PEARLMAN, BROWN & WAX, LLP

California Apportionment Case Law Outline Focusing On Evolving Themes, Trends, and Problem Areas. (July 2023 Edition)

Editor: Raymond F. Correio, Senior Associate, Pearlman, Brown & Wax, LLP; Workers' Compensation Judge (retired); Prior editions dated January 20, 2023, July 2022, January 2022, July 2021, January 2021, July 2020, January 2020, July 2019, January 2019, January 9, 2017, (110 pages), April 2013 (67 pages), and January 2011 (120 pages) can be found at: www.PBW-law.com under the "Resources" tab.

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NOTICE TO READERS

1. 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 include this section once again in the outline are exemplified by numerous cases that clearly show there is what appears to be a continuing and unabated 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 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 that 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. In *Pattiz,* the WCAB granted defendant's Petition for Reconsideration and rescinded the WCJ's Award. These cases and similar cases underscore the fact that the core concepts, standards, 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)
>
> 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. Consequently, 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 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."

2. 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 is 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 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 do not 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 several 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) 11 Cal.App. 5th 109 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 several 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 applicant's 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 that 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 an 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.

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

City of Petaluma et al., v. WCAB (Lindh) **(2018) 29 Cal. App. 5th 1175, 83 Cal. Comp. Cases 1869 (Petition for Review by Supreme Court 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-ophthalmologist 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 hyperactive 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 (Borman)* (2013) 218 Cal.App.4th 1137, *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."

Substantial medical evidence issues: In *Lindh*, the WCAB applied the wrong legal apportionment standard of pre-SB 899 apportionment law combined with its' misinterpretation of *Escobedo* in erroneously assessing and determining the QME's report did not constitute substantial medical evidence of valid legal apportionment. There is no question both WCJ's and the WCAB are vested with the responsibility and authority to determine whether a medical report constitutes substantial medical evidence to support legal apportionment. However, if the Board or a WCJ applies the wrong legal principles and standards related to apportionment, even a medical report that has the requisite "how and why" analysis pursuant to *Escobedo* combined with the correct legal analysis will as evidenced by the WCAB's decision in *Lindh*, be mistakenly and erroneously found to not constitute substantial medical evidence.

In *Moreno v. Kern County Superintendent of Schools* 2020 Cal.Wrk.Comp. P.D. LEXIS 98 (WCAB panel decision) decided by the WCAB after the Court of Appeal's decision in *Lindh*, the Board found that a QME's apportionment determination of 40% nonindustrial based on a pre-existing congenital condition did not constitute substantial medical evidence. In *Moreno* it was undisputed that the applicant suffered from a pre-existing congenital condition in the form of Chiari Malformation that was triggered and aggravated by her industrial injury. The Board rejected the QME's nonindustrial apportionment determination on the basis that the QME simply changed his opinion on apportionment without providing an adequate explanation coupled with the fact that the QME's new opinion on apportionment was a mere conclusory one sentence statement reciting the industrial and nonindustrial percentages without explanation, or insight into his conclusions.

In rejecting the QME's apportionment determination the WCAB stated:

> The decisions in *Lindh* and *Rice* do not alter the framework for making apportionment determinations, in that all such determinations must be based upon medical evidence that establishes how and why a non-industrial factor caused some portion of the resulting

disability. In both cases, substantial discussion of the medical evidence was provided by the medical examiners that established a medical basis for apportionment to non-industrial factors.

See also, *Mitchell v. Securitas Security Services, PSI* 2019 Cal.Wrk.Comp. P.D. LEXIS 287 (WCAB panel decision) (Post *Lindh* decision where the WCAB rescinded a WCJ's 98% award of PD and found applicant was entitled to an unapportioned award of permanent total disability. WCAB rejected AME's apportionment of 10% of applicant's left knee disability since the AME impermissibly apportioned to applicant's underlying preexisting arthritis when in fact applicant's left knee meniscus tear developed from traumatic arthritis caused by the industrial injury and not the pre-existing arthritis.

***Garrison v. County of Los Angeles; PSI, Sedgwick Claims Mgt., Services*, 2023 Cal.Wrk.Comp. P.D. LEXIS 51 (WCAB panel decision)**

Issues and Holding: In this case the WCAB affirmed a WCJ's unapportioned award of 100% PTD. The WCAB found that applicant's vocational expert's opinion rebutted the scheduled rating. The WCAB also found that the IME in internal medicine's apportionment determination in which he opined that 20% of applicant's permanent disability related to his ulcerative colitis based on a preexisting nonindustrial condition of rheumatoid arthritis did not constitute substantial medical evidence.

Factual & Procedural Overview: Applicant while employed as a firefighter filed a cumulative trauma for the period of 9/20/99 through 10/18/17 claiming injury to his skin, psyche, knees, low back, colon, and hernia, and in the form of hearing loss, anal leakage, and anemia. He also filed a specific injury to his right knee and low back on October 17, 2017. In terms of medical legal evaluations, based on an alternative Dispute Resolution Agreement between the defendant and applicant's union, both of applicant's claims were evaluated by Independent Medical Evaluators (IMEs) in five different medical specialties. Those specialties included orthopedics, internal medicine, dermatology, psychology, and hearing loss.

When the claims could not be resolved based on the medical reporting of the IME's, the case proceeded to trial with the WCJ awarding applicant 100% PTD without apportionment. Defendant filed a Petition for Reconsideration that was denied by the WCAB.

Defense Issues on Reconsideration: Defendant asserted that the reporting of applicant's vocational expert relied upon to rebut the scheduled rating did not constitute substantial evidence and that the WCJ failed to consider evidence of nonindustrial apportionment.

Issues Raised in Applicant's Answer: Defendant contended the apportionment analyses of the IMEs were conclusory and also failed to adequately explain the reasoning behind their

apportionment opinions. Applicant also alleged that the apportionment of the IME in internal medicine based on applicant's preexisting rheumatoid arthritis did not constitute substantial medical evidence.

The WCAB's Decision on Reconsideration

The WCAB framed the issue presented on appeal as "…..whether the medical and vocational evidence constitutes substantial evidence to support the conclusion that applicant is permanently and totally disabled due to applicant's inability to benefit from vocational rehabilitation."

1. The Vocational Evidence: Applicant's vocational expert determined that applicant was not feasible to return to the open labor market as well as unable to participate in vocational retraining. He reviewed all of the applicant's relevant medical history and administered the standard vocational skills testing. Chronicling and synthesizing the plethora of applicant's medical problems and work restrictions especially those impacting his activities of daily living, as well as his transferable skills and the results of the vocational interview and skills testing, applicant's vocational expert "concluded that applicant would not benefit from vocational services." He also concluded that the applicant was "not able to meet the minimum requirements of competitive employment given his ongoing problems."

In contrast, the WCAB found the conclusions and opinion of the defense vocational expert who opined that applicant was amenable to vocational rehabilitation and could compete in the open labor market did not constitute substantial evidence. The Board identified several flaws in the defense experts reporting including the fact that her analysis only focused and was limited only to applicant's orthopedic limitations and work restrictions ignoring any non-orthopedic work restrictions. Her opinion was based on an incomplete review of the medical record as well as an "incomplete understanding of applicant's work restrictions."

The Board concurred with the WCJ's conclusion that based on applicant's vocational expert's opinion served to rebut the scheduled rating "by establishing that "due to the residual effects of his work-related injuries [applicant] could not be retrained for suitable meaningful employment." (citations omitted).

2. Whether the IME in Internal Medicine's Opinion that 20% of Applicant's Permanent Disability Related to his Ulcerative Colitis was Non-Industrial based on Applicant's Pre-Existing Rheumatoid Arthritis Constituted Substantial Medical Evidence: Applicant argued that the Internal IME's opinion on apportionment did not constitute substantial medical evidence because applicant's ulcerative colitis was triggered by exposure to workplace stress and more importantly that there was no evidence that the pre-existing rheumatoid arthritis was a work disabling condition or that applicant lost any time from work due to this condition. Applicant

further argued that there was no evidence that the pre-existing rheumatoid arthritis "had any impact on the applicant's inability to participate in vocational rehabilitation."

However, the WCAB agreed with the defense argument:

> ….that the pre-existing conditions need not be labor-disabling to appropriately form the basis of apportionment. (Petition, at 12:5; *Escobedo v. Marshalls* (2005) 70 Cal.Comp.Cases 604 [2005 Cal. Wrk. Comp. LEXIS 71] (Appeals. Bd. en banc) [factors of apportionment 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].)

Even though the Board acknowledged that valid apportionment could be based on pre-existing conditions that were not labor disabling including pathology, asymptomatic prior conditions etc., the WCAB citing *Escobedo* indicated that the internal medicine IME failed to adequately explain the nature of the non-industrial condition in this case the preexisting rheumatoid arthritis, and more importantly how and why it is a cause or contributing causal factor of the applicant's permanent disability at the time of the evaluation, and how any why it is responsible for the assigned percentage of disability."

The Board indicated the IME's apportionment opinion and analysis is premised on a pre-existing condition/pathology of rheumatoid arthritis which they describe as a "risk factor" "rendering applicant more susceptible to the onset of ulcerative colitis in the presences of significant and ongoing workplace stress." The panel also noted that the IME testified that the colon surgery and removal of applicant's colon as well as the fact that applicant's colitis does not allow him to absorb iron leading to anemia were all in part the reason for his current impairment.

In finding the internal IME's opinion on apportionment did not constitute substantial medical evidence the WCAB concluded by stating that:

> The record does not disclose how applicant's rheumatoid arthritis, a cause of applicant's *injury,* caused the *disability* identified at the time of the evaluation, following the removal of applicant's colon. In the words of *Escobedo*, the apportionment analysis fails to explain "how and why" applicant's preexisting rheumatoid arthritis caused permanent disability at the time of the evaluation, and how and why it was responsible for approximately 20% of applicant's residual disability. (*Escobedo, supra,* 70 Cal.Comp.Cases 604.)

Editor's Comments: First, I agree with the WCAB's ultimate conclusion that the internal IME's opinion on apportionment did not constitute substantial medical evidence. However, I disagree with the analysis they applied in arriving at their conclusion. As I have pointed out and emphasized in other case summaries in this section of the outline, many WCJ's and some WCAB panels apply either a wrong or incomplete analysis related to substantial medical evidence under *Escobedo*, and more importantly based on the Court of Appeal's decision in *Lindh* dealing with apportionment to pathology and asymptomatic conditions and also situations where an industrial injury aggravates and accelerates an underlying disease process.

I find it incomprehensible that in a case like this, the WCAB did not cite to or refer to the *Lindh* case at all which is the definitive dispositive case on apportionment to preexisting pathology and asymptomatic conditions which the Board prefers to label as "risk factors." In *Lindh,* the Court of Appeal annulled the WCAB's unapportioned award to applicant where the Board erroneously determined that the QME's report apportioning 85% of the applicant's PD related to loss of vision in applicant's left eye did not constitute substantial medical evidence. The *Lindh* court in reversing the WCAB found the QME's 85% nonindustrial apportionment constituted substantial medical evidence. The Court of Appeal in *Lindh* also noted that for many years, the WCAB in numerous cases had been misinterpreting and misapplying the *Escobedo* decision. The Court of Appeal held that the WCAB in their en banc decision in *Escobedo* correctly found contrary to the WCAB's subsequent misinterpretation of their own en banc decision, that a preexisting pathology or condition (described by the WCAB as "risk factors") whether asymptomatic or not can be both a contributing cause of an applicant's injury as well as a contributing causal factor of the resultant permanent disability but in different percentages.

Defendant in this case during the deposition of the internal IME could have and should have provided an analytical roadmap for the IME to follow in correctly applying both *Escobedo* and *Lindh* so the IME would have the opportunity to cure the defects in his reports by providing a revised opinion on apportionment that would have constituted substantial medical evidence.

In the instant case, the WCAB correctly determined that the applicant's preexisting rheumatoid arthritis was at a contributing cause in part of applicant's ulcerative colitis injury. In my opinion the analytical methodology articulated by the Court of Appeal in *Lindh,* is applicable not only to the instant case but also to any case where the issue involves potential apportionment to preexisting underlying pathologies, conditions, or disease processes whether symptomatic or not and also to those cases where an industrial injury aggravates, lights up, or accelerates a pre-existing pathology or disease process. It also does not matter in the *Lindh* analysis and consistent with LC sections 4663 and 4664, whether the pre-existing pathology or condition was labor disabling before the current injury or whether it caused any loss of time from work or need for medical treatment.

In terms of the applicant's PD in this case, the initial analysis by a medical-legal evaluator in explaining "how and why" the alleged non-industrial is a contributing causal factor of the applicant's PD at the time of the MMI evaluation is to identify each and every body part, condition, or system is at issue in terms of assessing PD and possible apportionment.

The next step in the analysis is to determine what are all of the industrial and non-industrial (if any) contributing causal factors of any resulting PD by assigning an approximate percentage figure to each based on reasonable medical probability. The medical-legal evaluator should also consider whether the applicant's permanent disability would be as large or great in the absence of any identified nonindustrial contributing causal factor or factors? Also, did the non-industrial contributing causal factor or factors contribute to the applicant's need for surgery or any other medical treatment the applicant received for the body part, condition, or system at issue? Also, in determining whether there is valid apportionment based on preexisting pathology and asymptomatic conditions, prior disability is not required, nor does it matter if the applicant did not receive medical treatment or lost any time from work based on any preexisting pathology (whether symptomatic or not) or received any medical treatment.

4. 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 unless an apportionment analysis or methodology in the AMA Guides is Consistent with Labor Code sections 4663 and 4664 and applicable case law.**

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 that 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) (2013) 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 applicant's 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.

Editor's Comment: In *Ashman v. State of California Department of Rehabilitation Center* (WCAB panel decision 1/31/22), the orthopedic QME based his determination of 89% non-industrial apportionment attributable to the applicant's previous fusions of 1998 and 2010 on a formula or methodology based on the ratio between the pre-existing impairment and the post-industrial impairment. The WCAB rejected this methodology because the QME treated impairment as the equivalent of permanent disability without an adequate explanation. The WCAB remanded the case back to the trial level for development of the record for the QME to clarify his opinion on apportionment or in the alternative for the parties to have applicant evaluated by an AME or if no agreement on an AME, for the WCJ to appoint a regular physician under LC 5701.

The basis for the WCAB finding the formula or methodology used by the QME in this case was not substantial medical evidence on apportionment was as follows:

Regarding the issue of apportionment, according to Dr. Pelton, there is 89% apportionment to the non-industrial fusions of 1998 & 2010 under Labor Code section 4663 because the ratio between the pre-existing impairment and the post-industrial injury impairment is 89% (25 [divided by] 28) = 89%.) In applying the ratio between the two impairments to determine apportionment of permanent disability, it appears that Dr. Pelton assumed the pre-existing impairment (25%) was subsumed within applicant's impairment at the time of the evaluation regarding the July 23, 2013 injury (28%). **However, Dr. Pelton did not provide an explanation for this assumption. Further, Dr. Pelton treated impairment as the equivalent of permanent disability without explaining why this produces an accurate evaluation of apportionment and an accurate description of applicant's disability caused by the motor vehicle accident.** (emphasis added).

Also, if as here, the doctor states that a portion of the injured worker's disability is caused by a pre-existing condition, the physician must explain the nature of the pre-existing condition, how and why it is causing permanent disability at the time of the evaluation, and how and why it is responsible for the percentage of the disability assigned by the physician. (*Escobedo v. Marshalls* (2005) 70 Cal.Comp.Cases 604, 621 (Appeals Board en banc).) Dr. Pelton did not provide an explanation of his apportionment opinions, and in turn did not comply with the requirements of *Escobedo v. Marshalls, supra*.

For these reasons, the reports from Dr. Pelton do not constitute substantial evidence on the issue of apportionment. Based on our review of the record, it appears there is no dispute that applicant had undergone cervical fusion surgeries prior to his July 23, 2013 injury, which would constitute pre-existing permanent disability factors. Permanent disability and apportionment were issues submitted for decision and as discussed herein; the record does not contain substantial evidence upon which those issues may be decided

Editor's Comment: In another case illustrating how some medical-legal evaluators come up with some creative but questionable methods to determine apportionment is *Jimenez v. Pacific Cambria, Inc*., 2022 Cal.Wrk.Comp. P.D. LEXIS 258 (WCAB panel decision). *Jimenez* involved a knee replacement case with related permanent disability and apportionment based on preexisting severe osteoarthritis that was a contributing causal factor of the applicant's left knee permanent disability. Instead of deciding what approximate percentage of the applicant's left knee permanent disability was caused by the applicant's preexisting osteoarthritis versus the specific left knee industrial injury, the reporting physician based his apportionment determination on epidemiological studies that demonstrated the percentage of people with osteoarthritis who are symptomatic or asymptomatic.

Both the WCJ and the WCAB found the reporting physician's opinion on apportionment did not constitute substantial medical evidence since they were "unable to discern how this relates to applicant's permanent disability caused by factors other than the disability." As a consequence applicant received an award of 50% permanent disability without apportionment.

5. Petitions to Reopen/*Vargas*

Sykes v. Los Angeles County Metropolitan Transit Authority **2022 Cal.Wrk.Comp. P.D. LEXIS 175 (WCAB panel decision)**

Issues and Holding: Whether applicant sustained new and further disability related to her July 16, 2012 injury and whether her permanent disability was subject to apportionment pursuant to Labor Code sections 4663 related to a 2016 non-industrial motor vehicle accident and based on Labor Code 4664(b) related to a prior award involving applicant's lumbar spine. On Reconsideration, the WCAB affirmed the WCJ's unapportioned award of 59% permanent disability less credit for amounts previously paid by defendant.

Factual & Procedural Overview: Applicant suffered two specific injuries in 2012 while employed as a bus operator. On July 16, 2012 she suffered an injury to her cervical spine, lumbar spine, right wrist, right ankle, left thigh and right shoulder. She also suffered a specific injury on September 20, 2012 to her psyche.

The parties settled both specific injuries in 2015 by way of joint Stipulations with Request for Award issued on December 21, 2015. It was stipulated that the July 16, 2012 specific injury caused 30% permanent disability with the parties including language that " "SETTLEMENT IS FOR A COMPROMISED 26% LUMBAR SPINE, 5% CERVICAL SPINE (MDT 30%) for 7/2012 DATE OF INJURY." As to applicant's lumbar spine, the orthopedic AME, Dr. Angerman found 24%WPI with apportionment to the lumbar spine of 10% related to non-industrial degenerative disease and 5% to a "prior industrial injury already stipulated to." With respect to the specific psyche injury of September 20, 2012, the parties stipulated that there was "No PD per QME Steiner as to the 9/2012 date of incident." In March of 2017, the applicant filed a timely petition to reopen both claims.

