

**“Apportionment: Case law update focusing  
on themes, trends, and problem areas.”  
(January 2016 Edition)**

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# Fundamental Analytical Principles

## Introduction:

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

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

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

Perhaps a more graphic example is the very recent case of *Pattiz v. SCIF/MTC Trucking, Inc.* 2015 Cal.Wrk.Comp. P.D. LEXIS 541, 43 CWCR 201, in which a workers’ compensation judge in issuing a joint Findings of Fact and Award in two cases incorrectly dealt with four separate apportionment issues in the same case, including *Benson*, Labor Code §4663 nonindustrial apportionment, the interaction of medical evidence of apportionment and vocational evidence, and finally erroneously construed and applied the Labor Code §4662(b) determination of permanent total disability “in accordance with the fact.” (sic). The fact a judge ten years after the passage of SB899 and Labor Code §§4663 and 4664 could render an incorrect and erroneous decision on a “quartet” of apportionment issues in a single case is troublesome. The WCAB granted defendant’s Petition for Reconsideration and rescinded the WCJ’s Award. These cases and similar cases underscore the fact the core concepts and fundamental analytical principles underlying Labor Code §§4663 and 4664 require continued and repeated reemphasis.

## **Labor Code Section 4663**

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

- (a) Apportionment of permanent disability shall be based on causation.
- (b) Any physician who prepares a report addressing the issue of permanent disability due to a claimed industrial injury shall in that report address the issue of causation of the permanent disability.
- (c) "...A physician shall make an apportionment determination by finding what approximate percentage of the permanent disability was caused by the direct result of injury arising out of and occurring in the course of employment and what approximate percentage of the permanent disability was caused by other factors both before and subsequent to the industrial injury, including prior industrial injuries."

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

The other significant issue is the net cast by Labor Code Section 4663 is extremely broad in terms of what may constitute legal apportionment. You will note the reference to "other factors" and not just to injuries or disability. The term "factors" is much broader than an injury whether that injury occurred prior to or subsequent to the industrial injury in question. The critical legal and medical questions to be resolved are to determine all the contributing causal factors of the applicant's permanent disability and impairment at the time of the MMI evaluation(s) in any case. A "factor" or "factors" that can be a contributing cause of impairment or disability are myriad and contingent on the specific medical record and facts. For example, in a psychiatric case, as indicated by cases in the outline, a "factor" contributing to an applicant's psychiatric impairment or disability may be a pre-existing personality disorder or other mental condition that is a contributing cause of the applicant's current psychiatric or psychological disability. As is also demonstrated repeatedly in the outline, a contributing "factor" to disability can be an asymptomatic pre-existing condition so long as that condition is a contributing cause or factor of the applicant's present impairment, 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. 4<sup>th</sup> 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. 4<sup>th</sup> 274, 284-285, 70 Cal. Comp. Cases 133.) Thus, new sections 4663, subdivision (a) and 4664, subdivision (a) eliminate the bar against

apportionment based on pathology and asymptomatic causes. (E.L. Yeager Construction v. WCAB (Gatten) (2006) 145 Cal. App. 4<sup>th</sup> 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 decisions from line WCJs continued 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.

It was not until the Court of Appeal issued a decision which was certified for publication in E.L. Yeager Construction v. WCAB (Gatten) (2006) 145 Cal. App. 4<sup>th</sup> 922, 71 CCC 1687 where 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 other significant case, as discussed hereinabove, was the California Supreme Court's decision in Brodie in 2007. (Brodie v. WCAB (2007) 40 Cal. 4<sup>th</sup> 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.4<sup>th</sup> 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 had 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.

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

In order for a medical report to constitute substantial evidence on the issue of apportionment, a medical opinion "must disclose familiarity with the concepts of apportionment, describe in detail the exact nature of the apportionable disability, and set forth the basis for the opinion." (E.L. Yeager Construction v. WCAB (Gatten) (2006) 145 Cal. App. 4<sup>th</sup> 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.4<sup>th</sup>, 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.”

## OVERLAP

### ***New Axia Holdings v. WCAB (Martinez)* (2014) 79 Cal. Comp. Cases 196; 2014 Cal. Wrk. Comp. LEXIS 5 (writ denied)**

**Issue:** Whether the WCJ improperly reduced applicant's award of 45% on a current industrial injury to the lumbar spine by subtracting a prior award of 28% permanent partial disability to the applicant's lumbar spine and lower extremities, and by indicating it was the applicant's burden to prove rehabilitation from the old injury under Labor Code §4664.

**Holding:** The WCJ improperly reduced applicant's award on a current injury of 45% permanent disability by subtracting a prior award of 28% when the defendant failed to prove the prior award of 28% overlapped either totally or partially with the factors of disability related to the current date of injury.

**Facts & Procedural Overview:** Applicant suffered an injury to his lumbar spine as a result of a cumulative trauma ending in 2002. He had previously suffered an industrial injury to his back and lower extremities in 1990 for a different employer, which resulted in a Stipulated Award in 1993 of 28% permanent disability related to the back and lower extremities. The prior Stipulated Award of 28% was introduced into evidence but there was no supporting medical file or medical reports.

The WCJ issued a Findings and Award of 17%, which was based on a determination of 45% permanent partial disability related to the current cumulative trauma injury and subtracting 28% related to the prior 1993 award. The judge subtracted the prior 28% award under Labor Code §4664(b). Applicant filed a Petition for Reconsideration.

Applicant argued on reconsideration that the WCJ had improperly subtracted the prior 1993 Stipulated Award of 28% from the applicant's current disability and the applicant should be deemed 100% permanently totally disabled based on the opinion of applicant's vocational expert.

It was undisputed that defendant had introduced into evidence the prior Stipulated Award of 28% permanent partial disability related to the applicant's prior injury to the back and lower extremities. The WCJ reasoned that she was compelled under Labor Code §4664(b) to subtract the prior disability award of 28% from the current cumulative trauma injury based on the fact applicant produced no medical evidence that he had been rehabilitated from his prior injury.

