, and if so, apportionment is required. (*Acme Steel v. Workers' Comp. Appeals Bd., (Borman)* (2013) 218 Cal.App.4th 1137, 78 Cal.Comp.Cases 751; *City of Petaluma v. Workers' Comp. Appeals Bd. (Lindh)* (2018) 29 Cal.App.5th 1175, 83 Cal.Comp.Cases 1869, *County of Santa Clara v. Workers' Comp. Appeals Bd. (Justice)* (2020) 49 Cal.App.5th 605; see also, *Brodie v. Workers' Comp. Appeals Bd*. (2007) 40 Cal.4th 1313).