The Medical Evidence: Before the parties settled both specific injuries by way of the December 21, 2015 award, the parties used Dr. Angerman as an AME in orthopedics and Dr. Steiner as the QME in psychiatry. With respect to the applicant's Petition to Reopen, AME, Dr. Angerman re-evaluated the applicant in November of 2017. The AME noted that applicant in the interim between when he last evaluated her, gave a history of being involved in a non-industrial automobile accident in February 2016. She provided details that the accident in 2016 had increased pain in her neck, low back, left thigh and left knee. She also reported that she received physical therapy for 6 months

from February 2016 to August of 2016. She claimed that the therapy was beneficial and that her neck, low back, and left thigh conditions "reverted to their previous state" by August 2016. Dr. Angerman requested treatment records related to the February 2016 non-industrial auto accident.

Treatment records were obtained and reviewed by Dr. Angerman confirming that applicant complained of neck and back pain following the February 2016 auto accident. The records also indicated applicant had increased neck and back pain after the auto accident. However, Dr. Angerman was not provided with any of the orthopedic treatment records between the the non-industrial traffic accident on February 16, 2016 and when a treating physician issued a report on April 5, 2017, before Dr. Angerman's re-evaluation of applicant in November of 2017.
Dr. Angerman re-evaluated the applicant again on November 5, 2019, but the parties advised him they were unable to procure any additional treatment records related to the February 16, 2016 nonindustrial traffic accident but still asked him to render an opinion on the applicant's PD and on apportionment. In that regard, Dr. Angerman stated:

> With regard to the February 2016 motor vehicle accident, it is noted that the patient took six months off work. It is indicated she last worked on April 8, 2017 and officially retired on February 1, 2018.
> …
> With regard to the lumbosacral spine, the medical evidence supports that she had progressively worsening complaints even prior to the non-industrial motor vehicle accident in February of 2016. Therefore, it is felt the patient has increased permanent disability/impairment referable to her lumbosacral spine beyond the level already stipulated to.
> …
> With regard to the lumbosacral spine, if the subtraction method is determined to be applicable, it is then felt appropriate to state that, in all medical probability, 50% of the patient's increased level of disability/impairment would be attributable to the nonindustrial motor vehicle accident occurring in February of 2016 with the remaining portion attributable to the stipulated injury of July 16, 2012.
>
> If the subtraction method is not determined to be applicable, it is then felt appropriate to state that, in all medical probability, 10% of the patient's lumbosacral spine disability/impairment would be attributable to underlying degenerative disease and her history of obesity on a non-industrial basis, 30% would be attributable to the industrial injury already stipulated to with the remaining portion split equally between the natural progression of the July 16, 2012 industrial injury and the non-industrial motor vehicle accident occurring in February of 2016.

Dr. Angerman also provided impairment ratings including 28% WPI for the lumbar spine with a 3% add-on for pain. He also found applicant had sustained additional impairment to the right shoulder but not to her cervical spine.

The WCJ's Decision: The WCJ issued a Findings and Award that applicant was entitled to an unapportioned Award of 59% permanent disability for the July 16, 2012 injury, less credit for the amounts previously paid by defendant.

Defendant's Petition for Reconsideration**:** On reconsideration, defendant argued that that applicant's permanent disability for the lumbar spine under LC 4663 should be apportioned based on applicant's 2016 non-industrial traffic accident and there must be apportionment for the lumbar spine based on Labor Code section 4664(b) based on applicant's prior award.

The WCAB's Decision on Reconsideration: With respect to defendant's argument related to apportionment of applicant's lumbar spine PD based on her February 2016 nonindustrial traffic accident the WCAB found that Dr. Angerman's report did not constitute substantial medical evidence. The Board noted that Dr. Angerman apportioned part of applicant's lumbar spine PD to the 2016 non-industrial automobile accident without a complete review of the medical records pertaining to applicant's treatment and condition related to the accident. "Furthermore, Dr. Angerman does not explain how and why the non-industrial accident contributed to applicant's current level of disability for her lumbar spine." Defendant also argued that the record should be reopened for further discovery related to apportionment since Dr. Angerman did not adequately address apportionment. However, the WCAB indicated defendant has the burden of proving a valid basis for apportionment and that neither the WCJ nor the WCAB is "obligated to reopen discovery where a defendant proceeds to trial on inadequate reporting on the issue of apportionment."

Defendant also argued that there was a basis to apportion applicant's lumbar spine permanent disability under LC 4664(b) based on her prior award of December 21, 2015, which included her lumbar spine. However, the WCAB noted that to support apportionment to a prior award under LC 4664(b) the employer must prove more than just a prior award to the same body part, system, or condition.

> The employer must make the following showing in order to prove apportionment for a prior permanent disability award is warranted under section 4664:
>
> First, the employer must prove the existence of the prior permanent disability award. Then, having established by this proof that the permanent disability on which that award was based still exists, the employer must prove the extent of the overlap, if any, between the prior disability and the current disability. Under these circumstances, the employer is entitled to avoid liability for the claimant's current permanent disability only to the extent the employer carries its burden of proving that some or all of that disability overlaps with the prior disability and is therefore attributable to the prior industrial injury, for which the employer is not liable. (*Kopping v. Workers' Comp. Appeals Bd.* (2006) 142 Cal.App.4th 1099, 1115; see also *Pasquotto v. Hayward Lumber* (2006) 71 Cal.Comp.Cases 223 (Appeals Board en banc).)

The Board indicated that the parties initially stipulated that the applicant suffered 26% PD to her lumbar spine in the 2015 award presumably based on Dr. Angerman's report of June 24, 2015 in

which he apportioned applicant's PD for the lumbar spine 10% to non-industrial degenerative disc disease and 5% to a prior March 7 2007 award with the remaining PD attributable to the July 16, 2012 specific injury. Dr. Angerman in his subsequent report of November 5, 2019 related to applicant's petition to reopen for new and further disability discussed two possible scenarios for apportionment of applicant of the applicant's lumbar spine. However, the WCAB found Dr. Angerman's opinion to be unclear and ambiguous as to what he meant in one of the scenarios when he states as to which "industrial injury already stipulated to" caused 30% of the PD in the second scenario. Dr Angerman, while noting that there was a 2007 award of 16% for the neck, back and shoulders but the specific level of PD attributed to the back, if any from this award is not discussed by him. As a consequence the Board found that defendant failed to provide substantial evidence establishing overlap between applicant's prior disability and the 2007 award and her current disability from the July 16, 2012 injury.

The WCAB panel also pointed out that a review of the 2015 award reflects that the parties stipulated to 26% PD for the lumbar spine "but there is no language in the award to indicate that the parties stipulated that Dr. Angerman's apportionment conclusions in 2015 would apply to a claim for new and further permanent disability. A stipulation by the parties to specific apportionment percentages may not be inferred when it is not contained in the 2015 award.

Defendant also argued that under section 4664 there should be apportionment of the 26% PD for the lumbar spine related to the July 16, 2012 injury that had been previously stipulated to. However, while recognizing that the subtraction method advocated by defendant may be appliable where there are two industrial injuries, in this situation the 2015 award the applicant received was for the same injury for which the applicant has medically established new and further disability. Therefore if cannot be defined as a "subsequent industrial injury" for purposes of section 4664(b).

Defendant in this situation is only entitled to take a credit for the dollar amount previously paid under the 2015 award related to the lumbar spine. Applicant is entitled to a new permanent disability award reflecting the total level of disability resulting from the July 16, 2012 injury and defendant is entitled to credit for amounts previously paid as permanent disability. (*Shedelbower, supra*.) This is precisely what the F&A reflects. Therefore the WCAB affirmed the unapportioned award of 59% less credit for amounts previously paid by defendant.

Editor's Comment: It is important for practitioners to take note and to be wary of the WCAB's concern related to the distinction and legal effect in the 2015 Joint Stipulations with Request for Award between the parties stipulating to 26% PD related to the applicant's lumbar spine but that the actual specific apportionment percentages referenced in the stipulation cannot be inferred since was not contained in the actual Award signed and issued by the WCJ on December 21, 2015. "A stipulation by the parties to specific apportionment percentages may not be inferred when it is not contained in the 2015 award."

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 should 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 that 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 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 the *Condit* case, 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. See also *Corente v. Aetna: Ace American Ins. Co*., 2022 Cal.Wrk.Comp. P.D. LEXIS 358 (WCAB panel decision) (In a case involving a Petition to Reopen, the WCAB granted the defense petition for reconsideration and remanded the case back to trial level for the WCJ to correctly determine whether applicant actually suffered any new and further disability and if so, the proper methodology to use in calculating whether or not a prior award of 7% PD after apportionment of 50% could or should be applied and calculated against any new and further disability.)

In *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).

6. BENSON

Johnson v. State of California, Department of Corrections, Inmate Claims **2020 Cal.Wrk.Comp. P.D. LEXIS 57 (WCAB panel decision).**

Issues & Holding: The WCAB rescinded the WCJ's single combined award of permanent total disability without apportionment related to applicant's two specific injuries and one cumulative trauma claim and remanded for further proceedings. The WCJ failed to apply apportionment of disability pursuant to *Benson* among applicant's three separate industrial injuries even though the AME in orthopedics consistently provided separate permanent disability ratings for applicant's three injuries.

The WCJ also erroneously relied on the opinion of applicant's vocational expert in concluding applicant was permanently totally disabled based on her not being amenable to vocational rehabilitation and inability to return to the labor market. However, the WCAB held that the opinion of applicant's vocational expert did not constitute substantial evidence sine the vocational expert did not consider or adequately address the orthopedic AME's apportionment of applicant's right knee disability to nonindustrial arthritis pursuant to *Acme Steel v. Workers' Comp. Appeals Bd.* (2013) 218 Cal.App.4th 1137.

Factual and Medical Overview: Applicant was employed as a firefighter inmate by the Department of Corrections. The parties stipulated that applicant sustained three separate admitted industrial injuries. Applicant suffered two specific injuries on April 26, 2001 and February 15, 2002 to her lumbar spine and hepatitis C. She also suffered a cumulative trauma injury to her left knee, left shoulder, and neck over the period of April 6, 2001 to March 6, 2002. Also based on the reporting of the AME in orthopedics, applicant suffered a compensable consequence injury to her right knee with related disability based on applicant shifting her weight from her left knee ACL reconstructed knee.

Medical Reporting: There were AME's in internal medicine and orthopedics. The AME in orthopedics prepared numerous reports over a twelve-year period from 2007 through 2019. With respect to applicant's lumbar spine disability, the orthopedic AME consistently opined that the 28% WPI related to the lumbar spine was equally apportioned between applicant's two specific

injuries. When asked whether the disability caused by applicant's injuries were "inextricably intertwined" the AME indicated his previous opinion on apportionment remained essentially unchanged.

When the AME reevaluated applicant in 2017 he determined that she suffered a compensable consequence injury to her right knee and the right knee impairment should be apportioned 50% to the cumulative trauma injury and 50% to applicant's underlying degenerative arthritis.

In 2017 the AME agreed with applicant's vocational expert that applicant was permanently totally disabled due to her pain medication usage combined with the fact of her worsening condition manifested by a significant limitation on her ability to sit and stand intermittently. Also, a trial spinal cord stimulator was not successful and made her substantially worse.

The Vocational Evidence: Applicant's vocational expert concluded the applicant did not have the functional capacity to compete in the labor market and was unable to perform work on a sustained basis, and not amenable to vocational rehabilitation sustaining a 100% loss of future earning capacity. With respect to medical apportionment, the expert stated he found no basis for apportionment in the medical records and therefore no basis for apportionment of the vocational impact of the applicant's disability, impairments, and work restrictions related to the orthopedic body parts of cervical spine, left shoulder, and low back as determined by the AME. The vocational expert did not address or consider applicant's right knee disability and the AME's nonindustrial apportionment of applicant's right knee disability as being 50% attributable to her underlying degenerative arthritis.

The WCAB's Decision: The WCAB in a short two sentence introductory paragraph set for the reasons why it was rescinding the WCJ's single combined award of permanent total disability without apportionment of applicant's permanent disability among her three separate injuries. "The WCJs award of permanent total disability arising out of applicant's three separate claims of industrial injury is not sustainable without further evidence and analysis. The medical and vocational reporting is not sufficient to support the award."

Citing to *Benson* the WCAB stated:

> The WCJ issued a single combined award of permanent total disability for all three dates of injury. Absent a finding that the medical evidence establishes that applicant's disability cannot be parceled out between his separate injuries, applicant's disability must be apportioned between his separate dates of injury. (*Benson v. Workers' Comp. Appeals Bd*. (2009) 170 Cal.App.4th 1535, 1560 [74 Cal.Comp.Cases 113].)

The Board stressed the fact that there was no evidence that the orthopedic AME could not parcel out the approximate percentages of disability related to each of applicant's separate and successive injuries.

> The WCJ issued a single combined award of permanent disability without reference to whether the medical record justified this determination. We note that Dr. Scheinberg was asked to opine on this issue, but we have not seen, or been directed to, a report where he stated that he could not parcel out the approximate percentages of the overall permanent disability caused by each industrial injury. In fact, Dr. Scheinberg has consistently provided separate permanent disability ratings for applicant's three industrial injuries. 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.

The WCAB also explained why applicant's vocational evidence was not substantial evidence and therefore could not support the WCJ's unapportioned award of permanent total disability.

> Here, the WCJ relied on Mr. Van Winkle's opinion to find that 100% of applicant's permanent disability is due to her industrial injuries. However, Mr. Van Winkle's report is not substantial evidence that applicant is totally permanently disabled on an entirely industrial basis. This is because Mr. Van Winkle's expert opinion did not account for the apportionment of applicant's permanent disability. Where the medical disability, on which a vocational expert's report is based, is apportionable, a vocational expert cannot simply say that "there does not appear to be a basis for apportionment of the vocational impact of Ms. Johnson's industrial medical disability" as Mr. Van Winkle did here, when the medical evidence is to the contrary. An expert opinion that disregards or ignores relevant facts does not constitute substantial evidence. (citations omitted).

The WCAB's Rescission and Remand: The Board rescinded the WCJ's Joint Findings of Fact and Order and returned the matter to the trial level to resolve the issues discussed herein and for issuance of a new final award. With respect to applicant's permanent disability, the WCAB stated, "[t]herefore, we will return this matter to the trial level for further determination of the proper rating of the disability caused by each date of injury and apportionment between the dates of injury, per *Benson, supra.*

Editor's Comments: Understanding and navigating apportionment of permanent disability between and among separate and successive injuries is challenging and inherently problematical due primarily to the "limited exception" apportionment escape hatch available to try and avoid diminishment of an applicant's recovery inherent in separate awards of PD as opposed to one combined award if of PD related to multiple injuries which is always beneficial to an applicant. After reading scores of *Benson* apportionment cases it is the editor's opinion that many judges and various WCAB panels do not favor the requirement i.e., general rule under *Benson* that permanent disability related to separate and successive injuries is required to be apportioned among and between separate injuries except in limited circumstances.

This can be readily seen in *Philpot v. Performance Dairy Services Inc*., 2023 Cal.Wrk.Comp. P.D. LEXIS 43; 51 CWCR 51 (April 2023). In *Philpot* it was undisputed applicant was 100% permanently totally disabled based primarily on a traumatic brain injury resulting from two separate specific industrial traffic injuries on 4/26/10 and 7/14/11. The reporting physicians were two AME's and one IME. Following trial the WCJ found the applicant based on *Benson* and applicable 4663 apportionment, was to received two separate awards of 70% and 30% as opposed to one combined award of 100% PTD. Applicant filed for Reconsideration that was granted by the WCAB who reversed the WCJ's two separate PD awards implicitly finding that the *Benson* exception applied resulting in applicant receiving a combined unapportioned award of 100% PTD. In finding the medical reporting on *Benson* apportionment did not constitute substantial medical evidence, the WCAB indicated in their opinion all of applicant's PD related to his traumatic brain injury was primarily attributable to the first specific injury and that the PD from both injuries was "probably" inextricably intertwined thus justifying application of the *Benson* "limited circumstances" exception.

The WCAB in the case of *Sanchez (Jaime) v. California Dept. of Corrections, SCIF* (2022) 87 Cal.Comp.Cases 344; 2022 Cal.Wrk.Comp. P.D. LEXIS 35 (WCAB panel decision) dealt with an issue of first impression related to *Benson* apportionment involving a specific injury and a cumulative trauma injury. The unique issue in this case was that it was the defendant and not the applicant who was trying to prove an exception to *Benson* in arguing that applicant should only receive one combined award of PD rather than two separate awards.

In *Sanchez*, the WCJ awarded applicant 100% permanent total disability related to a specific injury and 85% PD related to a CT injury. Defendant filed for reconsideration and one of the issues they raised was that the medical evidence warranted a single combined award of permanent disability for applicants two separate and successive injuries. The WCAB described this situation as a "peculiar circumstance" In that regard the WCAB stated, "[s]ince defendant would be the beneficiary of the reduced liability inherent in a single award, we believe that defendant has the burden of proof to establish the applicability of the *Benson* exception."

In rescinding the WCJ's Findings and Award and remanding back to the trial level for further proceedings on a variety of issues including the *Benson* issue raised by defendant, the WCAB noted that there was a subsidiary issue not addressed by the WCJ related to the *Benson* issue. The WCAB noted that inconsistent with defendant's argument that the medical evidence establishes applicant's two injuries are "inextricably intertwined" defendant stipulated at trial that applicant sustained two distinct and separate industrial injuries, "even though it appears the medical evidence shows a significant relationship between the two injuries." The Board stated that "the general rule is that stipulations are binding on the parties absent a showing of good cause." (citations omitted).

In providing guidance to the WCJ on remand the Board indicated that:

> Under the circumstance of the instant matter, we are persuaded that the WCJ must address the issue of whether defendant's attempt to establish the *Benson* exception of one award, on the premise that the two injuries are "inextricably intertwined," requires defendant to make a showing of good cause to disregard its stipulation to two distinct injuries. Again we express no final opinion on this issue.