In terms of the overall PD, the WCJ indicated she applied the range of the evidence standard between 4% and 100% and had rejected applicant's vocational expert's opinion the applicant could not return to the open labor market based on applicant's own testimony and the conclusion of the defense vocational expert.

The WCAB granted reconsideration and issued a split panel decision rescinding the WCJ's finding on PD and apportionment and returned the case to the trial level for further proceedings.

With respect to the Labor Code §4664 issue, the WCAB noted that under the *Kopping* decision (*Kopping v. WCAB*) (2006) 142 Cal. App. 4<sup>th</sup> 1099, 71 Cal. Comp. Cases 1229), the defendant retains the dual burden not only of proving the existence of a prior award, but also the factors of disability related to the prior award either totally or partially overlapped applicant's current permanent disability. "The burden of proving overlap is part of the employer's overall burden of proving apportionment..." A defendant must always prove overlap of disability the defendant seeks to subtract from the current permanent disability award under Labor Code §4664(b).

Moreover, the WCAB noted that if Labor Code §4664 had applied in this case and defendant had met its burden of proving a prior award and overlapping disability, then applicant would not be permitted to rebut the apportionment to the prior permanent disability by trying to show rehabilitation from the prior injury.

The WCAB concluded the record in this case was insufficient to make a determination with respect to overlap pursuant to Labor Code §4664(b) and, therefore, there was no basis for subtracting the 28% prior Stipulated Award from applicant's permanent disability in the current injury. (see also *Cedars-Sinai Health System v. WCAB (Wade)* 2105 Cal.Wrk.Comp. LEXIS 146 (writ denied). Defendant failed to meet burden of proving overlap between applicant's back and right hip permanent disability from two current injuries and applicant's prior 60% permanent partial disability award for a 1988 industrial left knee injury.)

**Comment:** Rather than relying exclusively on Labor Code §4664(b), defendant in this case could have tried to prove apportionment under Labor Code §4663. However, since there were no medical reports or records in existence related to the old 1990 injury, the only basis for proving up Labor Code §4663 apportionment would have been through the applicant's own testimony or other non-medical records. The chances on remand of defendant proving up valid Labor Code §4663 apportionment would be very slim and, moreover, unlike Labor Code §4664, under Labor Code §4663 an applicant can prove rehabilitation from a prior industrial or nonindustrial injury. (see also; *County of Los Angeles v. WCAB (Seatus)* (2014) 79 Cal. Comp.Cases 580) (writ denied), (87% PD after 15% Labor Code §4663 apportionment but failure to prove overlap under §4664); *Soldi v. San Diego Unified School Dist*, 2014 Cal.Wrk. Comp. P.D. Lexis 180 (WCAB panel decision)

**Perez v. UC Santa Cruz, PSI 2013 Cal.Wrk.Comp. P.D. LEXIS 225 (WCAB panel decision)**

**Ruling:** Applicant received an unapportioned Award due to the fact defendant failed to meet their burden to show or establish overlap between the factors of disability related to applicant's prior Compromise & Release, in which disability was primarily based on range of motion and permanent disability in the new or present case which was based on DRE-IV impairment.

**Factual and Medical Overview:** Applicant initially suffered a low back injury on January 21, 2004, that was resolved by way of a Compromise & Release with an Order Approving issued on September 29, 2005. The Compromise & Release indicated the settlement was based on reports from a Panel QME which rated 21% permanent disability. The summary rating determination indicated the 21% permanent disability was based on range of motion (ROM). It should be noted that the QME reports were not introduced into evidence at the time of the earlier Compromise & Release or at the Trial in the new case.

Applicant suffered a second injury with the same employer related to a cumulative trauma injury ending on November 11, 2009. The reporting physician for the new injury was an AME in orthopedics. Applicant underwent a lumbar fusion and was found MMI on approximately February 15, 2012. The AME indicated that with respect to the new CT injury, the ROM method could not be used because of inhabitation of spinal motion. Under DRE-IV, he found applicant to have suffered 23% whole person impairment and under *Almaraz/Guzman II*, he increased it to 27% WPI.

The AME's opinion on apportionment indicated that based on Labor Code §4664 and the basic subtraction method, that 2/3 of applicant's lumbar disability should be apportioned to the cumulative trauma and 1/3 to the old January 20, 2004, lumbar injury.

The WCJ submitted alternative rating instructions to the DEU rater. First, based upon DRE-IV impairment, applicant would have 26% WPI which would adjust to 35% after adjustment for age and occupation. After consideration of apportionment, overall permanent disability would be 23% under the DRE-IV method. Alternatively, under the ROM method, the overall rating would be 36%.

The rater was cross examined. She noted the correct occupational group should be 430H and with this occupational variant the DRE-IV rating would increase to 41% after apportionment of 1/3 for the prior permanent disability rating attributable to the old Compromise and Release. The resulting permanent disability would be 27%. The rater also testified she did not know whether there would be any overlap between the prior injury of January 21, 2004, based upon a ROM impairment and a current rating based on the DRE-IV impairment.

The WCJ issued an Award of 27% based on the AME's conclusions and the testimony of the

DEU rater. Defendant filed a Petition for Reconsideration, which was granted.

On reconsideration, defendant contended and argued that overlap was not an issue under Labor Code §4664(b)! Defendant also argued applicant has the burden of proof on the issue of overlap! The WCAB made short shrift of both arguments citing Kopping v. WCAB (2006) 142 Cal. App.4<sup>th</sup> 1099, 71 Cal.Comp.Cases 1229. Under Kopping it is defendant's burden to show not only the existence of a prior Award, but also with respect to apportionment, overlapping factors of disability.

“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.”

The WCAB concluded that defendant presented no evidence to establish any overlap between the permanent disability in a prior case i.e., which was settled by way of a Compromise & Release and based on a range of motion and the permanent disability in the present case, which was based on a DRE-IV impairment. The AME's report did not establish overlap.