For another case dealing with *Benson* the WCAB rejected and rescinded a WCJ's unapportioned award of 74% PD related to three specific injuries based on the AME's conclusory determination that the disabilities from all three injuries were "inextricably intertwined" see, *Cargile v. State of California, Department of Transportation* (2020) 48 CWCR 136. The WCAB issued their own amended findings of fact and awarded the applicant three separate awards for each of three specific injuries of 28%, 33%, and 20% PD as opposed to a single unapportioned award of 74% PD. The three separate awards had a combined dollar value of approximately $93,000 versus $144,000 for the single unapportioned award resulting in the applicant receiving $51,000 less due to three separate awards versus one unapportioned single joint award.

See also, *Navarrete v. Sectran Security, Inc*., 2020 Cal.Wrk.Comp. P.D. LEXIS 281 (WCAB affirmed WCJ unapportioned award of 46% PD based on the basis the QME's report with respect to *Benson* apportionment related to a specific and CT injury and injuries applicant incurred in a nonindustrial automobile accident did not constitute substantial evidence. The QME failed to explain the nature of the preexisting condition and how and why the preexisting condition and any related disability was responsible for a percentage of applicant's permanent disability at the time of the QME evaluations. Also, the QME did not explain why each of the two separate and successive industrial injuries caused a portion of the total PD he found.)

However, there are still many cases where the WCAB has found that the *Benson* "limited circumstances" exception is applicable, and therefore the applicant was entitled to a single combined award as opposed to separate awards for each separate and distinct industrial injury.

See, *Carter v. City of Los Angeles, PSI,* 2021 Cal.Wrk.Comp. P.D. Lexis 39 (single joint award of 79% of PD related to a specific and CT injury when presumptive heart condition/injury "inextricably linked" to other non-presumptive injuries); *Schieffer v State of California, Salinas State Prison* 2021 Cal.Wrk.Comp. P.D. LEXIS 48 (single joint award of 100% PTD for a specific and CT injury based on *Benson* exception that disability attributable to each injury was "inextricably intertwined."); *Bullard v. County of Los Angeles* 2020 Cal.Wrk.Comp. P.D. LEXIS 104 (single joint award of 100% PTD based lack of unanimity of opinion by three AME's on *Benson* apportionment of PD between a CT and specific injury. Psychiatric AME indicated disability was inextricably intertwined while both the orthopedic and internal medicine AME's found *Benson* apportionment between both injuries); *Peters v. Bank of America* 2021 Cal.Wrk.Comp. P.D. LEXIS 122 (100% single joint 100% PTD award where AME was unable to apportion disability between a specific and CT injury and therefore case came within "limited

circumstances" exception to *Benson.*); *Lopez v. Hartnell Packing, Inc.*, 2021 Cal.Wrk.Comp. P.D. LEXIS 85 (single joint award of 100% PTD related to two specific injuries and one CT injury based on lack of unanimity on *Benson* apportionment by reporting evaluators. QME able to apportion applicant's disability between the separate injuries but psychiatric AME opined disability was inextricably intertwined. QME in internal medicine deferred apportionment to orthopedic specialist.).

***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 on 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. Defendants 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: The primary holding in *Herrera* is that there can be no valid apportionment under *Benson* unless there is unanimity among all of the reporting physicians that they are able to parcel out and apportion the disability between multiple and successive injuries. 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 five of six AME's were able to apportion applicant's disability under *Benson*, the internal AME was unable to do so. Since there was no unanimity amongst all of the reporting AME's 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.

While the author understands that it is always the defendant's burden to prove valid legal apportionment, the WCAB in *Mills* should have also considered that the six reporting physicians were all AME's and therefore should be held to a higher standard since technically they are reporting to the WCAB and not the parties. Something seems fundamentally wrong where five of six reporting AME's had no problem apportioning under *Benson* and yet defendant was unable to meet their burden in proving apportionment. Perhaps the WCAB in *Mills* should have considered remanding the case in order for the single holdout AME to try to persuasively explain why unlike his colleagues, he could not apportion applicant's PD among the five separate injuries as in *Chavez v. Chief Auto Parts, AutoZone, Inc.* 2018 Cal. Wrk. Comp. P.D. LEXIS 257 (WCAB Panel Decision). Alternatively, as the Board did in *Chavez*, they could have remanded the case back to the trial level and recommended that the WCJ appoint a regular physician under Labor Code 5701 to replace the one AME who could not apportion properly under *Benson.*

In a 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 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."

Editor's Comment: In *Fanning v. Workers' Compensation Appeals Board* (2022) 87 Cal.Comp. Cases 91; 2022 Cal.Wrk.Comp. LEXIS 2 (writ denied), the case was submitted for decision at trial. The WCJ ordered the case "unsubmitted" in order to develop the record on apportionment. The PQME in the case issued 6 reports and was deposed but still could not determine if applicant's 3 injuries were inextricably intertwined or apportion the disability between them. The WCJ ordered development of the record on apportionment through appointment of a "regular physician" (LC 5701) to replace the PQME since all of his six medical reports and deposition testimony did not constitute substantial evidence. So, defendant got a second bite of the apple on the issue of apportionment. Applicant filed for removal which was denied by the Board who affirmed the WCJ's decision. Applicant then filed a writ which was also denied.

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 salesperson 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 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 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)*(1993) 16 Cal.App.4th 227, 58 Cal. Comp. Cases 323.

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).

Consequently, 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."

7. Medical Treatment and Apportionment

Ryan (Joseph) v. California Department of Corrections **2022 Cal.Wrk.Comp. P.D. LEXIS 272 (WCAB panel decision)**

Issues and Holding: Whether a WCJ's award of 100% permanent total disability without apportionment was warranted when the WCJ refused to follow the AME's apportionment of permanent disability under Labor Code 4663 by ruling that all of applicant's permanent disability resulted solely and entirely from his spinal surgeries as opposed to his preexisting degenerative spinal pursuant to *Hikida v. Workers' Comp. Appeals Bd* (2017) 12 Cal.App.5th 1249 [82 Cal.Comp.Cases 679]. The WCAB on reconsideration while finding that the applicant's injuries resulted in permanent total disability remanded the case back to the WCJ to redetermine the correct application of apportionment under Labor Code 4663 pursuant to *County of Santa Clara v. Workers' Comp. Appeals Bd.* (*Justice*) (2020) 49 Cal.App.5th 605, 615 [85 Cal.Comp.Cases 467].

Factual & Procedural Overview: Applicant was employed as a correctional captain. The trial involved four injuries including one cumulative trauma injury and three specific injuries. With respect to the CT claim, the WCJ found the applicant to be 100% permanently totally disabled without apportionment either under *Benson* or Labor Code 4663. With respect to the three specific injuries, the WCJ found that any permanent disability was addressed in the CT award and there was no valid apportionment related to any of the specific injuries.

The Medical Evidence: The AME opined that 10% of applicant's cervical spine disability and 20% of the thoracic spine disability should be apportioned to preexisting degenerative disc disease. With respect to applicant's lumbar spine disability 20% was attributable to preexisting grade 1 isthmic spondylolisthesis at L5-S1. The AME provided medical reasoning and evidence in support of his opinion on apportionment. The WCJ in relying on the *Hikida* decision rejected the AME's opinion on apportionment stating it was the applicant's three spinal surgeries in 2016 that caused all of his permanent disability.

The Defense Petition for Reconsideration: Defendant raised several arguments. The primary arguments related to the failure of the WCJ to apportion applicant's PD among the multiple injuries and issue separate awards as required by *Benson* and that the WCJ also erred in not following the AME's opinion on apportionment under Labor Code section 4663.

The WCAB's Decision on Reconsideration:

Benson **Apportionment:** With respect to *Benson* apportionment, the Board noted that *Benson* mandates that multiple injuries ordinarily require separate permanent disability awards but that there may be "limited circumstances" when the evaluating physician is unable to parcel out, with reasonable medical probability, the approximate percentages to which each distinct industrial injury causally contributed to the employee's overall permanent disability. In these limited

circumstances where the employer fails to meet their burden of proof as to apportionment, a combined award as opposed to separate awards may still be justified.

The AME indicated one medical report that with respect to the four alleged injuries he could not parcel out with reasonable medical probability, the percentages to which each of those injuries causally contributed to applicant's overall permanent disability. Therefore, the WCAB concluded that the Benson exception of "intertwined injuries" applied and that the WCJ correctly issued a combined award of permanent disability.

Apportionment of Applicant's PD based on LC 4663: The Board indicated the WCJ erroneously rejected the AME's opinion on apportionment of applicant's PD by relying on *Hikida* and simply stating that it was applicant's three spinal surgeries in 2016 that caused all of his permanent disability. By pointing to key excerpts from the AME's opinion on apportionment of PD related to the applicant's spine, the Board found that the AME did not conclude that the industrial medical treatment in the form of spinal surgeries endured by the applicant was the sole cause of his permanent disability but that the preexisting spinal degenerative disease pathology was also a contributing causal factor.

The WCAB citing *County of Santa Clara v. Workers' Comp. Appeals Bd.* (*Justice*) (2020) 49 Cal.App.5th 605, 615 [85 Cal.Comp.Cases 467] indicated there are limitations to the *Hikida* holding and that "Hikida precludes apportionment *only where* the industrial medical treatment is the *sole cause* of the permanent disability." As a consequence the WCAB deferred and remanded the case back to the WCJ for a proper application of apportionment of applicant's spinal PD under Labor Code 4663.

County of Santa Clara v. Workers' Comp. Appeals Bd. (Justice) (2020) 49 Cal.App.5th 605, 85 Cal.Comp.Cases 467, 2020 Cal.App. LEXIS 461, 48 CWCR 103 (Applicant's petition for review denied on 8/26/20)

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: The WCAB in *Street v. Greenfield Union School District* 2022 Cal.Wrk.Comp. P.D. LEXIS 6 (WCAB panel decision) rescinded a WCJ's unapportioned award of 52% PD related to a right knee injury resulting in knee replacement surgery that produced a poor result. It should be noted that the WCJ's F&A issued on 3/9/20 before the Court of Appeal's decision in *Justice* discussed hereinabove. The WCAB did not issue their decision on reconsideration until 1/11/22 almost 2 years after they granted reconsideration for "further study."

Without the benefit of the *Justice* decision from the Court of Appeal, the WCJ in *Street* simply applied what he perceived to be the holding and principle in *Hikida* in finding no legal basis for apportionment related to the applicant's right knee PD even though the PQME opined that up to 90% of applicant's right knee PD was caused by pre-existing nonindustrial degenerative arthritis.

In rescinding the portion of the WCJ's F&A related to the applicant's unapportioned award of 52% right knee PD, the WCAB indicated that based on the Court of Appeal's decision in *Justice* "Hikida precludes apportionment only where the industrial medical treatment is the sole cause of the permanent disability." In this case based on the medical reporting of the SPQME the applicant's right knee replacement surgery was not the sole cause of her resultant PD. As a consequence, the Board rescinded the WCJ's finding on permanent disability and remanded the case back to the WCJ for further proceedings for the WCJ to revisit the issues of right knee PD and apportionment in light of the Court of Appeal's opinion in *Justice*.

In another 2022 decision from the WCAB dealing with *Hikida* related issues, *Jackson v. FedEx Ground Package Systems, Inc., PSI* 2022 Cal.Wrk.Comp. P.D. LEXIS 170 (WCAB panel decision), the WCAB affirmed a WCJ's award of 21% PD after 60% valid non-industrial apportionment related to applicant's bilateral knee permanent disability after bilateral knee replacement surgeries. The WCAB denied applicant's Petition for Reconsideration in which she argued that the PQME's opinion on apportionment did not constitute substantial evidence of apportionment and also since applicant's PD rating was based on her bilateral knee replacement surgeries necessitated by the industrial injury, she was entitled to an unapportioned award under *Hikida.*

Prior to the specific injury on March 6, 2015, applicant had an extensive history of prior surgeries including bilateral meniscectomies in 1995 and 1996 as well as a left ACL reconstruction in 1992. She also fell off a curb in 2016 and was obese all of which resulted in degenerative changes that made the bilateral knee replacement surgeries necessary. Base on objective findings the PQME opined that the degenerative findings in both knees were predominantly pre-existing. The WCAB in denying applicant's Petition for Reconsideration characterized the instant case as "more like *Justice* than *Hikida*." The WCAB also seemed to reluctantly concede in a reference to *County of Santa Clara v. Workers' Comp. Appeals Bd. (Justice)* (2020) 49 Cal.App.5th 605, 85 Cal.Comp.Cases 467, 2020 Cal.App. LEXIS 461, 48 CWCR 103 (Applicant's petition for review denied on 8/26/20) that "the Court of Appeal does seem to have made an attempt to limit *Hikida* with the Court in *Justice* stating: "*Hikida* precludes apportionment *only where* the industrial medical treatment is the *sole cause* of the permanent disability."

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, many WCAB panels decisions after *Hikida* and before *Justice* 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); ***Sweet v. Garden Grove Unified School District, PSI*** 2020 Cal.Wrk.Comp. P.D. LEXIS 167 (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."

Fuller v. Monterey Bay Aquarium **2020 Cal.Wrk.Comp. P.D. LEXIS 190 (WCAB panel decision).**

Issue & Holding: The WCAB held that apportionment of applicant's right knee permanent disability was required under Labor Code sections 4663 and 4664 since applicant's industrial medical treatment in the form of nine knee surgeries including two total right knee replacements did not cause an entirely new compensable injury that was the sole cause of his right knee permanent disability. Applicant's right knee disability did not arise solely from his medical treatment but was due in part to a number of pre-existing conditions that existed before his nine knee surgeries including diagnostically confirmed advanced osteoarthritis with extensive Grade IV chondromalacia of the medial joint compartment, medial and lateral meniscus tears, and a low-grade anterior cruciate ligament tear. The WCAB affirmed the WCJ's award of 91% PD after apportionment relying on both *Hikida v W.C.A.B.* (2017) 12 Cal.App.5th 1249 and *County of Santa Clara v W.C.A.B. (Justice)* (2020) 49 Cal.App.5th 605

Procedural Overview: This was the second award of 91% PD after apportionment. After the first apportioned award of 91%, applicant filed a Petition for Reconsideration that was granted by the WCAB. However the WCAB remanded the case to the trial level to further develop the record on the issue of apportionment of applicants PD per *Hikida, see, Fuller v. Monterey Bay Aquarium* 2018 Cal.Wrk.Comp P.D LEXIS 454 (WCAB panel decision). The Board's remand was before the Court of Appeal's decision in *Justice*.

Following the remand, the AME in Neurology issued two additional reports and was deposed. Applicant also obtained additional vocational evidence. The case was once again resubmitted for decision and the WCJ once again issued an award of 91% PD after apportionment. Applicant filed

a second Petition for Reconsideration that was granted by the WCAB. The Board adopted and incorporated the WCJ's Report of Reconsideration and affirmed the WCJ's Second Findings and Award of 91% PD after apportionment.

Applicant filed a Petition for Reconsideration contending the WCJ erred in failing to find applicant permanently totally disabled based on the medical evidence as well as vocational evidence that indicated applicant was precluded from returning to gainful employment and had a total loss of earning capacity. Applicant also argued the WCJ should have used the addition method to rate applicant's disabilities as opposed to the combined values chart (CVC).

Factual and Medical Overview: The Applicant suffered an admitted specific injury on October 21, 2010 that resulted in a series of nine knee surgeries including two total right knee replacements. In terms of his prior medical history applicant had 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, he 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 neurology initially apportioned 80% to a specific injury and 20% to pre-existing non-industrial degenerative arthritis. In a later report the 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. On remand the AME, reverted back to his original apportionment opinion finding that 80% of applicant's right knee disability was industrial and 20% nonindustrial.

The WCAB's Decision: The WCAB concurred with the WCJ's determination that even following development/augmentation of the record on remand there was still "no substantial evidence that establishes applicant is entitled to an unapportioned award of permanent disability based on the application of the holding in Hikida…." Referencing their prior opinion, the Board reiterated its understanding of the Court of Appeals decision in *Hikida.* More importantly the WCAB noted the recent post-*Hikida* decision from the Court of Appeal in *County of Santa Clara v. Workers' Comp. Appeals Bd. (Justice)* 49 Cal.App.5th 605 supports the Board's own interpretation in very similar circumstances in this case involving total knee replacements.

> The court in *Justice* held that apportionment was required under Labor Code sections 4663 and 4664, where an underlying non-industrial degenerative knee condition was responsible for the injured workers need for knee replacement surgery and 50 percent of the postsurgical permanent disability. The court reversed a finding that *Hikida* precluded apportionment because Justice's permanent disability was based on the result of the knee replacement surgery, holding that apportionment was required unless the industrial medical treatment causes an entirely new compensable injury that is the sole cause of the permanent disability.

The WCAB in the instant case emphasized that the Court of Appeal in *Justice* interpreted the rule or opinion in *Hikida* very narrowly in stating:

> Although parts of the *Hikida* opinion can be read to announce a broader rule that there should be no apportionment when medical treatment increases or precedes permanent disability, it is clear that the rule is actually much narrower. Put differently, *Hikida* precludes apportionment only where the industrial medical treatment is the sole cause of the permanent disability. (*Justice*, supra, p. 12)

***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 enactments 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 <u>both</u> 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 after *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*.

PRACTICE POINTERS: 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). In any case involving the issue of medical treatment and apportionment the *Hikida* case must always be read in conjunction with the subsequent decision from the Court of Appeal in *County of Santa Clara v. Workers' Comp.Appeals Bd. (Justice)* (2020) 49 Cal.App.5th 605, 2020 Cal.App. LEXIS 461 addressing the same issue and also summarized in this outline hereinabove.

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.

8. Medical Evidence of Apportionment and Vocational Evidence

Nunes v. California Dept. of Motor Vehicles **2023 Cal.Wrk.Comp. P.D. LEXIS 30 (WCAB en banc 6/22/23)**

Issues and Holding: Whether the reporting medical-legal experts and vocational experts made apportionment determinations that were in accordance with the correct legal principles and standards of Labor Code sections 4663 and 4664. Whether the concept of "vocational apportionment" has a statutory basis in the Labor Code. What is the correct way vocational evidence may be used by the parties to rebut a scheduled rating? Whether vocational evidence must address valid medical apportionment. With respect to these issues the WCAB held that:

> 1. Section 4663 requires a reporting physician to make an apportionment determination and prescribes the standard for apportionment. The Labor Code makes no statutory provision for "vocational apportionment."
> 2. Vocational evidence may be used to address issues relevant to the determination of permanent disability.
> 3. Vocational evidence must address apportionment, and may not substitute impermissible "vocational apportionment" in place of otherwise valid medical apportionment.

Factual Overview: The applicant sustained two admitted injuries. A specific injury of 9/13/21 to her neck, upper extremities, and left shoulder. She also suffered a cumulative injury during the period of 9/13/10 to 9/13/11 to her bilateral upper extremities. The primary reporting medical-legal evaluator was an orthopedic QME selected by the parties. In terms of the applicant's medical history, she had cervical spine surgery on March 20, 2014, including a fusion at the C5-6 level. She was found to be permanent and stationary as of 5/17/16.

The Medical Evidence: The QME in her P&S report found impairment to applicant's cervical spine, left upper extremity, and carpal tunnel syndrome. With respect to applicant's cervical spine impairment, the QME apportioned 60% to industrial contributing causal factors and 40% to non-industrial preexisting degenerative factors. As to applicant's left shoulder impairment, all of her permanent disability was industrial. The QME opined that applicant's carpal tunnel symptoms and disability were related to her cumulative trauma injury, with apportionment of 40% to industrial factors and 60% to applicant's nonindustrial diabetes.

The orthopedic QME indicated a variety of work restrictions and also opined that absent shoulder surgery applicant was not likely to return to her usual and customary duties with the Department of Motor Vehicles ("DMV"). In supplemental reporting in 2021 following a re-evaluation of the

applicant and a review of records, the QME indicated that from a functional standpoint the applicant would not be employable in the open-labor market.

The Vocational Evidence: Both defendant and applicant introduced vocational evidence related to applicant's feasibility for vocational retraining and her ability to compete in the open labor market.

Applicant's Vocational Evidence: Applicant's vocational expert concluded that applicant sustained a 100 percent loss with respect to her ability to compete in and access the open labor market and was not amendable to vocational training. Although applicant's vocational expert acknowledged and discussed the QME's nonindustrial apportionment related to the cervical spine he also noted that applicant's left shoulder permanent disability was 100 percent industrial.

He opined there was a distinction between "vocational apportionment" and medical apportionment. In that regard he stated that applicant's pre-existing non-industrial cervical spine degenerative condition "had zero impact" on her pre-injury earning capacity based on her work history. He concluded that "without question" vocational apportionment is 100 percent industrial and solely attributable to the specific injury of 9/13/11 and not the cumulative trauma injury. To support his conclusion, he stated that "because the applicant was capable of performing her usual and customary work with zero impediment until the specific injury of September 13, 2011…100 percent of Ms. Nunes' loss of future earning capacity and non-amenability to vocational rehabilitation is industrial in nature."

The orthopedic QME upon reviewing the reporting from applicant's vocational expert agreed that there were no "job options available in the open labor market that are meeting her limitations" and agreed that applicant was 100% disabled.

Defense Vocational Evidence: The defense vocational expert concluded the applicant was not employable in the competitive labor market with a corresponding substantial loss of future earning capacity. However, in contrast to applicant's vocational expert, the defense expert discussed the nonindustrial contributing causal factors of applicant's permanent disability related to her cervical spine, right upper limb, and left carpal tunnel. He then opined that "at least 10% *vocational apportionment* from non-industrial medical factors is attributable to Ms. Nunes' inability to compete in the open labor market and participate in vocational services.' (original emphasis). In a supplemental report the defense vocational expert elaborated that his assessment of 10 percent "vocational apportionment" "was based on the fact that applicant's non-industrial conditions would be aggravated and would cause additional problems for the applicant in engaging in alternative work and more strenuous work in the open labor market.

The WCJ's Decision: Following trial, the WCJ issued a Findings and Award determining that the applicant was entitled to an un-apportioned award of 100% permanent disability. The basis for the

WCJ's decision was that applicant had rebutted the AMA Guides based on the reporting of applicant's vocational expert as well as the reporting of the orthopedic QME who agreed with applicant's vocational expert. The WCJ also noted that in finding the applicant 100% disabled there was "no evidence of previous loss of earnings capacity."

Defendant's Petition for Reconsideration: On reconsideration defendant raised four issues as follows:

> 1. The WCJ's decision failed to comply with LC 5313, which requires a WCJ to state the "reasons or grounds upon which the determination was made.
>
> 2. The WCJ's decision failed to discuss whether applicant's specific injury, cumulative injury, or a combination of both, resulted in the award of permanent disability.
>
> 3. The WCJ impermissibly disregarded the QME's apportionment of 40% of applicant's cervical spine disability to preexisting nonindustrial factors, thus precluding any assertion that the 2011 industrial injury is the sole cause of applicant's permanent total disability.
>
> 4. Defendant also argued the applicant had not rebutted the AMA Guides and that a new award issue "in accordance with the strict application of the AMA Guides" based on the reporting of the orthopedic QME.

The WCAB's En Banc Decision

The Correct Legal Standards and Principles: With respect to Labor Code Section 4663, the WCAB held that it requires a reporting physician to make an apportionment determination and also prescribes the applicable legal standards for determining valid legal apportionment. More importantly, the Board held that the Labor Code makes no statutory provision for "vocational apportionment."

The WCAB set forth a comprehensive review of Labor Code section 4663 as well as the Supreme Court's decision in *Brodie* and their en banc decision in *Escobedo v. Marshalls*. In doing so the WCAB concluded that:

> Accordingly, section 4663(c) authorizes and requires the reporting physician to make an apportionment determination, and further prescribes the standards the physician must use. (Lab. Code, § 4663(c); *Escobedo, supra*, at pp. 607, 611-612.) Apportionment must account for "other factors both before and subsequent to the industrial injury," and may include disability that formerly could not have been apportioned, including apportionment to pathology, asymptomatic prior conditions, and retroactive prophylactic work restrictions. (*Ibid*.) In addition, when a physician considers all appropriate factors of apportionment but nevertheless determines that it is not possible to approximate the percentages of each factor contributing to the employee's overall permanent disability to a reasonable medical probability, the physician has made the apportionment determination required under section 4663(c).

(*Benson v. Workers' Comp. Appeals Bd.* (2009) 170 Cal.App.4th 1535 [74 Cal.Comp.Cases 113, 133]; see also *James v. Pacific Bell Tel. Co.* 2010 Cal. Wrk. Comp. P.D. LEXIS 188).

The WCAB also stated that Labor Code section 4663(c) does not provide for reliance on what they described as "collateral sources" of expert opinion as to apportionment and does not authorize the application of any other legal standard of apportionment except as found in the statute itself. "Accordingly, "vocational apportionment" offered by a non-physician is not a statutorily authorized form of apportionment." Moreover, "apportionment determinations that deviated from the mandatory standards described in section 4663(c) are not a valid basis for upon which to determine permanent disability." ((Lab. Code, § 4663(c); *Escobedo, supra*, at p. 604; *Place v. Workmen's Comp. App. Bd.* (1970) 3 Cal.3d 372, 378-379 [35 Cal.Comp.Cases 525] [not all expert medical opinion constitutes substantial evidence upon which the Appeals Board may rest its decision].)

Pursuant to Section 4663(c), Medical-Legal Evaluators Play an Integral Role in the Determination of Permanent Disability: The WCAB recognized that it was both appropriate and necessary for medical-legal evaluators to "consider the vocational evidence as part of their determination of permanent disability, including factors such as whether applicant is feasible for vocational rehabilitation, and whether the reasons underlying applicant's non-feasibility for vocational retraining arise solely out of the present industrial injury or are multifactorial." In footnote 9 the Board noted that the AMA Guides section 1.9 at pages 13-14 recognize that evaluating physicians may need to address an injured workers' ability to return to work and that this usually requires "input from medical and nonmedical experts such as vocational specialists."

The WCAB Clarified How Vocational Evidence can be Used to Properly Rebut a Scheduled Rating: The Board indicated that pursuant to Labor Code section 4660, and the Supreme Court's decision in *Brodie*, permanent disability is based on whole person impairment "within the four corners of the AMA Guides, Fifth Edition (AMA Guides), as applied by the Permanent Disability Rating Schedule (PDRS) in light of the medica record and the effect of the injury on the worker's future earning capacity." (citations omitted).

Citing the *Fitzpatrick, Ogilvie* and *Dahl* cases the WCAB reiterated that a "scheduled rating is not absolute." In terms of whether and how the PDRS could be rebutted the the Board referenced the *Ogilvie* decision from the Court of Appeal as follows:

> Another way the cases have long recognized that a scheduled rating has been effectively rebutted is when the injury to the employee impairs his or her rehabilitation, and for that reason, the employee's diminished future earning capacity is greater than reflected in the employee's scheduled rating. This is the rule expressed in *LeBoeuf v. Workers' Comp. Appeals Bd.* (1983) 34 Cal.3d 234 [193 Cal. Rptr. 547, 666 P.2d 989].*7* In *LeBoeuf*, an injured worker sought to demonstrate that, due to the residual effects of his work-related injuries, he could not be retrained for suitable meaningful employment. (*Id.* at pp. 237-238.) Our Supreme Court concluded that it was error to

> preclude LeBoeuf from making such a showing, and held that "the fact that an injured employee is precluded from the option of receiving rehabilitation benefits should also be taken into account in the assessment of an injured employee's permanent disability rating." (*Ogilvie, supra,* at p. 1274.)

Pursuant to *Ogilvie,* an employee may challenge a presumptive scheduled rating in three ways:

> 1. By showing a factual error in the calculation of a factor in the rating formula or application of the formula.
>
> 2. Showing the omission of medical complications aggravating the employee's disability in preparation of the rating schedule.
>
> 3. By demonstrating that due to *industrial injury* the employee is not amendable to rehabilitation and therefore has suffered a greater loss of future earning capacity than reflected in the scheduled rating. (citations omitted, emphasis added).

The WCAB also specifically identified and provided numerous examples from relevant cases of additional ways as well as specific situations where vocational evidence can be properly used to assist the parties and the court in evaluating the various factors precluding successful vocational rehabilitation." (citations omitted). The Board stressed that the numerous examples they provided illustrate that "vocational evidence remains appropriate to assist the parties and the court in evaluating factors relevant to a determination of permanent disability, even where valid medical apportionment has been identified by the reporting physicians." More importantly it is the WCJ "who is authorized and required to weigh the totality of the evidence adduced, and to enter a corresponding findings, order, or award. (Lab. Code, § 5313.)." However, in doing so the WCJ "must consider whether the vocational evidence is substantial, whether it rests upon relevant facts, applies correct legal theory, and refrains from surmise, speculation, conjecture, or guess." (citations omitted).

Notwithstanding the fact that vocational experts may no longer use "vocational apportionment" to negate or circumvent substantial medical evidence of apportionment, other vocational evidence may still be used to rebut a scheduled rating. In that regard the WCAB stated:

> In sum, vocational evidence continues to be relevant to the issue of permanent disability, and may be offered to rebut a scheduled rating by establishing that an injured worker is not feasible for vocational retraining. Vocational evidence may also be considered by evaluating physicians as relevant to their determination of permanent disability, and may assist the parties and the WCJ in assessing those factors of permanent disability. Finally, the WCJ retains the duty and the authority to review and weigh the medical and vocational evidence, and to enter corresponding orders, findings, decisions, and awards that are supported by substantial evidence in light of the entire record, including orders for development of the record where necessary. (*Garza v. Workmen's Comp. Appeals Bd.* (1970) 3 Cal.3d 312 [35 Cal.Comp.Cases 500]; see also *Kuykendall v. Workers' Comp. Appeals Bd.* (2000) 79 Cal.App.4th 396,

404 [65 Cal.Comp.Cases 264] ["the WCJ or the Board may not leave undeveloped matters which its acquired specialized knowledge should identify as requiring further evidence"].)

The Standard for Determining Whether a Vocational Expert's Opinion Constitutes Substantial Evidence: The Board cited both the *Escobedo* and *Gatten* decisions with respect to the standards for determining whether a vocational expert's opinion constitutes substantial evidence. "The same considerations used to evaluate whether a medical expert's opinion constitutes substantial evidence are *equally applicable* to vocational reporting. In order to constitute substantial evidence, a vocational expert's opinion must detail the history and evidence in support of its conclusions, as well as "how and why" any specific condition or factor is causing permanent disability. (*Escobedo, supra*, at p. 611; see also *E.L. Yeager v. Workers' Comp. Appeals Bd.* (*Gatten*) (2006) 145 Cal.App.4th 922 [71 Cal.Comp.Cases 1687].)"

Vocational evidence must address apportionment and may not substitute impermissible "vocational apportionment" in place of otherwise valid medical apportionment: The WCAB based on decisions from the Court of Appeal in *Borman* and *Lindh* held that while vocational evidence may be used to to rebut a scheduled rating, "vocational apportionment" is an invalid legal methodology and theory to rebut a scheduled rating and to offset or negate the application of valid medical apportionment. Quite simply with respect to Labor Code section 4663, the task is to determine whether an injured worker's inability to compete in the open labor market or to participate in vocational training is entirely attributable to industrial factors or whether there are also non-industrial contributing causal factors which also prevent the worker from competing in the open labor market and impact overall vocational feasibility.

Following their analysis of the Court of Appeal's decision in *Borman*, the WCAB stated that "[c]onsequently, factors of apportionment must be carefully considered, even in cases where the injured worker is permanently and totally disabled as a result of an inability to participate in vocational training."

Citing the *Lindh* case, the Board stated that "[t]he apportionment analysis required under 4663(a) and *Escobedo, supra,* does not permit reliance on facts offered in support of a competing theory of apportionment." The WCAB in no uncertain terms negated the entire flawed rationale and legal theory "vocational apportionment" was premised upon. In that regard the WCAB stated:

> Accordingly, a vocational report is not substantial evidence if it relies upon facts that are not germane, marshalled in the service of an incorrect legal theory. Examples of reliance on facts that are not germane often fall under the rubric of "vocational apportionment," and include assertions that applicant's disability is solely attributable to the current industrial injury because applicant had no prior work restrictions (*Zmek v. State of California, Department of Corrections and Rehabilitation* (2019 Cal. Wrk. Comp. P.D. LEXIS 552), or was able to adequately perform their job (*Lindh, supra,* at p. 1194), or suffered no wage loss prior to the current industrial injury (*Borman, supra,* at p. 1141).

> The analysis described by *Escobedo, Borman,* and *Lindh* requires an evaluation of *all* factors of apportionment, so long as they are otherwise supported by substantial medical evidence, and irrespective of whether they were the result of pathology, asymptomatic prior conditions, or whether those factors manifested in diminished earnings, work restrictions, or an inability to perform job duties.
>
> Therefore, an analysis of whether there are valid sources of apportionment is still required even when applicant is deemed not feasible for vocational retraining and is permanently and totally disabled as a result. In such cases, the WCJ must determine whether the cause of the permanent and total disability includes nonindustrial or prior industrial factors, or whether the permanent disability reflected in applicant's inability to meaningfully participate in vocational retraining arises solely out of the current industrial injury.

The WCAB's Decision to Remand Back to the Trial Level: Based on the WCAB's analysis of the correct legal standards pursuant to Labor Code section 4663 and applicable case law hereinabove, the WCAB determined that the opinions of both the defense and applicant's vocational experts did not constitute substantial evidence. And since the orthopedic QME relied in part upon the fatally flawed vocational evidence in determining the applicant to be 100% disabled, her reporting did not constitute substantial medical evidence.

The WCAB also determined the WCJ failed to comply with the requirements of Labor Code 5313 as well as section 3208.2 and the WCAB's en banc decision in *Hamilton* with respect to an adequate and completely developed record. As a consequence the WCAB rescinded the WCJ's unapportioned award of 100% permanent disability and returned the matter to the trial level. The Board noted that "the parties may wish to obtain supplemental reporting from their respective medical and vocational experts to address apportionment in accord with the principles explained above."

Editor's Comment: For several years I have attempted to bring the issue of "vocational apportionment" to the attention of the workers' compensation community via speaking engagements, seminars, webinars and also by way of an article in 2021 published by LexisNexis. (California: A Critical Assessment of "Vocational Apportionment" (lexisnexis.com)).

I have always thought that "vocational apportionment" was contrary to Labor Code 4663 and was specifically being used to negate and circumvent both the statute and applicable case law i.e., *Brodie, Acme/Borman,* as well as *Lindh*. The *Estrada* case case cited by proponents was of very little precedential value and more importantly there was no substantial medical evidence of apportionment in *Estrada* which made it easily distinguishable from cases where there was unrebutted substantial medical evidence of apportionment.

Moreover, the Court of Appeal in *Acme* while conceding that applicant's vocational evidence rendered him vocationally non-feasible, still held that the 40% nonindustrial apportionment found by the AME had to be both considered and applied reducing applicant's 100% PD award to 60%.

I also found it strange that I could not find any reported case over the course of several years where an applicant's vocational expert ever found valid "vocational apportionment."

Gonzales v. Northrop Grumman Systems Corp., **2022 Cal.Wrk.Comp. P.D. LEXIS 159 (WCAB panel decision)**

Issues and Holding: Whether there was substantial vocational evidence to rebut the scheduled rating of 97% permanent disability after the application of non-industrial apportionment to warrant an award of 100% permanent total disability. On reconsideration the WCAB affirmed the WCJ's Findings of Fact and Award of 100% permanent total disability based on a determination that applicant's vocational evidence served to rebut the scheduled rating since applicant was not amenable to participate in vocational rehabilitation and was not employable in the open labor market.

Factual & Procedural Overview: The WCJ found that applicant suffered a cumulative trauma injury while employed as a structural mechanic during the period of March 31, 1992 to July 28, 2014, related to injuries to both shoulders, both knees, cervical spine, lumbar spine, and internal injury in the form of heart disease and hypertension. From a procedural perspective it should be noted that the WCJ's F&A and Award in this case issued on February 3, 2020. Defendant filed for Reconsideration and the WCAB granted Reconsideration for further study but waited for over two years to issue their decision!

The Medical Evidence: There was reporting from an AME in orthopaedics and an Agreed QME in internal medicine. The AME in orthopaedics found that with respect to applicant's cervical, lumbar, and bilateral knee permanent disability, 85% was industrial and 15% attributable to nonindustrial degenerative disc and joint changes. The permanent disability attributable to applicant's bilateral shoulder and wrist disability was entirely industrial without and nonindustrial contributing causal factors.

The QME in internal medicine opined that applicant's hypertension related permanent disability was 50% industrial and 50% nonindustrial related to applicant's obesity and metabolic syndrome. He also found that 50% of applicant's permanent disability from his myocardial infarction was industrial including hypertension and a recent total knee replacement. However, there was also 50% nonindustrial contributing causal factors attributable to hyperlipidemia, previous tobacco use, glucose intolerance, and non-compliance.

Both the WCJ and the WCAB found that there was valid non-industrial apportionment as reflected in the medical reporting of both reporting physicians. The Disability Evaluation Unit issued a recommended rating of 97% PD after apportionment based on the rating instructions from the WCJ was not disputed by defendant.