**Discussion:** It is almost unfathomable to the author that a defendant, almost 10 years after the enactment of both Labor Code §4663 and 4664(b) could possibly argue in good faith that overlap is not an issue under Labor Code §4664(b) and that applicant had the burden proof on the issue of overlap. There also appears to be an issue that was not discussed by the Board and that is whether the Compromise and Release, which was approved on September 29, 2005 constituted “an Award” under Labor Code §4664(b). Generally, case law indicates a Compromise & Release can constitute an “Award” if the parties stipulate and expressly provide they are treating it as an Award. In this case, there is no evidence the parties stipulated to or agreed the prior Compromise & Release and Order Approving Compromise & Release constituted an Award.

Moreover, it appears there was a possibility of apportionment under Labor Code §4663 that was not pursued by defendant based on their sole focus on Labor Code §4664(b).

**Van Allen v. City of Los Angeles/Registrar-Recorder 2013 Cal.Wrk. Comp. P.D. LEXIS 633 (WCAB panel decision)**

**Issue:** Whether defendant pursuant to Labor Code §4664(b) was able to establish that a prior stipulated award of 15.5% overlapped the factors of disability attributable to applicant's current injury of October 10, 1998 and whether under *LeBoeuf* there was substantial evidence applicant was unable to function in the open labor market.

**Procedural & Factual Overview:** Following trial, the WCJ found applicant suffered 100% permanent total disability without apportionment as a result of an October 20, 1998, specific injury to her psyche, back, neck, bilateral knees, teeth, TMJ, sleep apnea, pulmonary lungs, and internal while employed as a clerk by the County of Los Angeles. Defendant filed a Petition for

Reconsideration, arguing primarily the WCJ erred by failing to apportion a prior stipulated award of 15.5% permanent disability to her back that overlapped the disability from the October 20, 1998 injury to the applicant's back, pursuant to Labor Code §4664(b). Moreover, defendant argued that given the number of nonindustrial factors contributing to the applicant's permanent disability, that reliance on *LeBoeuf* to find the applicant was precluded from the open labor market was not supported by substantial vocational evidence.

The WCAB granted defendant's Petition for Reconsideration and amended the WCJ's Findings and Award to reduce the Award from 100% permanently total disabled to 93% permanent disability after apportionment.

The primary reporting physicians were AMEs in orthopedics and internal medicine, as well as applicant's treating physician in psychology and defendant's QME in psychiatry.

There was also a vocational evidence expert on behalf of applicant.

**The Medical Evidence:** The AME in orthopedics found that 80% of applicant's current knee disability was caused by her recent 1998 industrial injury and 20% attributable to preexisting arthritis. He initially found the applicant's back and neck disability was 100%, caused by the 1998 injury, with no nonindustrial contributing factors. However, later the AME was provided with records related to the applicant's 1990 industrial back injury, which included a stipulated award of 15.5% permanent disability. He then revised his opinion on apportionment, noting there were prior work restrictions of no heavy lifting, repetitive bending, or stooping. Therefore, he concluded that 15% of the applicant's spinal disability was attributable to the 1990 injury and 85% to the 1998 injury. He also reviewed a copy of the applicant's 1993 deposition testimony related to the 1990 injury.

The AME in internal medicine opined applicant's pulmonary/lung disease was 20%, caused by industrial factors and conditions and 80% to the applicant's admitted tobacco use, consisting of two packs of cigarettes per day until 2007! Also, with respect to the applicant's morbid obesity, he found 80% related to industrial injury and the other 20% to preexisting morbid obesity. As to the applicant's pulmonary hypertension, 60% was due to her lung disease, 10% due to nonindustrial hypertensive heart disease, and 30% due to her obstructive sleep apnea. With respect to the sleep apnea, he apportioned 80% to industrial factors and 20% of her lung disease to industrial factors. The AME in internal medicine opined the applicant, from an internal medicine standpoint, was not able to compete in the open labor market, citing the applicant's restricted functional capacity.

With respect to both AMEs, there was no dispute that both determined applicant was permanently totally disabled in view of her need for twenty-four hour care and her inability to walk due to her significant pain and need for oxygen. While reconsideration proceedings were in process, applicant was in a nursing facility and on oxygen twenty-four hours per day.

The applicant's treating psychologist found the applicant to be 100% disabled on a combined orthopedic/psychological basis, with no basis for apportionment to nonindustrial factors in the absence of "preexisting psychological disability or other nonindustrial stressors."

In contrast, the defense QME in psychiatry while finding the applicant 100% permanently totally disabled, indicated 7.5% apportionment to the hypertensive condition, 7.5% to the various other internal medical issues, and 2.5% to the prior psychiatric issues. Applicant did have a history of prior psychiatric complaints which were untreated prior to the 1998 injury.

The WCAB on reconsideration indicated applicant's treating psychologist's opinion did not constitute substantial medical evidence due to the fact her reporting was not based upon a full examination of the medical records in the case and, therefore, relied on the defense QME in psychiatry.

**The Vocational Evidence:** There was no defense vocational expert, but there was an expert on behalf of applicant. Based on his review of the medical reports, he concluded applicant was unable to work in any capacity and could not return to the open labor market. He also testified at trial and testified there was no open labor market or job available to someone in the applicant's condition.

**Labor Code §4664(b):** The WCAB referenced and discussed Labor Code §4664(b) in depth. Their starting point was the *Kopping* case, noting the employer has the dual burden of proving the prior award and also that the prior permanent disability related to a prior award overlaps in order to receive the benefit of the Labor Code §4664(b) conclusive presumption. The WCAB stated:

Overlap of permanent disability occurs when factors of disability resulting from the current injury duplicate factors resulting from a different injury or condition, regardless of whether the injuries affect different body parts. (*Mercier v. Workers' Comp. Appeals Bd.* (1976) 16 Cal. 3d 711 [4] Cal.Comp.Cases 205[.]) To the extent that permanent disabilities overlap, the injured worker is not entitled to recover twice for the same affected or diminished [\*19] abilities. (*State Comp. Ins. Fund v. Industrial Acc. Comm. (Hutchinson)* (1963) 59 Cal. 2d 45 [28 Cal.Comp.Cases 20].) However, permanent disabilities do not overlap if they affect different abilities to compete in the open labor market and earn. (*Sanchez v. County of Los Angeles* (2005) 70 Cal. Comp.Cases 1440 (Appeals Board en banc).)