The Vocational Evidence: To rebut the 97% scheduled rating, applicant relied on the opinion of a vocational expert. There is no indication that defendant obtained any vocational evidence. Applicant's vocational expert opined that applicant was unable to return to open labor market and suffered a total loss of earning capacity as well as not being "amenable to or capable of benefitting from any form of assistance through vocational rehabilitation services." In doing so applicant's vocational expert's opinion was premised on two rationales. His first rationale was that there was no basis for "vocational apportionment" and therefore 100% of applicant's loss of earning capacity was industrial in nature. In that regard he stated as follows:

> From an orthopedic and internal medicine perspective, Mr. Gonzales was able to perform his employment with Northrop Corporation for 23 years, up until August 2015, when he chose to prematurely retire due to the extent of the industrial-related injures he incurred while working for the employer. Even if there were any pre-existing orthopedic and/or internal medical factors that may have been involved, they did not prevent him from performing his job. In fact, Mr. Gonzales reported to me that he underwent a preemployment physical examination with the employer prior to the beginning of his employment and was not given any work restrictions. Therefore, and in view of this, there is nothing to indicate that there was any degree of vocational apportionment that prevented Mr. Gonzales from performing his job prior to his injuries with the employer Northrop Corporation. During my interview with Mr. Gonzales, he appeared credible and gave me no reason to disbelieve any of his statements. As such, I find that 100% of his loss of earning capacity is industrial in nature….. (*Id*, at pp. 14-15.)

Applicant's vocational experts second rationale was that "the combined residual effect of his industrial related work limitations and resulting functional capacity would preclude him (applicant) from performing any employment in the competitive labor market." He further expand on this rationale by stating:

> The synergistic and global effect of his overall physical and psychological impairment and residual functional capacity would prevent him from performing work at a sedentary or light level even on a regular-schedule part-time basis. His degree of constant pain; limited use of his wrists and hands; inability to concentrate and lack of focus, and lack of stamina and fatigue are such that he would be unable to maintain an acceptable work pace, as well as maintaining acceptable attendance performance.

The WCAB's Decision on Reconsideration: The WCAB in affirming the WCJ's Findings and Award of 100% permanent total disability found that applicant's vocational expert's opinion was "thorough, well-reasoned and substantial evidence upon which the WCJ properly relied to determine that applicant rebutted the permanent disability rating and is permanently totally disabled."

The WCAB also rejected defendant's arguments and characterized defendant's reliance 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] as "misplaced." In that regard the Board stated that "In *Borman*, the WCJ actually ignored and failed to address substantial medical evidence of non-industrial apportionment. (*Id*, at p. 1143.) In this case, both Mr. Liebman and the WCJ considered and applied the non-industrial apportionment found."

Editor's Comments: The fact that the defense did not introduce any vocational evidence to rebut the opinion of applicant's vocational expert contributed in part to applicant being able to successfully rebut the scheduled rating of 97% PD and obtaining a 100% total permanent disability award. I also do not have any major disagreement with the part of applicant's vocational expert's persuasive opinion that the combined "synergistic and global" effect of his industrially related work limitations and resulting functional capacity effectively precluded the applicant from re-entering and competing in the open labor market and participating in vocational rehabilitation served to rebut the scheduled PD rating of 97% after apportionment.

My disagreement relates to the part of the applicant's vocational expert's opinion dealing with "vocational apportionment" or the lack thereof that serves as an independent basis to rebut the scheduled rating in this case. The fact that applicant took and passed a pre-employment physical examination and was able to work for 23 years when he chose to prematurely retire due to the extent of his industrially related (in part) injuries and suffered no alleged disability before his CT injury is irrelevant under LC 4663 as to whether applicant's current permanent disability may be caused by non-industrial contributing causal factors so that not all of his PD as reflected in the scheduled rating was factually or medically totally industrial in nature. As reflected in the opinions of the AME in orthopedics and QME in internal medicine there were non-industrial contributing causal factors of the applicant's PD except for his bilateral shoulder and wrist disability.

As indicated by the WCAB in *Walsh v. Skyline Steel Erectors,* 2021 Cal.Wrk.Comp. P.D. LEXIS 84 (WCAB panel decision):

> 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, supra.*) **To disregard apportionment because there is no evidence that it was labor-disabling prior to an industrial injury is contrary to *Section 4663***. 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 be considered and applied by vocational experts and the WCJ. (emphasis added).

The instant case differs from *Acme* and *Walsh* in that the WCJ unlike both the WCJ and WCAB in *Acme,* applied non-industrial apportionment to arrive at the 97% scheduled rating. However, it was unnecessary and unwarranted for applicant's vocational expert to try and buttress his

otherwise valid rebuttal opinion with a theory that attempts to disregard valid nonindustrial apportionment of applicant's PD because it was not labor disabling prior to the current industrial injury. As indicated by the Court of Appeal in both *Acme, Lindh* and the WCAB in *Walsh*, such a theory is contrary to the mandates of Labor Code section 4663.

For another questionable case that is contrary to both *Acme* and *Walsh*, see *County of Sonoma/Health Services Department v. W.C.A.B.* (2023) 88 Cal.Comp.Cases 309; 2023 Cal.Wrk.Comp. LEXIS 4 (writ denied). WCAB affirmed WCJ's determination that applicant's vocational evidence served to rebut a strict scheduled rating of 54% PD resulting in applicant receiving an unapportioned award of 100% PTD. Applicant had preexisting cerebral palsy and wore a leg brace before the current injury but was able to work with the brace prior to the current injury. The AME apportioned 15% of applicant's lower extremity PD which included a gait derangement to the nonindustrial contributing causal factor of applicant's cerebral palsy and need to wear a leg brace. The WCJ focused on the fact that prior to the current industrial injury the applicant "was able to be successfully employed with the County of Sonoma. His non-industrial condition did not affect his ability to perform the Drug & Alcohol Counselling position." This analysis is fundamentally flawed in the sense that valid legal apportionment under LC 4663 and 4664 does not require that the pre-existing condition (cerebral palsy) be labor disabling, caused any lost time for work, or required medical treatment. This type of analysis reflects the law prior to 2004 which was abrogated by SB 899 and the enactment of LC sections 4663 and 4664.

Moreover, the Court of Appeal in *Acme/Borman* rejected the same arguments and rationale by the trial judge in the *Acme* case that mirrors almost verbatim the WCJ's reasoning hereinabove.

***Walsh v. Skyline Steel Erectors*, 2021 Cal.Wrk.Comp. P.D. LEXIS 84 (WCAB panel decision)**

Issues and Holding: Whether the WCJ's award of permanent total disability without apportionment was based on a misapplication of Labor Code section 4663 and whether applicant's vocational evidence rebutted the scheduled rating when applicant's vocational expert failed to consider and apply substantial medical evidence of apportionment based on the unrebutted opinion of the AME in orthopedics that 25% of applicant's disability was nonindustrial.

The WCAB amended the WCJ's unapportioned award of permanent disability finding instead that applicant's specific injury of December 15, 2014, caused permanent disability of 91% after nonindustrial apportionment of 25%. In doing so the WCAB succinctly stated that "[t]he WCJ's finding that applicant is entitled to an award of 100% permanent total disability is based upon a mis-application of the law of apportionment and reliance upon unsubstantial vocational evidence."

Factual & Procedural Overview: After an initial denial of applicant's specific injury of December 15, 2014, at the time of trial defendant admitted injury to applicant's lower back, cardiovascular system, cognitive impairment, circulatory system, right eye, DVT, and groin while employed as an ironworker by defendant.

Due to a burn to his back while applying a heating pad, applicant suffered compensable consequence injuries that required applicant to undergo extensive medical treatment including multiple surgeries. The reporting physicians included AME's in internal medicine and orthopedics as well as QME's in ophthalmology and neurology. The only physician indicating non-industrial apportionment of the applicant's PD was the orthopedic AME who found 25% nonindustrial apportionment attributable to applicant's pre-existing developmental asymptomatic lumbar spondylolisthesis with associated degenerative changes in the L5-S1 disc.

The DEU formal rating of applicant's PD including 25% nonindustrial apportionment was 91% PD. However, the WCJ found that applicant's vocational evidence rebutted the scheduled rating and awarded applicant permanent total disability without apportionment. Defendant filed a Petition for Reconsideration which was granted by the WCAB.

The Vocational Evidence: Both defendant and applicant introduced vocational evidence based on the opinions of their respective vocational experts. The defense vocational expert opined that applicant could participate in vocational training and was not permanently totally disabled. In contrast, applicant's vocational expert concluded the applicant could not return to gainful employment in the open labor market due to his work restrictions.

Applicant's vocational expert initially reviewed and acknowledged the orthopedic AME's report wherein he found that 25% of applicant's orthopedic PD was nonindustrial. However, in a later report he ignored the AME's medical apportionment and erroneously stated that "the various medical evaluators" found no non-industrial apportionment. Applicant's vocational expert then erroneously concluded that all of applicant's permanent disability was entirely and exclusively attributable to the specific injury of December 15, 2014, and there were no nonindustrial contributing causal factors. One of the primary rationales applicant's vocational expert relied on in reaching his conclusion that applicant's diminished occupational capacity was entirely industrial was that prior to the applicant's specific injury on December 15, 2014, applicant was able to perform his usual and customary job as an ironworker without any restrictions.

The WCJ's Decision: The WCJ obtained a formal rating from the DEU which reflected a scheduled rating of 91% permanent disability which included the orthopedic AME's 25% nonindustrial apportionment. However, based on the opinion and conclusion of applicant's vocational expert that applicant had lost 100% of his earning capacity, the WCJ found that applicant rebutted the scheduled rating and was permanently totally disabled. In doing so the WCJ explained her decision by stating:

> On the other hand, and assuming that 25% of Applicant's orthopedic permanent disability was caused by factors other than his work, Applicant was still capable of performing all of his work duties up to the 12/15/2014 date of injury. The 25% non-industrial

> apportionment opined by AME Sommer was due to Applicant's anatomic condition and associated degenerative changes in the L5- S1 disc. Up until the date of injury, Applicant had no work restrictions related to the anatomic condition and degenerative changes and was able to complete his job duties.
>
> Therefore, even if 25% of the permanent disability pre-existed the date of injury, Applicant's need for work restrictions was solely caused by the 12/15/2014 date of injury.

The WCAB's Decision on Reconsideration: The WCAB amended the WCJ's unapportioned award of permanent disability finding instead that applicant's specific injury of December 15, 2014, caused permanent disability of 91% after nonindustrial apportionment of 25%. In doing so the WCAB succinctly stated that "[t]he WCJ's finding that applicant is entitled to an award of 100% permanent total disability is based upon a mis-application of the law of apportionment and reliance upon unsubstantial vocational evidence."

Relying upon the Court of Appeals decision in *Acme Steel v. Workers' Comp. Appeals Bd. (Borman)* (2013) 218 Cal.App.4th 1137 [78 Cal.Comp.Cases 751], the WCAB stated:

> In *Borman*, the court reversed an award of 100% permanent disability where the medical evidence established that applicant's permanent disability from hearing loss was 40% caused by non-industrial cochlear degeneration and 60% due to occupational factors. The court held that even where the vocational evidence was sufficient to establish a total loss of earning capacity, per *Ogilvie*, apportionment to the causative sources of the current disability is required.

In terms of applicant's vocational expert's opinion not constituting substantial evidence and therefore not rebutting the scheduled rating of 91% PD after apportionment, the WCAB noted that applicant's vocational expert "…disregarded Dr. Sommer's apportionment to non-industrial factors rendered his reporting unsubstantial. Thus, a finding that applicant rebutted the scheduled rating of his permanent disability is not supported by substantial evidence."

The WCJ found that the AME's 25% non-industrial apportionment was inapplicable based on her analysis that applicant's non-industrial condition was not labor disabling at the time of his December 15, 2014, industrial injury since he had no work restrictions related to to his pre-existing developmental asymptomatic lumbar spondylolisthesis with associated degenerative changes in the L5-S1 disc. However, the Board concluded the WCJ's analysis was flawed since:

> This analysis fails to address the principles of apportionment to pathology and asymptomatic conditions which is now required by Labor Code section 4663. (*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, provided there "is substantial medical evidence that establishes that the asymptomatic condition or pathology was a contributing cause of the disability." (*Lindh,* 83 Cal.Comp.Cases at 1882.) Similarly, in *Rice*, the court held that apportionment to a pre-existing degenerative condition which is caused in part by heredity or genetics is required where there is substantial medical evidence, as found here, to establish that the pre-existing asymptomatic condition played a role in causing the disability.

The WCAB's Holding: The WCAB citing the Court of Appeal's decision in *Acme* held that:

> 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,* supra.) To disregard apportionment because there is no evidence that it was labor-disabling prior to an industrial injury is contrary to Section 4663. 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 be considered and applied by vocational experts and the WCJ.

Editor's Comments: The WCAB's panel decision in this case is a long overdue correct application of the Court of Appeals decision in *Acme Steel v. Workers' Comp. Appeals Bd. (Borman)* (2013) 218 Cal.App.4th 1137 [78 Cal.Comp.Cases 751]. Over the years since *Acme* issued in 2013 it has been inconsistently and in some cases, erroneously misinterpreted and applied by both applicant and defense counsel as well as WCJ's and the WCAB.

Over the last several years, the concept of "vocational apportionment" has come to the forefront of efforts to offset or in some instances negate substantial medical evidence of nonindustrial apportionment. In reality "vocational apportionment" is just another form of vocational evidence that has been given a catchy descriptive but simply embodies many of the same erroneous arguments and rationale made at the trial level and on reconsideration in *Acme* that were expressly rejected by the Court of Appeal.

What is important about the WCAB's decision in the instant case is that the Board clarified in unambiguous language that vocational experts must both consider and apply substantial medical evidence of apportionment and not merely "consider" it when rendering an opinion on whether an injured workers' loss of earning capacity and inability to compete in the open labor market or to participate in vocational rehabilitation may be attributable to nonindustrial contributing causal factors.

More importantly, the WCAB held just as the Court of Appeal did in *Acme* that substantial medical evidence of apportionment must be applied even when there is substantial vocational evidence that an applicant has a 100% loss of earning capacity.

In the instant case the WCAB shredded the notion that evidence the injured worker had no underlying pre-existing conditions that were disabling prior to the current injury and had no work restrictions related to any underlying pathology is somehow a viable legal basis to ignore substantial medical evidence of apportionment. *"To disregard apportionment because there is no evidence that it was labor disabling prior to an industrial injury is contrary to Section 4663."* (emphasis added).

With respect to the genesis of the concept and application of 'vocational apportionment" see the article authored by the editor entitled "California: A Critical Assessment of "Vocational Apportionment" published in the LexisNexis California Workers' Compensation Newsletter, Vol 12, No.8-February 29, 2021.

Orr v. Hayward Unified School District, PSI, **2021 Cal.Wrk.Comp. P.D. LEXIS 117 (WCAB panel decision)**

Issues and Holding: WCAB in denying applicant's Petition for Reconsideration upheld the WCJ's award of 24% PD after apportionment to a cumulative trauma injury to applicant's lumbar spine and 4% PD after apportionment to a specific injury related to applicant's lumbar spine. The WCAB also held that the *Hikida* case did not foreclose valid legal apportionment since applicant's alleged failed back surgery was not the sole cause of his lumbar spine PD. The Board also found that applicant failed to rebut the scheduled ratings since his vocational evidence which asserted all of applicant's PD was attributable to his most recent specific injury of 7/26/05 without apportionment to any prior non-industrial contributing causal factors or applicant's 2/27/02 prior back injury did not constitute substantial evidence.

Factual Overview: Applicant was employed as a school custodian. He suffered a specific back injury on 2/27/02 that was resolved by a Stipulated Award of 25% PD. After the 2/27/2002 injury he was on light duty for approximately one year. With respect to the 2002 specific back injury both applicant's PTP and the reporting QME indicated both permanent and prophylactic work restrictions. Even before his 2002 industrial back injury, applicant received both medical treatment and disability related to chronic low back pain in 1993 and 1995. A possible spinal fusion was discussed by applicant's treating physicians in 1996.

After his 2002 specific back injury applicant provided a history that he should not have returned to work and that he never fully recovered from the 2002 back injury. He also self-modified his job duties in various ways and estimated he was only able to perform half of his required job duties until he resigned in 2006. Applicant also suffered another specific back injury on 7/26/05 due to a fall at work. Following that injury, he tried to return to work but would often call in sick and his symptoms continued to worsen to the point where he resigned in 2006 because he thought he would

be fired for not doing his job. Applicant also filed a cumulative trauma back injury for the period ending on 12/26/2006.

Applicant had lumbar spine surgery on 2/17/2009 consisting of a two-level fusion and subsequent removal of hardware which was described as "somewhat helpful."

Medical Reporting of the AME: The reporting AME in the case diagnosed applicant as having "symptomatic lumbar disc disease superimposed on spondylolysis and spondylolisthesis…." With respect to apportionment of applicant's current lumbar spine PD, the AME opined that 25% was nonindustrial attributable to applicant's developmental and congenital problems. Another 10% was attributable to the old 2002 industrial back injury, 10% to the 2005 specific back injury, with the remaining 55% apportionable to the CT injury ending on 12/26/06.

The AME deferred the issue of whether applicant was employable to a vocational expert but did factor into his lumbar spine PD determination the reported results of applicant's functional capacity evaluation (FCE).

The Vocational Evidence: Both applicant and defendant obtained reports from vocational experts. Applicant's vocational expert while acknowledging applicant's prior 2002 back injury and applicant performing light duty for a year, minimized its significance by saying that from a vocational standpoint he was able to return to full duty at some point. Consequently, he apportioned 0% of applicant's "loss of labor market access" to the 2002 industrial injury. Applicant's vocational expert also ignored both the actual and prophylactic work restrictions imposed by the reporting physicians related to applicant's 2002 back injury. Applicant's vocational expert said that applicant's CT injury was moot because it was the specific injury of 7/26/2005 that was the cause of applicant not being able to continue to work his usual and customary job and not the CT injury. Applicant's vocational expert's opinion in support of rebutting the scheduled rating was as follows:

> Therefore, I am of the opinion that zero percent (0%) of Mr. Orr's LeBoeuf determination is attributable to any pre-existing non-industrial disabilities, and one hundred percent (100%) of Mr. Orr's LeBoeuf determination is attributable to his industrial injury of July 26, 2005.

The defense vocational expert opined that applicant was employable and amenable to vocational rehabilitation.

The WCAB's Decision on Reconsideration: In denying applicant's Petition for Reconsideration the WCAB adopted and incorporated the WCJ's Report on Reconsideration and Opinion on Decision.

The AME's Apportionment Determination Constituted Substantial Medical Evidence: On reconsideration the applicant argued that the AME's apportionment determination did not constitute substantial evidence because applicant did not suffer a cumulative trauma injury (to

which the AME apportioned 55% of applicant's lumbar spine PD to) and that the *Hikida* decision precludes apportionment because applicant's lumbar spine PD was attributable to his alleged failed back surgery.

With respect to the argument that applicant did not suffer a CT injury the Board pointed out that the parties stipulated applicant suffered a CT injury ending on 12/26/06. In addition, this stipulation was buttressed by applicant's testimony that following his 2002 specific back injury "he only performed half of his job duties, that his symptoms worsened as a result of working, and that the work was wearing him down." The AME also found applicant suffered a CT injury.

As to applicant's argument that the *Hikida* decision precluded apportionment, the Board stated that the AME found that the cause of applicant's PD was not attributable to the alleged failed laminectomy but rather to applicant's various work injuries. The WCAB also cited the Court of Appeal's decision in *County of Santa Clara v. Workers' Comp. Appeals Bd. (Justice)* (2018) 49 Cal.App. 5th 605 narrowly interpreting the *Hikida* decision which in application should only preclude apportionment "where the industrial medical treatment is the sole cause of the permanent disability" which it was not in this case.

Applicant's Vocational Evidence did not Rebut the Scheduled Rating: Applicant argued that his vocational expert's report and opinion combined with the Functional Capacity Evaluation served to rebut the scheduled rating and that applicant was 100% disabled.

The WCAB rejected the opinion of applicant's vocational expert that all of applicant's lumbar spine PD was attributable to the 2005 specific injury based on the fact the vocational expert ignored irrefutable medical and testimonial evidence that applicant's 2002 specific back injury resulted in both disability and work restrictions and that applicant had prior back related disability dating back to 1993 and 1995 all of which were clearly contributing causal factors of applicant's lumbar PD.

The Board stated that "……a vocational expert must consider, and cannot ignore, medical evidence of apportionment. (*Kirkwood v WCAB* (2015) 80 Cal.Comp. Cases 1082 (writ denied).

***Colvin v. Inner Circle Investments, Inc*. 2020 Cal.Wrk.Comp. P.D. LEXIS 136 (WCAB panel decision).**

Issues & Holding: Based on the unrebutted opinion of the AME in orthopedics, the WCJ found that while applicant was permanently totally disabled, there was valid legal apportionment of 50% attributable to applicant's multiple nonindustrial injuries causing significant pre-existing disability. The WCJ also found that applicant's vocational expert's opinion that applicant was not amenable to vocational rehabilitation did not constitute substantial evidence since the vocational expert failed to address the unrebutted substantial medical evidence from the AME that 50% of applicant's lumbar spine disability was nonindustrial as required by *Acme Steel v. Workers' Comp. Appeals Bd.* (2013) 218 Cal.App.4th 1137.

Applicant filed for Reconsideration contending that he was entitled to an unapportioned award of permanent total disability. The WCAB on Reconsideration adopted and incorporated the Report on Reconsideration and denied Reconsideration.

Factual and Medical Overview: While employed as a construction manager, applicant sustained a specific injury to his low back on April 4, 2016. He was evaluated by an AME in orthopedics who issued four reports. Applicant had two fusion surgeries. The AME relying on an *Almaraz/Guzman* analysis found applicant had 49% WPI. In terms of work limitations, the AME found applicant was limited to sedentary work and he also required the use of a cane for ambulation and his use of narcotic pain medication impaired his ability to work. From a medical standpoint based on all of these factors, the AME opined applicant was unable to compete in the open labor market and therefore was 100% disabled from an orthopedic standpoint.

Apportionment: There was a plethora of evidence that applicant was significantly symptomatic as well as disabled prior to the industrial injury of April 4, 2016. Applicant suffered a serious lumbar spine injury in July of 2009 while in the military service in Iraq. He experienced both neck and back pain and treated at the VA Hospital in 2009. He also had physical therapy consistently for two years. He suffered daily neck and back pain which progressively worsened with some radiculopathy.

Applicant was also involved in a non-industrial motor vehicle accident on November 30, 2012 in which he was rear ended by a vehicle going 40 mph. His low back worsened significantly as a result of this accident. An MRI of applicant's lumbar at that time revealed L5-S1 was severely herniated and lacerated. In terms of treatment, applicant received between 10 and 14 epidural injections in 2014. After a year, the epidurals failed to alleviate his symptoms, he had low back surgery in February of 2015. The surgery worsened his low back condition significantly. He had additional physical therapy. He began working for defendant, Inner Circle Investments in May of 2015 just three months after his first low back surgery.

One month before his specific injury at Inner Circle on April 4, 2016, applicant started treating with a pain management specialist who prescribed pain medication for him.

During the course of the trial applicant testified about his pre-existing disability and work limitations. He had been taking some pain medications since 2009. While he was able to do his job at Inner Circle, he avoided sitting for too long. He also did a lot of driving on the job that was painful for him. He candidly testified that even before the specific injury of April 4, 2016, it was too painful for him to bend over to pick up a pen. He claimed that it was also painful for him to go up ladders and recalled that in his deposition he testified that he could not go up ladders with a work crew on one occasion. He also experienced pain related to other work activities. Prior to his April 4, 2016 injury he also testified the pain level in his back was around 6 or 7 on a scale of 1-10 but could spike up to a level 8.

His condition worsened after the April 4, 2016 injury. His treating physician informed him that his low back surgery in 2015 failed to fuse and had collapsed. Applicant had a second back surgery on July 1, 2016.

Based on this history, the AME in orthopedics opined the applicant was significantly symptomatic with respect to his low back prior to and subsequent to the April 4, 2016 industrial injury. The orthopedic AME apportioned applicant's lumbar spine disability 50% to the specific industrial injury of April 4, 2016 and 50% to his nonindustrial injuries and related surgery.

The vocational evidence: Applicant's vocational expert concluded that applicant was not amenable to vocational rehabilitation. She opined that direct placement was not an option and that applicant was not amenable to vocational training. While she noted the orthopedic AME's 50% non-industrial apportionment, she indicated that the AME did not apportion the applicant's sedentary work restriction to the prior MVA accident. Therefore, she based her opinion that her vocational conclusion and findings related to applicant's sedentary work restriction as opposed to any other factor. However, she did discuss other factors including applicant's medication usage to support her opinion that applicant was not amenable to vocational rehabilitation because there were too many factors which the applicant had to contend with in order to acquire new skills in order to return to competitive employment.

Defendant also submitted a vocational report that found applicant was able to engage in future vocational rehabilitation services but the WCJ did not find this report persuasive.

As to applicant's vocational expert's opinion, the WCJ while noting her opinion was persuasive on the issue of applicant not being amenable to vocational rehabilitation also found her conclusions that applicant's preexisting non-industrial disability of 50% as found by the AME was not a factor was not persuasive. The WCJ citing both *Acme Steel* as well as *Rodriguez v. YRC Worldwide,* 2017 Cal.Wrk.Comp. P.D. LEXIS 177 (WCAB panel decision), concluded that the failure of applicant's vocational expert to address and consider the unrebutted medical evidence of 50% non-industrial apportionment rendered her opinion that the applicant was not amenable to vocational rehabilitation solely as of his industrial injury did not constitute substantial evidence.

Comment: Another case addressing this recurring issue is *Johnson v. State of California Department of Corrections* 2020 Cal.Wrk.Comp. P.D. LEXIS 57 (WCAB panel decision). In *Johnson,* the WCAB on reconsideration rejected the WCJ's reliance on applicant's vocational expert's opinion finding that applicant was permanently totally disabled based on applicant not being amenable to vocational rehabilitation and unable to return to the labor force. The WCAB concluded that applicant's vocational report did not constitute substantial evidence to rebut the scheduled rating since the vocational expert failed to note the orthopedic AME's apportionment of applicant's right knee disability to nonindustrial arthritis as required by *Acme Steel*.

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. (emphasis added)

Comment: For other cases dealing with the interaction of vocational evidence and substantial medical evidence of apportionment, see *Kirkwood v. Workers' Comp. Appeals Bd*. (2015) 80 Cal.Comp.Cases 1082 (writ denied). In *Kirkwood*, a vocational expert improperly disregarded the impact of applicant's nonindustrial amputation contrary to the statutory apportionment requirements. Also, in *Wright v. First American Title Company* 2019 Cal.Wrk.Comp. P.D. LEXIS 584 (WCAB panel decision) applicant's vocational expert's opinion did not constitute substantial evidence in part because he improperly disregarded the opinion of the AME in psychiatry who found applicant was unable to compete in the open labor market on a psychiatric basis, but also opined that 49% of applicant's psychiatric permanent disability was attributable to non-industrial factors and 51% to her cumulative trauma injury.

9. Labor Code Section 4662(a)

Paramo v. Lamb Chops, Inc., Security National Ins. Co., **2021 Cal.Wrk.Comp. P.D. LEXIS 351 (WCAB panel decision)**

Issues & Holding: Whether applicant's brain injury resulting from a compensable consequence injury was an injury to the brain resulting in permanent mental incapacity so as to trigger the LC 4662(a)(4) presumption of permanent total disability. Whether applicant's permanent disability based on the conclusive presumption of permanent total disability pursuant to LC 4662(a)(4) is subject to apportionment pursuant to Labor Code section 4663,

The WCAB in incorporating and adopting the WCJ's Report on Reconsideration and Opinion on Decision held that that the conclusive presumption of total disability under LC 4662(a) was applicable and is not subject to apportionment pursuant to LC 4663. The WCAB also found that even if the 4662(a) conclusive presumption did not apply, that apportionment of the applicant's brain injury permanent disability was not apportionable based on the Court of Appeals decision in *Hikida* since it was entirely attributable to medical treatment the applicant received to treat his industrial injury of August 29, 2014.

Factual & Procedural Overview: On August 29, 2014, applicant was injured when the truck he was driving partially rolled over. In addition to the specific injury of August 29, 2014, applicant

also claimed a compensable consequence injury related to a stroke he suffered on August 31, 2014, as well as a cumulative trauma injury. Defendant stipulated to the fact that applicant suffered a compensable injury on August 29, 2014, to his ribs, right shoulder, internal injuries and a stroke. Defendant denied that the type of stroke applicant suffered was a brain injury. The WCJ and the WCAB found that applicant did not suffer a cumulative trauma injury.

The WCJ and the WCAB found that applicant's brain injury produced substantial impairment that fell under the Labor Code section 4662(a)(4) conclusive presumption that applicant was permanently totally disabled. Defendant filed for Reconsideration alleging in part that apportionment should be applied to applicant's brain permanent disability.

The WCAB's decision: As indicated herein above, the WCAB adopted and incorporated the WCJ's Report on Reconsideration as well as his Opinion on Decision as their own decision.

The 4662(a)(4) Conclusive Presumption of Total Disability and Apportionment: Defendant conceded in its Petition for Reconsideration that applicant "has a significant brain injury." The WCJ found that this created the conclusive presumption that applicant was permanently totally disabled pursuant to Labor Code Section 4662(a)(4).

The WCJ and the WCAB found that LC 4663 could not be used as a basis to apportion the permanent total disability created by the conclusive presumption of permanent disability based on LC 4662(a)(4). In support of that conclusion the WCJ cited to two cases. The first is a writ denied case involving a split panel decision in *City of Santa Clara v. W.C.A.B. (Sanchez)* (2011) 76 Cal.Comp.Cases 799 (writ denied) that also involved a stroke which in turn relied on another writ denied case in *Kaiser Foundation Hospitals v. W.C.A.B. (Dragomir-Tremoureux)* (2006) 71 Cal.Comp.Cases 538 (writ denied).

Alternatively, the WCJ and the WCAB found there was no basis for apportionment based on the Court of Appeals decision in *Hikida v. WCAB* (2017) 12 Cal.App5th 1249, 82 Cal.Comp.Cases 679 since all of applicant's PD related to his stroke was allegedly solely attributable to medical treatment in the form of medication he received for his orthopedic injuries that caused a drop in his blood pressure that caused his stroke.

The WCJ and the WCAB also found that the reporting from the physician who evaluated applicant's stroke permeant disability did not constitute substantial medical evidence on apportionment since the doctor changed his apportionment finding from 100% industrial to 50% industrial and 50% non-industrial without sufficiently explaining the reasons for his change of opinion.

Editor's Comments: Although the WCJ and the WCAB cited the *Sanchez* and *Dragomir-Tremoureux* writ denied cases to support their holding that LC 4663 apportionment is not applicable to any conclusively presumed permanent disabilities found under LC 4662(a) (1)-(4). In doing so they failed to discuss the WCAB panel decision in *Fraire v. California Department of Corrections and Rehabilitation and State Compensation Insurance Fund* 2020 Cal.Wrk.Comp. P.D. LEXIS 60. In *Fraire*, in a split panel decision, the majority found that Labor Code "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 results from industrial causation."

In remanding *Fraire* 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. The WCAB also found *Benson* apportionment that with respect to the 60% industrial component, 30% should be apportioned to each of two specific injuries.

In the instant case with respect to the WCAB's backup reasoning that there was no basis for apportionment based on *Hikida,* the editor notes that the medical reporting indicates that applicant had a confirmed history prior to the truck accident and the stroke of suffering from a number of preexisting conditions that were aggravated by the industrial accident of August 29, 2014. The pivotal issue as pointed out by the Court of Appeal in *County of Santa Clara v. WCAB (Justice)* (2020) 49 Cal.App.5th 605, 85 Cal.Comp.Cases 467. as well as the WCAB in a number of panel decisions subsequent to *Hikida,* is whether the medical treatment in the form of medication the applicant received that allegedly caused a drop in his blood pressure leading to his stroke, was the sole and exclusive cause of the resulting brain related PD or whether there were multiple contributing causal factors causing the PD related to the the stoke applicant suffered. If so, under *Justice* and consistent with *Hikida* there was an arguable basis for apportionment even if the stroke aggravated and accelerated any of applicant's underlying conditions that contributed to his stroke related PD.

***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, the 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 Chairperson 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 vision in 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. Consequently, 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. See also, *Sanders v. Chico Immediate Care* 2023 Cal.Wrk.Comp. P.D. LEXIS 125 (WCAB panel decision. In *Sanders*, the WCAB in remanding the case back to the trial level for further development of the record, discussed the applicable standards as well as the 2007 legislative amendments for determining whether a finding of disability that is total in nature based on an injury to the brain resulting in permanent mental incapacity pursuant to Labor Code § 4662(a)(4).

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 of 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. See also, *Gaskins v. Wet Dirt Inc.; National Fire and Liability Ins.* Co., 2023 Cal.Wrk.Comp. P.D. LEXIS 60 (WCAB panel decision). In a traumatic brain injury case caused by a specific injury, the WCJ and WCAB found applicant had sustained a brain injury resulting in permanent mental incapacity in accordance with LC section 4662(a)(4) based on applicant's credible testimony as well as the medical reporting of the SPQME as well as a neuropsychologist. Applicant was awarded 100% permanent total disability without apportionment.

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 he 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". Therefore, 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.

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 preexisting 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 of 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.

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 on 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.

10. Labor Code Section 4662(b)

Rodriquez 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."

11. Labor Code Section 4663

***Brophy v. Workers' Compensation Appeals Board* (2021) 86 Cal. Comp. Cases 706; 2021 Cal.Wrk.Comp. LEXIS 23 (Writ denied)**

Issues and Holding: Whether the QME's opinion that 80% of applicant's pulmonary system disability related to obstructive pulmonary disease and hoarse voice was nonindustrial based on his long history of heavy smoking and morbid obesity constituted substantial evidence. In this writ denied case, the Court of Appeal affirmed the WCAB's split panel decision that there was 80% valid nonindustrial apportionment of applicant's pulmonary system disability related to his long history of heavy smoking and obesity and 20% industrial PD related to applicant's industrial toxic exposure on January 3, 2014.

Factual Overview: On 1/3/2014 while employed as a truck driver applicant was exposed to toxic paint fumes while unloading a truck. He was diagnosed with chronic obstructive pulmonary disease and restrictive lung disease. Applicant had a confirmed history of 20-years of heavy smoking and weighed 383 pounds shortly after his specific injury of 1/3/2014.

Medical Reporting: The reporting QME determined the applicant was 100% permanently totally disabled but found 80% nonindustrial apportionment attributable to contributing causal factors related to his lifetime of heavy smoking and morbid obesity attributable to applicant's dietary problems. The QME was deposed and reiterated his opinion on apportionment supported by scientific literature as the harmful effect of years of heavy smoking had on applicant's lungs.

> "On the one hand, you have this tremendous smoking history in this individual combined with morbid obesity. On the other hand, you have a single, fleeting exposure to what is reported to be marine paint. I think apportioning 20% to his lung disease to that exposure is very generous.

With respect to the applicant's underlying non-industrial risk factors the QME stated:

> This patient had extensive nonindustrial risk factors for his internal medicine-related pulmonary conditions and complications thereof. Chief among these risk factors are lifelong cigarette smoking and obesity. With regard to the lung disease, however, I do believe that the lion's share of causation is caused by nonindustrial factors related to smoking and diet.

The WC's Decision: Based on the reporting of the QME the WCJ found applicant to be 100% permanently totally disabled before apportionment. However, the WCJ found 80% valid nonindustrial apportionment and 20% industrial causation with the applicant being award 20% permanent disability.

Applicant's Arguments on Reconsideration: On reconsideration applicant argued that the QME's apportionment determination did not constitute substantial evidence because it was impermissibly based on apportionment to risk factors and that the QME's opinion failed to adequately explain his apportionment opinion pursuant to the WCAB's en banc decision in *Escobedo v. Marshalls* (2005) 70 Cal. Comp. Cases 604 (Appeals Board en banc opinion).

The WCAB's Decision: The WCAB affirmed the WCJ's decision in a split panel decision. With respect to applicant's arguments that the QME's apportionment opinion was based on apportionment to risk factors as opposed to actual nonindustrial contributing causal factors, the WCAB relying on the Court of Appeals decision in *Lindh* stating that:

> …. [W]here some portion of an injured employee's PD results from a preexisting asymptomatic condition that is caused by a non-industrial disease or pathology, by congenital or genetic factors, or by other non-industrial risk factors, a physician may permissibly apportion the disability. The WCAB pointed out that in *City of Petaluma v. W.C.A.B. (Lindh)* (2018) 29 Cal.App.5th 1175, 241 Cal.Rptr.3d 97, 83 Cal. Comp. Cases 1869, the Court of Appeal expressly rejected the Appeals Board's erroneous conclusion that mere non-industrial risk factors that predisposed the employee to having left eye blindness did not constitute a valid basis for apportionment.