The applicant's current injury fell under the 1997 PDRS which involved work restrictions and the applicant's prior injury and award related to the 1990 injury also fell under a PDRS that was based on work restrictions. Since those work restrictions were expressly contained in the award related to the 1990 injury the reporting AME in orthopedics could, with a reasonable degree of certainty that rose to the level of substantial medical evidence, deal with the overlapping factors of disability. As the Board stated:

It is evident that applicant's disability from her prior back injury overlap the disability caused by her 1998 industrial injury and apportionment under *Section 4664* is appropriate, and must be taken into consideration in determining applicant's permanent disability.

**The *LeBoeuf/Vocational evidence issue*:** The WCAB found applicant's vocational expert's opinion did not constitute substantial medical evidence under *LeBoeuf* that the applicant could not compete or function in the open labor market given the fact applicant's vocational expert failed to discuss and analyze a significant portion of the conditions that contributed to her inability to function in the open labor market were non-industrial.

***Southern California Edison v. WCAB (Martinez)* 2013 Cal. App. Unpub. LEXIS 5942; 78 Cal. Comp. Cases 825 (Second Appellate District, not certified for publication)**

**Procedural and Factual Overview:** Applicant was employed by Southern California Edison for a number of years as a systems computer programmer. Applicant filed two claims; one for a specific injury on June 15, 2001, related to various orthopedic body parts and psyche, and the second for a cumulative trauma injury spanning her entire employment from February 1998 through May 21, 2004, again to various orthopedic body parts and psyche. Prior to trial, the parties stipulated applicant suffered both injuries, but defendant disputed certain body parts and conditions, especially the claim that applicant suffered from fibromyalgia.

Following trial, the WCJ found that related to the specific injury of June 15, 2001, applicant suffered 29% permanent disability after apportionment between the specific injury and other causes. However, with respect to the cumulative trauma claim, the WCJ found that not only did applicant suffer injury characterized as fibromyalgia but was entitled to a 100% permanent total disability Award based solely on the fibromyalgia claim and related disability. Predictably, defendant filed a Petition for Reconsideration, which was denied by the WCAB. Defendant then filed a Petition for Writ of Review, which was granted by the Court of Appeal, who reversed the WCAB and remanded the case for further proceedings.

**Medical Evidence:** There were a number of reporting physicians in the case. There was an AME in psychiatry and an AME in orthopedics. With respect to the rheumatology condition, originally, applicant's treating physician concluded applicant did have fibromyalgia with defendant's reporting rheumatologist indicating she did not. As a result, the WCJ appointed what was mistakenly described as an Independent Medical Evaluator (statutorily the correct characterization should be "regular physician"). The IME concluded applicant's orthopedic injuries resulted in chronic regional myofascial pain, which evolved into the widespread pain syndrome of fibromyalgia and the fibromyalgia led to psychiatric/psychological injuries, secondary to her chronic pain.

**Apportionment Issues:** The AME in orthopedics provided an apportionment formula apportioning disability between the specific injury, the CT claims/injury and also to non-industrial causes for the orthopedic body parts.

The AME in psychiatry, as did the AME in orthopedics, found applicant suffered a WPI of 20% and while apportioning psychiatric disability between the specific and the CT injury, found no apportionment of applicant's psychiatric disability attributable to non-industrial factors.

With respect to the fibromyalgia rating, the reporting IME indicated the AMA Guides do not strictly rate fibromyalgia under any one particular table or chart. Using the four corners of the AMA Guides, the IME derived an impairment rating. His rating also reflected sleep/arousal disorder as well as an emotional and behavioral disorder. However, the IME acknowledged that the actual rating for the emotional/behavioral disorder should come from the psychiatric expert i.e., the AME in psychiatry. He did provide apportionment, with an impairment rating of 27% based on rheumatological factors alone.

However, the IME mistakenly believed or concluded applicant had suffered only a cumulative trauma claim and not a specific injury. Therefore, he did not apportion between the specific injury and the CT claim. All of the disability was attributable to the cumulative trauma claim. With respect to the fibromyalgia condition, there were no non-industrial factors. The IME in rheumatology also concluded notwithstanding that the overall WPI after apportionment was 27% related to rheumatology, that applicant was 100% permanently totally disabled solely attributable to her rheumatological factors and incapable of returning to the open labor market.

As indicated hereinabove, the WCJ found applicant was entitled to a 29% disability rating as a result of the specific injury and 100% disability rating with respect to the CT claim, with no overlap between the two claims, thus allowing applicant to be deemed more than 100% permanently totally disabled.

The basis for defendant's Writ to the Court of Appeal included issues of whether the WCJ should have found apportionment, whether a 100% permanent disability rating could be based on a condition (fibromyalgia) that was not subject to the AMA Guides and whether Dr. Levine's report supported a finding of permanent total disability.

**Discussion:** The WCJ's Report on Reconsideration indicated that even though the orthopedic AME and the psychiatric AME both found a basis for apportionment between injuries and to non-industrial factors, since the rheumatologic IME found that applicant was 100% permanently totally disabled based solely on the rheumatological condition, which was a separate body part or condition, there was no basis to apply apportionment. Moreover, the WCJ emphasized that Dr. Levine's report indicated applicant was not capable of working in the open labor market and had a total diminished future earnings capacity.

**The Court of Appeal Decision:** The Court of Appeal held there was no substantial medical evidence to support the fact that fibromyalgia was the sole cause of the applicant's disability.

Applicant also argued on appeal that based on Labor Code §4662, applicant's permanent disability was conclusively presumed and therefore there could be no apportionment. In an expansive footnote 9, the Court of Appeal indicated because they were annulling the Decision and Award, there was no need to resolve the issue but certainly telegraphed their opinion in footnote 9, that under Labor Code §4662, where permanent total disability is determined "in accordance with the fact" it does not operate as a conclusive presumption and apportionment is still applicable.

Moreover, the Court of Appeal indicated applicant was not disabled solely attributable to her fibromyalgia condition but rather by a combination of factors. The Court of Appeal noted there were many overlapping factors of disability between the orthopedic condition, the psychiatric condition, and the fibromyalgia condition. In essence, the Court of Appeal said the WCJ ignored the evidence of overlap and created an artificial construct to support the finding that apportionment was not required, concluding that fibromyalgia, standing alone, caused Martinez to suffer 100% permanent disability. The Court of Appeal, in discussing why the rheumatological IME's opinion did not constitute substantial medical evidence, indicated the IME did not explain how a 27% Whole Person Impairment from rheumatological disorders could lead to 100% permanent disability. The IME's opinion was fundamentally flawed. First, because he ignored that applicant had suffered two injuries, a specific injury and a cumulative trauma, and mistakenly concluded the applicant only had suffered a cumulative trauma injury. Moreover, the rheumatological IME, while qualified to assign ratings for applicant's impairments, that were solely attributable to fibromyalgia, erroneously assigned permanent disability ratings to applicant's behavioral and emotional disorders, which the court concluded fell outside his area of medical expertise. The rheumatology IME's conclusion that applicant was incapable of working in the open labor market was in part caused by factors of disability attributable to her psychological disorder and other psychological conditions, which were outside his area of expertise. Again, the Court of Appeal emphasized the IME's impairment ratings within his area of expertise, i.e. rheumatology only totaled 27%, therefore raising no inference of permanent total disability or total DFEC rebuttal.

As a consequence, the Court of Appeal annulled the WCAB's Decision and Award and remanded for further proceeding consistent with its opinion.

## **LABOR CODE §4663 (VOCATIONAL EVIDENCE/MEDICAL EVIDENCE)**

### **Acme Steel v. WCAB (Borman): (2013) 218 Cal. App. 4th 1137; 78 Cal.Comp. Cases 751; 2013 Cal.App. LEXIS 638**

**Issue:** In a case where the vocational evidence establishes the applicant is 100% permanently totally disabled must unrebutted substantial medical evidence establishing a basis for apportionment under Labor Code §4663 be considered.

**Facts:** Applicant was employed by Acme Steel as a steel worker for approximately 31 years, from 1972 to 2003. In a 1993 industrial explosion, he suffered injury to his ears, resulting in bilateral hearing loss. An examining physician in 1994 confirmed that as a result of the 1993 explosion, applicant had a 37.5% bilateral hearing loss, and also recommended he should be fitted with hearing aids. In conjunction with the 1993 industrial explosion, applicant received an award of 22% permanent disability. However, he did not lose any time from work and continued to work for Acme Steel until 2003, and then filed a cumulative trauma claim.

There was expert vocational evidence and testimony finding there was no job in the open labor market that could accommodate applicant's difficulty with oral communications, and other significant issues. Based on this evidence, pursuant to the Ogilvie case, the WCJ found applicant effectively rebutted any diminished future earning capacity (DFEC) and as a result established a 100% loss of earning capacity rendering him 100% vocationally permanently totally disabled.

In terms of the medical evidence, applicant was examined by three AMEs in different specialties. However, the focal report was from the AME in hearing loss. Based on comprehensive diagnostic testing, the AME indicated that, while applicant was 100% permanently totally disabled based on his "binaural neurosensory hearing loss," 60% of his bilateral hearing loss and related disability was industrial and 40% was attributable to non-occupational factors primarily cochlear degeneration. The AME did not base any of his apportionment determination on the prior Award of 22% applicant received related to the 1993 explosion.

The WCJ found applicant 100% permanently totally disabled relying exclusively on the vocational evidence applicant was unemployable in the open labor market, and therefore rebutted the DFEC. Given the vocational evidence, the WCJ essentially ignored the AMEs unrebutted report and opinion that 40% of applicant's permanent total disability of 100% was related to non-industrial factors, specifically a degenerative process related to the applicant's cochlear. Defendant filed a Petition for Reconsideration which was denied by the WCAB. Predictably, defendant filed a Petition for Writ of Review which was granted by the Court of Appeal.

**Ruling:** In a decision certified for publication, the Court of Appeal reversed the WCJ and WCAB ruling that even if there is vocational evidence showing a 100% loss of earning capacity, there is no legal basis under Labor Code §4663 for the WCJ and the Board to refuse to address and consider unrebutted substantial medical evidence from an AME establishing non-industrial contributing causal factors of applicant's hearing loss disability.

**Comments:** This is a very significant case since it is certified for publication from the Court of Appeal. Even in a case where the applicant is successful in presenting vocational evidence establishing 100% permanent total disability and rebutting the DFEC, if there is substantial medical evidence that apportionment, pursuant to Labor Code §4663 is established, then it must be considered by the WCAB and not simply ignored.

**Brewer v. Department of Corrections 2014 Cal.Comp.Cases P.D. LEXIS 218  
(WCAB panel decision)**

**Issue:** In order for a vocational expert's opinion to constitute substantial evidence, not only must it "consider" substantial medical evidence of apportionment, but it must consider and apply it in the same percentage ratio as the medical apportionment.

**Factual & Procedural Overview:** This is a complex case both procedurally and factually. There were two trials. In the first trial the WCJ found the applicant to be 100% PTD without apportionment to non-industrial factors. Defendant filed for reconsideration, which was granted by the WCAB resulting in the WCJ's decision being rescinded and remanded for further proceedings on the issues of permanent disability and apportionment. At the first trial both the defense and applicant's vocational experts testified that applicant was PTD based on the fact he was unemployable and had a total loss of future earning capacity. Both vocational experts testified that in forming their opinions they did not consider or address any medical evidence of apportionment. Applicant's expert candidly testified he did ".....not worry about apportionment."

Following remand, at the second trial, both vocational experts testified, and once again opined applicant was vocationally non-feasible and had a total loss of future earning capacity and the fact there was substantial medical evidence of apportionment and non-industrial factors contributing to the applicant's disability did not change or effect their determinations and opinions. At the conclusion of the second trial the WCJ awarded the applicant 92% PD. Applicant filed for reconsideration alleging defendant failed to prove legal apportionment and the WCJ should have found the applicant to be PTD on the vocational evidence alone. The WCAB affirmed the WCJ's award of 92% PD.