The WCAB also found that the QME's apportionment determination constituted substantial medical evidence since the QME adequately explained with reasonable medical probability "how and why" some portion of of the applicant's PD was caused by non-industrial factors. (*Escobedo v. Marshalls* (2005) 70 Cal. Comp. Cases 604 (Appeals Board en banc opinion).

In contrast to this case, see the WCAB's panel decision in *Junge v. City of San Jose*, 2021 Cal.Wrk.Comp. P.D. LEXIS 375 (WCAB panel decision). WCAB overturned WCJ's award if 70% PD after apportionment of 30% and awards applicant an unapportioned award of 100% PTD since the QME's apportionment opinion did not satisfy the "how and why" analysis required by *Escobedo* to constitute substantia medical evidence.

Editor's Comments: The dissenting Commissioner's opinion in this split panel decision warrants an extended comment. It is difficult to fathom or understand the dissent in this case given the Supreme Court's decision in *Brodie* as well as numerous decisions by the Court of Appeal holding that there can be a basis for valid legal apportionment under Labor Code sections 4663 and 4664 even in there was no prior medical treatment, no prior disability, and no lost time from work, so long as there is substantial medical evidence that a portion of applicant's PD is attributable to a non-industrial contributing causal factor or factors.

The dissenting Commissioner states that the basis for her opinion that the QME's apportionment opinion did not constitute substantial medical evidence is that applicant worked without difficulty since 1996 and worked in this position for the defendant for three years, often working overtime and engaging in heavy lifting. She also pointed out that the applicant had never been treated for any lung problems prior to his toxic exposure at work.

While these factors may have served as a basis to preclude apportionment of PD before SB 899 and Labor Code Sections 4663 and 4664 were enacted in 2004, they clearly do not preclude or negate valid apportionment under the current law which reflects a radical and diametrical change in apportionment law that existed for the 36 years prior to 2004 where apportionment of permanent disability based on causation was prohibited.

The dissenting Commissioner in this case and in other cases, has applied the wrong legal standards and principles related to apportionment under Labor Code 4663 and 4664 when determining whether a medical report or reports constitute substantial evidence. As a result, she erroneously concluded that the QME's medical report in this case did not constitute substantial evidence. (see, *E.L. Yeager Construction v. Workers' Comp. Appeals Bd. (Gatten)* (2006) 145 Cal.App.4th 922, 71 Cal. Comp. Cases 1687).

Wiest v. California Department of Corrections and Rehabilitation, Centinela State Prison **(2021) 80 Cal.Comp.Cases 856, 2021 Cal.Wrk.Comp. P.D. LEXIS 162 (WCAB panel decision)**

Issues and Holding: Whether there is a basis for apportionment of applicant's permanent disability including his bilateral below the knee leg amputations related to his underlying pre-injury non-industrial diabetes and whether adding applicant's impairments pursuant to the *Kite* rather than using the combined values chart (CVC) was based on substantial evidence.

The WCAB adopted and incorporated the WCJ's Report on Reconsideration and affirmed the WCJ's Findings and Award of permanent total disability. The Board found there was substantial medical evidence to support the *Kite* method of adding applicant's impairments. In addition, the WCAB relying on one panel decision and a writ denied case and distinguishing the *Lindh* case, found no basis for apportionment to applicant's underlying diabetes even though it contributed to the applicant's need to have bilateral below the knee amputations.

Factual Overview: Applicant was employed as a plumber at Centinela State Prison. He suffered a specific right ankle twist injury on May 19, 2015. Applicant was first diagnosed with diabetes when he was 42 years old, ten years before his specific injury on May 19, 2015. The record is silent as to the severity of his diabetes whether his diabetes was symptomatic prior to the date of injury. His job duties required him to spend 80% of his work time walking and with respect to the other 20% it involved both sitting and standing. Following the May 19, 2015, specific right ankle injury he received medical treatment. He was fitted with a boot and was off work for two or three months and then was released to return to work full duty. However, he could not walk normally to to pain in his right ankle and foot.

After his return to work his right ankle and foot felt different, and he formed a blister but continued to work full duty until he could no longer work. He underwent a fifth toe amputation on his right foot. He returned to his regular work after the toe amputation limping and walking 80% of the time. His condition continued to worsen, and he stopped working in July of 2017.

In 2018 after applicant developed a sore from a blister which led to a serious wound infection that required his right leg to be amputated below the knee. When he was in rehabilitation recovering from his amputation, he developed a wound on his left foot which led to a left leg amputation below the knee in August of 2018.

Procedural Overview: While the claim was pending prior to trial the employer only admitted injury to applicant's right foot and ankle. Following trial, the WCJ issued a Findings and Award finding the applicant sustained injury to his right foot and ankle, bilateral legs resulting in bilateral below the knee amputations, lumbar spine, vascular system, sleep, and psyche and that applicant was 100% permanently totally disabled without any apportionment.

Medical Reporting: The reporting QME initially indicated a strict AMA Guides rating of 87% permanent disability without apportionment. However, the QME opined that this strict rating was not an accurate description of the applicant's disability and that a more accurate rating should be based on adding rather than combining applicants' impairments pursuant to the *Kite* case. The WCJ and the WCAB found the QME's adding applicant's impairments constituted substantial medical evidence since "…. there is no overlap between the body parts, the synergistic effect of losing two legs to below the knee amputations is certainly greater than losing only leg (sic) and more limiting; and adding these values provide a more accurate "rating" of the applicant's actual disability than the Combined Values Table."

With respect to apportionment of applicant's disability as reflected in the WCJ's Report on Reconsideration, the QME determined "that there was no apportionment to non-industrial causes for the bilateral leg amputations or the back." Specifically, the QME found no apportionment to the bilateral legs since the PD "…was based on the loss of the leg below the knee and on gait. There was no part of the rating to diabetes and thus, no apportionment."

The WCAB's Decision on Reconsideration: In denying defendant's Petition for Reconsideration the WCAB adopted and incorporated the WCJ's Report on Reconsideration. However, with respect to the apportionment issue raised by the defendant, the WCAB provided additional analysis and case law to support the WCJ's sparse one paragraph apportionment discussion to find no substantial evidence of apportionment based on the QME's reporting.

With respect to apportionment, defendant argued that the QME's opinion that applicant's "bilateral below the knee amputations, and not the diabetes, is the cause of applicant's rated orthopedic impairment was incorrect. Defendant argued that apportionment is required where there is an underlying non-industrial diabetic condition that led in part to the need for the bilateral below the knee amputations.

However, the WCAB citing *Parga v. City of Fresno* 2011 Cal.Wrk.Comp. P.D. LEXIS 238 as well as *State of California v. Workers' Comp. Appeal Bd. (Ham)* (2019) 84 Cal.Comp.Cases 1006 (writ denied) to find that based on the QME's opinion "applicant's permanent disability rating is not

based on any diabetic impairment, but on the orthopedic impairments from his amputations and gait derangement."

The Board distinguished the instant case from the non-industrial pre-existing pathological eye condition in *City of Petaluma v. Workers' Comp. Appeals Bd (Lindh)* (2018) 29 Cal.App.5th 1175 [83 Cal.Comp.Cases 1869], by stating that:

> [W]here apportionment was found based on medical evidence that attributed the industrial disability to impaired vision, to both a workplace injury and an underlying asymptomatic condition which was identified as a contributing cause of the disability." "What is required is substantial medical evidence that the asymptomatic condition or pathology was a contributing cause of the disability." (*Lindh*, 29 Cal.App.5th at 1193.)

The WCAB concluded that "[w]hile applicant's diabetes here was a causal factor in the need for bilateral amputations, the resulting permanent disability was rated on the basis of his orthopedic disability alone and was not related to his diabetic condition.

Editor's Comments: For some unexplained reason or reasons, the WCAB as reflected in numerous decisions related to apportionment involving non-industrial diabetes appear to treat diabetes differently than other pathologies, underlying disease processes, and conditions in terms of applying the correct principles of apportionment pursuant to Labor Code Sections 4663. As the facts in this case indicate, the applicant was first diagnosed with diabetes ten years before his specific injury on 5/19/15 to his right foot. Whether applicant was receiving treatment for his diabetes or the nature and severity of his diabetes in the ten years before his specific injury is not discussed in the decision.

There are no compelling medical or legal reasons why an injured worker who has pre-existing diabetes, whether asymptomatic or symptomatic before a work injury should be treated any differently from any other injured worker who has an underlying disease process or condition which can be characterized for apportionment purposes as pathology and perhaps depending on the particular facts, can also be a risk factor for injury. The same analysis for determining whether there is a basis for valid legal apportionment under Labor Code Sections 4663 and 4664 are applicable to diabetes as they are to any other underlying pathological condition.

Underlying pathology in the form of diabetes may be a contributing cause of an applicant's injury as wells as a contributing cause of the permanent disability but in different percentages as reflected in the WCAB's en banc decision in *Escobedo* recently reaffirmed by the Court of Appeal in *Lindh*. In *Lindh*, the Court of Appeal annulled the WCAB's decision when the WCAB erroneously rejected the QME's 85% valid apportionment to applicant's eye related permanent disability (loss of vision) based on an underlying pre-existing asymptomatic hypertensive eye condition (pathology). The basis for the Board's erroneous analysis was their mistaken characterization of the applicant's underlying hypertensive eye condition as a mere risk factor of injury and not a contributing cause of the resultant permanent disability. The Court of Appeal flatly rejected this false dichotomy indicating that the WCAB had misinterpreted and misapplied their own en banc decision in *Escobedo*. The Court of Appeal

in *Lindh* held that when there are multiple contributing causes of permanent disability, apportionment is required if supported by substantial medical evidence.

Pursuant to the Supreme Court's decision in *Brodie*, if an industrial injury aggravates or accelerates an underlying disease process including diabetes, potential apportionment of any residual permanent disability may apply. Such apportionment was prohibited before the enactment of Labor Code Sections 4663 and 4664 in 2004.

The relevant apportionment analysis should begin with identifying the permanent disability related to all body parts and conditions found to be industrial. The next step is to determine or to parcel out based on approximate percentages, all of the contributing causal factors of the permanent disability whether industrial or nonindustrial for each body part or condition found compensable. Based on this analysis, if there are multiple contributing causes of permanent disability, then apportionment must be applied if supported by substantial medical evidence. In cases where diabetes is involved, it can potentially affect many different body parts, systems, and conditions depending on its severity and progression. The essential question with respect to apportionment is whether an applicant's diabetes is a contributing causal factor expressed in an approximate percentage of the applicant's permanent disability related to any body part or condition found compensable.

In the instant case the QME opined that the cause of the applicant's orthopedic impairment (permanent disability) was solely attributable to the bilateral below the knee amputations and that the applicant's diabetes was not a contributing causal factor of the bilateral below the knee amputations. As indicated in the WCJ's report, "there was no part of the rating to diabetes and thus, no apportionment." With respect to the bilateral legs the PD "was based on the loss of the leg below the knee and on gait."

When one carefully reads the facts of this case and the progression of what started as a twisted right ankle rapidly progressing to bilateral below the knee amputations, it is virtually irrefutable that the applicant's pre-existing nonindustrial diabetes was a substantial contributing causal factor not only of the amputations but also a contributing causal factor to some approximate percentage of the residual permanent disability attributable to the amputations no matter how the permanent disability resulting from the amputations was rated.

What readily distinguishes the instant case from the *Lindh* case is a QME whose opinion does not constitute substantial medical evidence on apportionment. The defendant simply failed to meet its burden of proving valid non-industrial apportionment related to diabetes. There is no indication that the QME was ever deposed by the defendant to clarify and explain the basis for his fundamentally flawed analysis and opinion there was no basis for apportionment related to applicant's non-industrial diabetes as a contributing causal factor of any of applicant's PD.

No Discussion of *Hikida* by the WCAB: *Hikida* was not discussed or mentioned in the WCAB's decision. Even though applicant's medical treatment in the form of bilateral below the knee amputations was a causal factor of the related PD, it was not the sole cause of all of applicant's PD. Applicant's PD before applying the Kite adding of impairments was 87% based

on multiple body parts and conditions not just the below bilateral below the knee amputations and gait related impairments. In *Hikida*, the medical treatment in the form of carpal tunnel surgery led to the development of an entirely new condition of a complex regional pain disorder that the AME opined was the sole and exclusive cause of applicant being permanently totally disabled which was not the situation in this case. More importantly, the applicant in *Hikida* did not have any pre-existing symptoms or pathology related to a complex regional pain disorder before her injury. In the instant case the PD related to the amputations comprised only a portion of applicant's overall PD and was diagnosed with diabetes ten years before his specific injury.

Moreover, the adding of applicant's impairments based on the *Kite* decision is what caused the rating of 87% to increase to 100% PTD.

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, it was applicant's counsel on reconsideration to the WCAB who argued that the AME's opinion on apportionment under 4664(b) constituted 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%.

In another case, *Lycett v. County of San Mateo* 2022 Cal.Wrk.Comp P.D. LEXIS_____(WCAB panel decision) the WCAB affirmed a WCJ's award of 76% after apportionment wherein the defendant was able to establish valid nonindustrial apportionment of 15% based on Labor Code 4663 related to applicant's cervical spine as well as valid apportionment pursuant to Labor Code 4664(b) of 30% related to a prior stipulated award related to hypertensive cardiovascular disease and coronary artery disease.

Person v. California Department of Corrections and Rehabilitation **(2020) 85 Cal.Comp.Cases 627, 2020 Cal. Wrk. Comp. LEXIS 42 (Writ denied)**

Issues & Holding: WCJ's award of 4% permanent partial disability after apportionment was upheld by the WCAB on reconsideration and also by the Court of Appeal based on substantial medical evidence. The orthopedic QME opined that applicant's specific injury aggravated or lit up applicant's preexisting patellofemoral degenerative joint disease in his left knee. The 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 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, 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.

Editor's Comment: This case illustrates what happens when a medical-legal evaluator in rendering an opinion on apportionment strays from the fundamental legal principles and inquiry that is essential in formulating an opinion that constitutes substantial medical evidence. That inquiry is simply to determine all of the contributing causal factors of the applicant's permanent disability including prior and subsequent industrial and non-industrial injuries as well as other contributing causal factors such as pathology and asymptomatic conditions etc.

See also *Collie v. State of California, EDD* 2023 Cal.Wrk.Comp. P.D. LEXIS 3 where the medical opinions of two AME's with respect to nonindustrial apportionment in a 100% PTD case, one in orthopedics and the other in psychiatry were rejected because they did not constitute substantial medical evidence. The AME in orthopedics attempted to apportion 10% of the applicant's lumbar and cervical spine permanent disability based on an underlying preexisting degenerative disease process but failed to include in his apportionment opinion any discussion whatsoever of the nature of the degenerative condition including its severity.

The AME in psychiatry tried to adopt the apportionment determination of the orthopedic AME and also noted there were no independent non-industrial contributing causal factors of the applicant's psychiatric PD other than the orthopedic injury. The WCAB indicated that "it is the responsibility of each medical evaluator to determine apportionment for the body parts and systems

within his or her area of expertise. Doctors may not simply mirror the apportionment opinions of other doctors in a case without providing independent justification for their opinion."

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 an 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.* Consequently, 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.

12. Labor Code Section 4664

Lee v. Xchanging, Granite State Insurance Co. **(2021) 2021 Cal.Wrk.Comp. P.D. LEXIS 200, 49 CWCR 167 (WCAB panel decision)**

Issues and Holding: Whether the defendant was entitled pursuant to Labor Code 4664(b) to subtract a pro per applicant's prior 2009 Stipulated Award of 84% PD from her current award of 84% PD resulting in applicant receiving zero PD? The WCAB held that because the applicant's prior award was calculated under the 1997 PDRS and her current award was based on the 2005 PDRS defendant was not entitled to a straight subtraction of the prior 84% award since different standards were used to measure disability. Consequently, applicant received an award of 84% after apportionment.

Factual Overview: The applicant although previously represented, appears to have been in pro per for a considerable period. She had a prior claim in which she received 84% PD for disability related to her spine and right knee by way of a 4/21/09 Stipulations with Request for Award. There was also a later Compromise and Release by which applicant settled her prior award for $350,000.00. Applicant was also diagnosed and treated for lupus and fibromyalgia since 1993 that pre-existed her current injury.

Medical Reporting: As reflected in the WCAB's decision, there was a wide range of medical reporting from physicians in a variety of medical specialties. The DEU, the WCJ, as well as the WCAB struggled with determining the most accurate rating of the applicant's multiple disabilities. There was also valid non-industrial apportionment under LC 4663 related to applicant's orthopaedic and psychiatric disability that had to be factored into the rating equation.

Ultimately the WCAB based on a range of the evidence, determined the most accurate rating of the applicant's disability after apportionment under 4663 was 84% PD. However, defendant

argued on reconsideration that pursuant to the LC 4664(b) conclusive presumption they were entitled to subtract the applicant's entire prior award of 84% PD from her current 84% award of PD leaving the applicant with zero percent PD!

The WCAB's Decision: The WCAB in denying defendant's Petition for Reconsideration held that while defendant based on substantial medical evidence was entitled to apportionment under LC 4663, they were not entitled to subtract any portion of the applicant's 84% current PD award under the 2005 PDRS based on applicant's prior 2009 award of 84% calculated under the 1997 PDRS related to her spine and right knee. In that regard the WCAB stated:

> Further on this issue, a straight subtraction of the prior award under the 1997 schedule from the present 2005 schedule rating was already rejected by the WCAB in *Contra costa County v. WCAB* (2010) 75 Cal.Comp.Cases 896 (writ denied) because different standards for measuring disability are applied between the two schedules. Therefore, the present award is correct based on apportionment parceled out by the examining physicians as opposed to subtracting applicant's prior award.

Editor's Comments: For other recent cases where a defendant was unable to prove up apportionment under LC 4664(b) to a prior award, see *Cowles v. Bimbo Bakeries* 2021 Cal.Wrk.Comp. P.D. LEXIS 309 (WCAB panel decision). In *Cowles*, the applicant received 8% PD after apportionment in a right knee replacement case. The WCJ and the WCAB found valid apportionment under LC 4663 based on 75% nonindustrial apportionment to applicant's prior knee injuries resulting in multiple surgeries including a partial knee replacement and 25% PD to applicant's current 6/11/19 right knee injury.

However, the WCJ and the WCAB based on the reporting of the AME rejected defendant's attempt to establish apportionment pursuant to LC 4664(b) based on a prior combined Stipulated Award of 30% PD since defendant failed to prove overlap of disability between applicant's current right knee injury of 6/11/19 and the prior specific and cumulative trauma injuries that the prior 30% PD award was based on.

In *Richmond v. Santa Rosa Tile Supply*, 2023 Cal.Wrk.Comp. P.D. LEXIS 27, as in *Cowles*, the defendant in *Richmond* was able to establish valid nonindustrial apportionment based on LC 4663 but was unable to meet their burden of proof with respect to applicant's prior award if 34:5% under LC 4664(b). The WCAB affirmed an award of 77% PD after 4663 non-industrial apportionment. With respect to LC 4664(b), applicant's prior award of 34:5% related to a 4/89 CT injury was rated under the 1997 PDRS.

However, applicant's current injury related to a CT injury ending on 5/19/14 was rated under the 2005 PDRS based on the AMA Guides. The reporting QME indicated he was unable to

assess applicant's WPI from the prior injury under the AMA Guides on the basis it would be speculative to rate the applicant's prior injury under the AMA Guides. As a consequence, defendant could not establish there was overlap between applicant's current disability and the disability that was the subject of the prior award.

There have been a few cases where medical-legal evaluators have successfully been able to bridge and determine PD where two different rating schedules are involved, in the majority of cases defendants have not been able prove overlap of disability as required by *Kopping v WCAB* (2006) 71 Cal.Comp.Cases 1229.

Ortiz v. South County Packing, Inc., **2021 Cal.Wrk.Comp. P.D. LEXIS 297; 49 CWCR 195 (WCAB panel decision)**

Issues and Holding: Whether a reporting physician's retrospective rating of applicant's prior specific 2/22/02 lumbar spine injury under the AMA Guides based on a review of diagnostic studies and extensive medical records for the 2002 injury constituted substantial medical evidence on the issue of apportionment. The second issue was whether pursuant to LC 4664 the prior disability of 18% permanent disability after adjustment for age and occupation related to the 2002 injury should be subtracted from the 30% permanent disability resulting from applicant's subsequent specific lumbar spine injury of 11/23/16 with applicant receiving an Award of 12% permanent disability. Applicant's lumbar spine WPI for both lumbar spine injuries was determined by using the DRE method.

The WCAB amended the WCJ's decision as recommended in the WCJ's Report on Reconsideration and found that the reporting physician's opinion on apportionment pursuant to LC 4663 constituted substantial medical evidence. The WCAB also found that the doctor was also able to retrospectively apply an AMA Guides Rating using the DRE method to applicant's prior 2/22/02 lumbar spine injury based on a combination of diagnostic studies and a review of extensive medical records concerning the 2002 injury. Overlap of applicant's lumbar spine disability was also established since the DRE method under the AMA Guides was also used to assess applicant's lumbar spine WPI related to the subsequent injury of 11/23/16.

Factual and Medical Reporting Overview: Applicant suffered two specific lumbar spine injuries on 2/22/02 and 11/23/16. The WCJ found the medical reporting and opinions of the panel QME did not constitute substantial evidence. Consequently, the WCJ appointed a "regular physician" pursuant to LC 5701. That doctor issued three medical reports and was deposed once. In terms of apportionment under LC 4663 the doctor concluded that 75% of applicant's lumbar spine PD should be apportioned to the 11/23/16 injury and 25% to prior injuries and the applicant's underlying arthritis.

The parties also asked the doctor to address the issue of overlap of permanent disability between the WPI attributable to the 2/22/02 lumbar spine injury and the subsequent lumbar spine injury of

11/23/16. In that regard the doctor said that without engaging in speculation he could retrospectively assign a WPI under the AMA Guides for applicant's 2002 injury. The parties agreed to have the doctor prepare a supplemental report by reviewing the old medical records and diagnostic testing. In that regard the doctor stated "……that as a result of the 2002 injury and using the standard approach to the AMA Guides retrospectively, *"Mr. Ortiz has non-verifiable radicular pain and would have been provided a Lumbar DRE-II at 8% WPI. He would have been allocated a 3% WPI for his chronic pain syndrome."*

In the same report the doctor also reiterated "…. his earlier conclusion that, as a result of the 2016 injury, applicant's impairment is most accurately described as a Lumbar DRE-III at 13% WPI with an additional 3% allowance for his chronic pain syndrome. "

The Subtraction Method was the Correct Formula to Determine Applicant's Permanent Disability from Both Injuries: In his Report on Reconsideration the WCJ acknowledged that applicant's contention on reconsideration was correct and that the subtraction method pursuant to LC 4664 should be used given the fact that the lumbar spine permanent disability from both dates of injury overlapped. Based on the amended award, applicant received 12% PD based on the subtraction of the 18% PD attributable to the 2/22/02 lumbar spine injury from the 30% PD attributable to the 11/23/16 injury.

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 met 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.

Editor's Comment: However, in another panel decision subsequent to *Hom*, the WCAB in, *Johnson v. City of Oakland* (2020) 2020 Cal.Wrk.Comp. P.D. LEXIS 328, 48 CWCR 239 (WCAB panel decision), both the WCJ and the Board found that defendant did not meet its burden to establish apportionment based on the Labor Code 4664(b) conclusive presumption related to a prior 24% stipulated award for a police officer's 2011 cumulative trauma back injury and a subsequent 2015 admitted low back injury. As a consequence, applicant received an unapportioned award of 39% PD. The WCAB distinguished *Johnson* from *Hom* both factually and legally acknowledging in the process that if the facts were similar to those in *Hom* it was likely that defendant would have met their burden in proving up apportionment under 4664(b).

In *Johnson*, the defendant was not able to prove there was overlapping disabilities resulting from the 2011 CT back injury and the 2015 specific back injury. The Board also identified several other inconsistencies, deficiencies, and contradictions in the medical reporting that undermined defendant's ability to prove up apportionment under 4664(b).

See also, *Harrison v. Los Angeles County Child Support* 2022 Cal.Wrk.Comp. P.D. LEXIS 321, 50 CWCR 239 (WCAB panel decision). In *Harrison*, while defendant was able to prove up valid apportionment under LC 4663, they were unable to establish the conclusive presumption under LC 4664(b) with respect to applicant's prior award related to a 2011 injury of 41%, 24% of which related to applicant's cervical spine. Applicant's current injury also involved the cervical spine. While the parties stipulated to the existence of the prior award of 41% PD, defendant failed to introduce into evidence the medical reporting of the AME related to the prior 2011 injury so that neither the WCJ nor the WCAB could compare the AME's evaluation of impairment related to the 2011 injury to the QME's reporting related to the current injury. More importantly in terms of the critical overlap issue, the reporting QME failed to provide any discussion related to how applicant's prior permanent disability for the cervical spine overlaps with her current permanent disability. The WCAB also indicated that:

> Overlap is not proven merely by showing that the second injury was to the same body part because the issue of overlap requires a consideration of the factors of disability or work limitations resulting from the two injuries, not merely the body part injured.

(*Contra Costa County Fire Protection Dist. v. Workers' Comp. Appeals Bd. (Minvielle)* (2010) 75 Cal.Comp.Cases 896, 901-902 (writ denied).)

See also, *Smith v. City of Berkley* 2020 Cal.Wrk.Comp. P.D. LEXIS 245 (WCAB panel decision). This panel decision also dealt with the conclusive presumption in L.C. 4664(b) issued after the *Hom* decision *supra*. However, in contrast to *Hom*, the defendant in *Smith* was unable to meet their burden of establishing overlap between the applicant's prior and subsequent disabilities involving a current award of 57% PD related to a CT injury in the form of hypertensive cardiovascular disease and a prior stipulated award in 2012 of 37% PD related to applicant's heart. The Board acknowledged in *Smith* that the conclusive presumption of 4664(b) applies to disabilities sustained in a subsequent injury to the same region of the body but only to the extent the disabilities overlap. The reason the defendant could not establish overlap in *Smith* was attributable to the fact that the reporting QME who rated applicant's impairment related to the current injury in the form of left ventricular hypertrophy used a different chapter of the AMA Guides than the one used for rating the prior heart injury caused by a myocardial infarction related to the 2012 Award of 37% PD. The WCAB found there was no substantial evidence to establish overlap between applicant's prior and subsequent heart injuries based on their distinct natures (i.e., damage to the heart caused by a myocardial infarction is caused by restricted blood flow to the coronary arteries, while in contrast, left ventricular hypertrophy involves thickening of the left ventricle wall.

In *Sperry v. San Diego Unified Port District* 2022 Cal.Wrk.Comp. P.D. LEXIS 123, 50 CWCR 78 (May 2022), the WCAB in a case involving a current low back injury and a prior award related to the applicant's low back rescinded the WCJ's Findings and Award and Order wherein the WCJ while finding applicant suffered a CT injury to her low back with need for future medical care failed to make any specific findings regarding the applicant's permanent disability or apportionment under LC sections 4663 and 4664

At trial the issues raised by the parties included permanent disability, attorney fees, apportionment pursuant to LC 4664, LC 3213.2 and the 4663(e) duty belt presumption and non-attribution clause. On reconsideration the applicant alleged the WCJ erred there was an impermissible attribution of causation in violation of section 4663(e). Defendant in its Answer argued that the apportionment to the applicant's prior award of PD related to her low back was permissible and not violative of the anti-attribution provisions of section 3212.2 and section 4663(e). Defendant also argued they met their burden of proving overlap between the applicant's prior and current low back injuries under the *Kopping* case.

In reversing the WCJ and remanding for further proceedings the WCJ ruled that the WCJ had failed to comply with the requirements of LC section 5313 by failing to make findings of facts on all issues raised by the parties with corresponding explanations for such findings in the Opinion on Decision consistent with the WCAB's en banc decision in *Hamilton v. Lockheed Corporation* (2001) 66 Cal.Comp.Cases 473 (WCAB en banc). Moreover, the WCJ failed to discuss the key

legal issues raised by the parties. On remand the WCAB set forth a detailed roadmap for the WCJ to follow in order for the WCJ to comply with section 5313 and *Hamilton.*

> In deciding the issues presented, the WCJ should first consider whether apportionment under section 4664(b) is applicable, given the anti-attribution provisions of section 4663(e). If apportionment to applicant's prior award is permissible under section 4664(b), the WCJ should then consider whether defendant has met its burden of establishing overlap, as set forth in Kopping v. Workers' Comp. Appeals Bd. (2006) 142 Cal.App.4th 1099, 1115 (71 Cal.Comp.Cases 129). Corresponding Findings of Fact should be entered, and the rationale therefor explained in the Opinion on Decision, as required under section 5313.

Ross v. California Highway Patrol **2020 Cal.Wrk.Comp. P.D. LEXIS 331**

Issues & Holding: Whether a defendant must prove overlap of permanent disability from an applicant's prior award(s) with disability related to a current injury or injuries with respect to the 100 percent lifetime cap for permanent disability affecting the same regions of the body under Labor Code §4664(c)(1) where an applicant received a prior award or awards involving the same regions of the body as defined in Labor Code § 4664(c)(1)(G)?

In this case, in addition to the 91% permanent disability related to an admitted current cumulative trauma, applicant a California Highway Patrol Officer had four prior awards totaling 59% permanent disability that fell into the catch-all provision of section 4664(c)(1)(G). The WCAB held that in the absence of conclusively presumed permanent total disability under Labor Code 4662, the sum of the permanent disability awards for one body region cannot exceed 100%, even where the permanent disability caused by the applicant's current injury does not overlap with the permanent disability underlying his or her prior permanent disability. In these situations, the Board carefully distinguished apportionment of disability to a prior award under section 4664(b) where overlap of disability is required but is a non-issue under section 4664(c)(1) that operates to limit an applicant's recovery by virtue of the lifetime cap on the accumulation of 100% permanent disability related to specified regions of the body.

Procedural Overview: The WCJ initially issued a Findings and Award wherein applicant was awarded permanent total disability related to an admitted cumulative trauma injury to his heart, hypertension, atrial fibrillation, and hemorrhoids. Defendant filed a Petition for Reconsideration. In response the WCJ rescinded the PTD award. The matter was then set for a second trial with the WCJ issuing a First Amended Findings and Award awarding applicant 32% permanent disability. In doing so the WCJ "…limited the award of permanent disability applying the lifetime cap of 100% permanent disability provided in Labor Code section 4664(c)(1)(G), based on applicant's prior awards of 59% permanent disability. The WCJ subtracted the four prior awards, reducing applicant's 91% permanent disability to 32% permanent disability."

Applicant filed a Petition for Reconsideration contending that the WCJ's initial award of PTD was correct and also that under the *Kite* case the addition method should be used related to the impairments to applicant's heart injuries rather than the combination method under the CVC. Applicant also argued that that the permanent disability found in applicant's five prior awards did not overlap the disability for his current cumulative trauma and therefore section 4664(c)(1) operates to limit or cap applicant's current award of permanent disability.

The WCAB granted applicant's Petition for Reconsideration and amended the WCJ's Findings and Award by recalculating the PD and awarding applicant 41% PD as opposed to the 32% PD awarded by the WCJ.

Analysis and Discussion: There was no dispute that applicant's four prior stipulated awards involving two specific injuries, one cumulative trauma, and a 2009 cumulative trauma and specific injury totaled 59% permanent disability. The WCAB also stated that:

> Those prior awards of permanent disability as proved up by defendant, all involve injuries to regions of the body that fall within the catch-all provision in Labor Code section 4664(c)(1)(G), as they involve the head, face, cardiovascular system, respiratory system, and all other systems or regions of the body not listed in subparagraphs (A) to (F) inclusive.

Addressing the overlap issue raised by applicant, the Board cited its previous *en banc* decision in *Sanchez v. County of Los Angeles* (2005) 70 Cal.Comp.Cases 1440 and also *Kopping v. Workers' Comp. Appeals Bd.* (2006) 142 Cal.App.4th 1099, 71 Cal.Comp.Cases 1229. Quoting directly from *Sanchez,* the Board stated:

> Section 4664(c)(1) provides that the accumulations of all permanent disability awards issued with respect to any one region of the body cannot exceed 100% over the employee's lifetime, except where the employee's disability is conclusively presumed to be total under section 4662. *Thus, absent conclusively presumed total disability, the sum of the permanent disability awards for one body region cannot exceed 100%,* ***even where the permanent disability caused by the applicant's current injury does not overlap the permanent disability underlying his or her prior permanent disability award(s).*** (*Sanchez,* 70 Cal.Comp.Cases at 1457) (emphasis added)

With respect to the *Kopping* case, the WCAB noted that it applies to situations where apportionment under 4664(b) related to the conclusive presumption of a prior award or awards is being considered and in those cases the issue of whether the disabilities related to any prior award(s) overlap with the disability related to the current injury or injuries is relevant.

However, with respect to section 4664(c)(1), overlapping disabilities is essentially a non-issue related to determinations as to whether the 100% lifetime cap on permanent disability applies to limit an applicant's recovery.

> However, there is no issue of section 4664(b) apportionment here. Rather, the question here is whether defendant has established the existence of applicant's four prior awards of permanent disability, which affect the same region of the body as applicant's current injury. Upon a finding that defendant has done so, the amount of permanent disability applicant may receive in his lifetime for disabilities affecting each region of the body specified in section 4664(c)(1) is limited to 100%. Unless the new injury causes disability that is conclusively presumed to be total under section 4662, which is not applicable here, the sum of the permanent disability awards for any one body region cannot exceed 100%.

The Board found the two cases cited by applicant to support his argument that the issue of overlap must be addressed were not relevant since the facts in those cases indicated the defendant failed to establish the permanent disability awarded from the prior permanent disability award(s) and current injuries were to the same regions of the body. In contrast in the instant case "…[a]s the evidence in the record establishes, that applicant received Stipulated Awards totaling 59% permanent disability for four prior injuries involving the regions of the body indicated in section 4664(c)(1)(G), applicant is not entitled to an award greater than 41% permanent disability."

The Board referencing *Sanchez supra* stated simply and directly that with respect to section 4664(c)(1)(G) "…[t]he issue of whether there is overlap between the prior and current permanent disability is not applicable where the 100% lifetime cap is reached."

Due to what the Board characterized as a substantive calculation error by the WCJ, the WCAB recalculated the 32% PD awarded by the WCJ and awarded applicant 41% PD. In describing the methodology, they used to determine the 41% PD figure the Board stated:

> Applicant was determined to have sustained 91% permanent disability as a consequence of his current cumulative trauma injury. Due to the impact of the 100% cap on permanent disability that may be awarded for the "region of the body" as defined in section 4664(c)(1)(G), applicant is not entitled to an award of the full amount of his permanent disability. Of the 91% permanent disability he sustained, he can only receive an award of 41% permanent disability he can only receive an award of 41% permanent disability, the amount remaining after the accumulations of 59% permanent disability.

The WCAB also indicated the *Kite* issue raised by applicant was moot in light of the fact that "…[s]ince applicant cannot receive more than 41% permanent disability for injuries to the "region of the body" involved here, the issue of whether the impairment caused by his current injury should be added or combined is moot."

Editor's Comment: Labor Code 4664(c)(1) limiting the accumulation of all permanent disability awards issued with respect to any one region of the body in favor of one individual to not exceed 100% also applies to cases where there are multiple awards of PD not just to case where there are prior awards of permanent disability. In *Green v. Para-Transit Corp*. 2022 Cal.Wrk.Comp. P.D. LEXIS 224 (WCAB panel decision), the WCAB denied defendant's petition for reconsideration

in a case involving two specific injuries one in 2013 related to applicant's back, neck, and upper extremities and the other in 2014 to applicant's left knee where the WCJ issued separate awards of permanent total (100%) disability for the 2013 specific injury and 40% permanent disability for the 2014specific injury. Defendant on reconsideration argued that there was overlap between two injuries since both injuries allegedly involved the same regions of the body and therefore applicant under LC 4664(c)(1) was precluded from an award in excess of 100%. However, the WCAB indicated the opinion of one of the QME's eliminated any potential overlap between the injuries by indicating that a DRE rating for the applicant's knee injury was more appropriate than a rating based on applicant's use of a walker or his lower extremity radiculopathy thus eliminating any potential overlap between the two injuries.

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 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. Therefore, 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: Another 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." Therefore, 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.

13. 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.

14. 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 of 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.

TABLE OF CASES