**Discussion:** *Brewer* is the first case in this evolving line of cases dealing with the interaction of vocational evidence and medical evidence of apportionment that held that not only must a vocational expert consider medical evidence of apportionment in formulating an opinion, but

must also consider it in the same percentage ratio as the medical disability. “Under *Borman*, where a vocational expert opines based on medical evidence that an injured employee is unemployable, the vocational expert must apportion that “vocational” disability in the same ratio as the medical disability.” (citing *Borman*, 218 Cal.App.4<sup>th</sup> 1142)

There was significant substantial evidence in this case establishing valid legal apportionment. There were multiple AMEs in the fields of internal medicine, orthopedics, neurology, and psychiatry. The AME in orthopedics found 10% non-industrial apportionment to the applicant’s spine as well as 25% non-industrial to the applicant’s right knee and 30% to the shoulders. The AME in psychiatry found 10% of the applicant’s PD to be non-industrial. Both vocational experts totally ignored and discounted this unrebutted medical evidence of apportionment. The WCAB also discussed the WCJ’s duty under the *Blackledge* case that it was the WCJ’s duty to state in the rating instructions, “how much of applicant’s total loss of earning capacity should be apportioned to non-industrial factors, if any, and not the rater’s responsibility.....” to determine from the vocational expert’s report combined with the medical evidence as to how the total loss of earning capacity should be determined or apportioned.

The WCAB also held and discussed extensively the burden of proof as it relates to both apportionment (defendant’s burden), and once a scheduled rating is established legally then the burden of proof shifts to the party disputing the rating. Thus, if an applicant attempts to prove they are not vocationally feasible, or are disputing the DFEC/FEC, then the burden shifts to the applicant. And as this case illustrates, the applicant failed to meet his burden since the vocational reports relied upon did not constitute substantial evidence since they both failed to “consider” medical evidence of apportionment. “Therefore, when attempting to rebut a scheduled permanent disability rating, the burden is on the injured employee to establish what portion of his or her diminished future earning capacity is due to the injury and what portion is due to non-industrial factors. This is an exception to the general rule regarding the burden of proof on apportionment.....”

Moreover, the Board elaborated on the applicant’s burden of proof in this regard citing *Ogilvie III* stating, “[A]n injured employee must affirmatively demonstrate that “the employee’s diminished future earnings are directly attributable to the employee’s work-related injury, and not due to nonindustrial factors. To conclude otherwise would impermissibly shift the burden to the defendant to prove a negative, i.e., that any post-injury work restrictions were not due to the injury.”

**Comment & Practice Pointers:** The overwhelming trend of the cases post-*Borman* hold that vocational experts must “consider” medical evidence of apportionment in formulating their opinions or risk that their reports will not constitute substantial evidence. However, while the cases require the vocational experts to “consider” apportionment there is to date no clear guidance from the Board or the Courts as to the methodology or formula a vocational expert should use when they consider apportionment in determining vocational feasibility or loss of future earnings. *Brewer* is the only case thus far that requires a vocational expert to consider

medical evidence of apportionment in the same ratio as the medical disability. The following cases all found the vocational expert(s) opinions and reports did not constitute substantial evidence based on the fact they failed to “consider” medical evidence of apportionment. (*Pound v. WCAB* (2014) 80 Cal.Comp.Cases 50 (writ denied); *Joberg v. Illuminations, Inc.* 2014 Cal. Wrk.Comp. P.D. LEXIS 717 (WCAB panel decision); *Pinzon v. RC Gramer Construction* 2014 Cal. Wrk. Comp. P.D. LEXIS 271 (WCAB panel decision); *Walter v. International Capital Group, SCIF* 2015 Cal.Wrk.Comp. P.D.LEXIS 32 (WCAB panel decision); *Qazi v. The Boeing Company* 2015 Cal.Wrk. Comp. P.D. LEXIS 233 (WCAB panel decision); *Van Allen v. City of Los Angeles/Registrar-Recorder* 2013 Cal.Wrk.Comp. P.D. LEXIS 633 (WCAB panel decision).

In order for an applicant to prevail in this area so that a vocational expert’s opinion does not have to “consider” apportionment an applicant must show the medical evidence of apportionment does not constitute substantial evidence to support a judicial determination that the alleged apportionment is invalid. The following cases illustrate where applicants have been successful in defeating apportionment and establishing substantial vocational evidence of non-feasibility or diminished future earning capacity. (*Aima v. Buestad Construction, Inc., SCIF* 2015 Cal.Wrk. Comp. P.D. LEXIS 62 (WCAB panel decision); *Mercer v. State of California Dept. of Motor Vehicles* 2014 Cal.Wrk.Comp. P.D. LEXIS 690 (WCAB panel decision); *Zirkle v. United Parcel Service* 2014 Cal.Wrk.Comp., P.D. LEXIS 211 (WCAB panel decision).

**Kirkwood v. WCAB (2015) 80 Cal.Comp.Cases 1082; 2015 Cal.Wrk.Comp. LEXIS 117 (writ denied)**

**Issue:** Whether vocational evidence that does not consider or ignores medical evidence of apportionment constitutes substantial evidence and whether the conclusive presumption of PTD under Labor Code §4662(a) applied and whether apportionment must be considered under Labor Code §4662(b).

**Holding:** A vocational expert’s opinion must consider and cannot ignore medical evidence of apportionment in order to constitute substantial evidence. In order for applicant to rely on the Labor Code §4662(a) conclusive presumption of PTD related to loss of both limbs, the loss of one limb prior to the injury in question must also be industrial. If PTD is determined in accordance with the fact (sic) under Labor Code §4662(b), apportionment is applicable.

**Overview & Analysis:** Applicant suffered a CT to her right upper extremity and psyche. In terms of medical history, applicant previously suffered an industrial injury to her cervical spine as well as a partial amputation of her left arm as the direct result of a non-industrial automobile accident. In terms of medical evidence, the AME in orthopedics found 1% PD related to applicant's right thumb and 3% WPI to applicant's right upper extremity and released applicant to work with restrictions. Diagnosis was right De Quervain’s stenosing tenosynovitis and mild right thumb carpometalcarpal synovitis.

In terms of vocational evidence, applicant's vocational expert concluded that based on a combination of applicant's industrial injuries she was unable to compete in the open labor market and had a total loss of earning capacity. The defense vocational expert opined that applicant would experience a significant loss of earning capacity, but such a loss was not entirely attributable to the industrial CT, but related in part to applicant's prior non-industrial partial amputation of the left arm and the prior cervical spine injury.

Following trial, the WCJ found applicant to be 100% PTD without apportionment to non-industrial contributing factors. Defendant filed a Petition for Reconsideration. The WCAB granted reconsideration and rescinded the WCJ's decision and remanded the case back to the WCJ to properly consider medical evidence of apportionment and SIBTF liability, if any. Applicant filed a Writ, which was denied.

The Labor Code §4662(a) conclusive presumption of PTD related to loss of use of both arms was not applicable since applicant's preexisting disability to her left arm in the form of a partial amputation was caused by a non-industrial accident and not by an industrial injury. The WCAB found that long-standing case authority supports the conclusion that a pre-existing disability that is non-industrial cannot be combined with a current industrial injury to warrant the application of the conclusive presumption under Labor Code §4662(a).

Moreover, applicant's vocational expert's opinion that applicant was unemployable in the open labor market and had a total loss of earning capacity was not substantial evidence since he did not consider and disregarded entirely applicant's preexisting nonindustrial left arm amputation and its impact on her overall disability "contrary to the statutory apportionment requirements." Also, the WCAB noted that the orthopedic AME's assessment of applicant's right upper extremity impairment did not support a finding of 100% PTD "in accordance with the fact" pursuant to Labor Code §4662(b) and that apportionment was applicable to any PD determined under this section.

**Duplessis v. Network Appliance, Inc. 2014 Cal.Wrk.Comp. P.D. LEXIS 316 (WCAB panel decision)**

**Issue:** Whether vocational experts for applicant and defendant must consider nonindustrial contributing factors along with multiple injuries in assessing and determining an applicant's ability to compete in the open labor market or alleged loss at earning capacity under the 1997 Rating Schedule. Also, whether applicant's disability should be apportioned between two separate injuries as well as to prior nonindustrial and industrial contributing factors.

**Procedural & Factual Overview:** Following two trials, the WCJ found applicant had suffered two admitted specific back injuries one on March 18, 2002 and the other on March 3, 2003. The

WCJ found 69% orthopedic permanent disability before apportionment and 15% psychiatric disability as rated under the 1997 Permanent Disability Rating Schedule.

With respect to the March 18, 2002 specific injury, it caused very little time off work, but did require some medical attention. However, the March 3, 2003 injury caused the applicant to stop working, and he never returned to work. Applicant had two spinal fusions--one in 2008, the other in 2009, and another surgical procedure in 2011 to remove fusion hardware.

The reporting physicians consisted of an AME in orthopedics and QMEs reporting for each party in psychology. In terms of prior industrial and nonindustrial injuries, the applicant suffered a 1979 nonindustrial automobile accident and two prior industrial injuries in 1999 and 2000. Each party also employed their own vocational evaluator.

Following the first trial, applicant filed a Petition for Reconsideration. In response, the WCJ concerned with due process issues, vacated his decision and reset the matter for trial.

Following the second trial, the WCJ applied the 1997 Permanent Disability Rating Schedule and found orthopedic permanent disability of 69% before apportionment, relying on the orthopedic AME, and 15% psychological disability, relying on the defense QME's conclusions and opinions. The WCJ also found that applicant did not successfully rebut the Permanent Disability Rating Schedule by his vocational experts' opinion. Permanent disability was apportioned between the two current industrial injuries of 2002 and 2003 as well as the prior nonindustrial traffic accident and the two prior industrial injuries. Specifically, the orthopedic AME concluded that 5% of applicant's overall disability should be apportioned to the 1979 nonindustrial automobile accident, 5% to the prior 1999 industrial injury, and 5% to the prior 2000 industrial injury. Moreover, in terms of apportionment, under *Benson*, between the two current successive injuries of 2002 and 2003, the AME in orthopedics found that 40% of applicant's orthopedic disability should be apportioned to the 2002 injury and 45% to the 2003 injury.

**The Vocational Evidence:** The judge and the WCAB determined neither applicant's vocational expert or the defense vocational expert quantified permanent disability under the terms of the 1997 PDRS nor apportioned among the various causes discussed by the medical evaluators, especially the AME in orthopedics in determining nonindustrial and industrial contributing causal factors of the applicant's overall permanent disability. Applicant on reconsideration argued that it was improper for the WCJ to charge vocational experts with the responsibility of determining apportionment. However, both the WCJ and the WCAB indicated that a vocational expert must provide a conclusion based on substantial evidence and, therefore, must consider both industrial and nonindustrial factors. Under the facts of this case neither vocational expert provided an analysis of the two new separate and successive industrial injuries, let alone apportionment to prior industrial and nonindustrial factors. The WCAB indicated that Labor Code §4663 operates to impede an employee's ability to establish permanent total disability when the disability that is reported by the physicians must be apportioned to separate injuries under *Benson*, and also apportioned based on prior industrial or nonindustrial factors.

**The AME's Apportionment Determination:** The WCAB pointed out that the orthopedic AME in this case had been involved in the case for seven and a half years! His final conclusion and opinions on both disability and apportionment were well-reasoned and, therefore, constituted substantial medical evidence.

**Williams v. WCAB (Berkley Unified School District) 2013 Cal.Wrk.Comp. LEXIS 115 (writ denied)**

**Holding:** Vocational evidence that does not adequately consider medical evidence of apportionment to non-industrial factors does not constitute substantial evidence.

**Factual & Procedural Overview:** Applicant, a custodian, suffered an admitted July 21, 2009, low back injury. The reporting physician was an AME. Following trial the WCJ issued a Findings & Award finding permanent disability of 28% after adjustment for age and occupation and apportionment. The WCJ relied on the reporting of the AME on the level of permanent disability and apportionment. The AME found that 80% of the applicant's disability was attributable to the specific injury of July 21, 2009, and 10% to pre-existing non-industrial causes, and 10% to an industrial cumulative trauma.

In terms of vocational evidence, the WCJ noted the two reporting vocational experts had set permanent disability on a vocational basis at 35% as opposed to the 28% medical disability after apportionment.

Applicant filed for reconsideration contesting the medical apportionment of 20%. He also argued there were two separate and distinct determinations and the vocational experts considered the medical apportionment. Applicant argued that to reintroduce medical apportionment into the vocational evidence equation resulted in an inequitable reduction of the true permanent disability.

The WCJ in his Report on Reconsideration focused on the fact both reporting vocational experts did not consider the apportioned medical disability to determine diminished future earning capacity. "Neither vocational expert testified that he had based his assessment of diminished future earning capacity on 80% of the applicant's functional capacity."

The WCJ articulated a careful analysis of two methods or approaches of reconciling medical evidence related to apportionment and vocational evidence and non-industrial factors. The first method articulated by the WCJ which he did not follow was:

Although the law regarding application of apportionment in "Ogilvie-type" cases is by no means clear, it seems to the undersigned that the ideal would be to start from the medically apportioned permanent disability and have the vocational

experts apply their diminished future earning capacity analysis based upon the injured worker's medical restrictions-after apportionment. That was not done in this case.

The WCJ then articulated the second method which he applied and followed as:

A second approach, advocated by some practitioners, is to assess the overall level of disability and then apply to the overall disability the apportionment found on a medical basis. This is not irrational, and this is the approach I have taken here. The Alternative, I believe, would involve the additional time and expense of having vocational experts revisit their opinions, basing their understanding of applicant's medical limitations on 80% of the overall medical disability found. I don't believe that due process requires this.

The WCAB denied applicant's Petition for Reconsideration adopting and incorporating the WCJ's report without further comment. Applicant's Petition for Writ of Review was also denied.

**Comment:** This is another case reflecting the Board's evolving view that vocational experts are mandated to consider medical evidence especially medical evidence of apportionment related to non-industrial factors in determining feasibility or non-feasibility in the open labor market and in determining any loss of future earning capacity.

### **Lentz v. WCAB 2013 Cal.Wrk.Comp. LEXIS 131 (writ denied)**

**Holding:** In order for a vocational rehabilitation expert's report and opinion to constitute substantial medical evidence related to alleged non-feasibility, the report and opinion must consider both non-industrial causes that exist in the case.

**Procedural/Factual Overview:** Applicant suffered an October 6, 2008, specific injury, which was admitted to his neck. Defendant denied the psychiatric and internal components of the claim. The reporting physicians consisted of an AME in orthopedics and a Panel QME in psychiatry.

Following the initial Trial, the WCJ found the applicant 100% permanently totally disabled, without apportionment. Both applicant and defendant filed Petitions for Reconsideration. The WCAB granted both Petitions for Reconsideration and remanded the case for further proceedings.

Subsequent to the remand, a Mandatory Settlement Conference was held. The parties waived cross-examination of the rater and provided no additional evidence, but requested an additional thirty days to submit Points and Authorities.

After the second submission, the WCJ issued his second Supplemental Findings & Award finding the applicant 69% permanently disabled after applying apportionment. The WCJ also found the report of the vocational expert did not constitute substantial medical evidence and

denied the vocational expert's fee in its entirety. Once again, both defendant and applicant filed Petitions for Reconsideration. Defendant's argument on appeal related to the 15% increase related to Labor Code § 4658(d). Applicant's arguments of reconsideration focused on the fact that the WCJ found only 69% PD after apportionment and should have relied on the opinions of the vocational expert, which determined the applicant was permanently totally disabled and had lost all earning capacity.

The WCAB granted applicant's Petition for Reconsideration and denied defendant's Petition for Reconsideration on the 15% bump up issue. The WCAB amended the WCJ's decision to reflect the vocational expert's fee was allowable as a cost, even where the vocational expert's opinion did not constitute substantial evidence. The WCAB affirmed the WCJ's F&A with respect to 69% permanent disability after apportionment.

With respect to apportionment, the WCAB indicated that the orthopedic AME found that 85% of applicant's cervical disability was due to the specific industrial injury and the remaining 15% was attributable to non-industrial factors, whereas the Panel QME in psychiatry opined that 60% of applicant's psychiatric disability was due to the specific industrial injury and the remaining 40% to non-industrial factors.

With respect to the vocational expert's opinion the applicant had lost all earning capacity as a result of the injury, the WCAB noted the vocational expert's opinion was not substantial evidence primarily due to the fact the vocational expert did not consider or ignored evidence of significant apportionment to non-industrial causes that existed in the case. The Board stated:

“The WCJ noted in his Opinion on Decision that the vocational rehabilitation expert failed to consider pre-existing causes of disability and failed to perform any objective testing. Thus, Mr. Greenberg's testimony is incapable of proving or disproving any increases above the medical opinions set forth by Dr. Suchard and Dr. Kimmel on the issue of permanent disability. Moreover, none of the arguments presented by applicant in the current Petition change our opinion that Dr. Greenberg's opinion is not substantial because, as we stated previously, “it bases the finding on non-feasibility on the totality of applicant's disability impairment without regard for the significant apportionment to non-industrial causes that exists in this case. (August 14, 2012, Opinion and Order Granting Reconsideration and Decision After Reconsideration, p. 8) Moreover, even if the record was sufficient to support a finding that the effects of applicant's industrial injuries caused total permanent disability under the analysis of LeBoeuf v. Worker's Comp. Appeals Bd. (1983) [34 Cal. 3d 234, 666 P.2d 989, 193 Cal. Rptr. 547, 48 Cal.Comp.Cases 587], the requirements of sections 4664 and 4663 would still need to be addressed.”

**Comment:** Although this is a writ denied case, it is significant. First, it affirms the trend in a number of cases that if permanent disability is being increased pursuant to LeBoeuf, you would take the overall permanent disability resulting from the application of LeBoeuf to the underlying

permanent disability and then apply apportionment at the end.

More importantly, vocational rehabilitation experts must, pursuant to the requirement of Labor Code §§ 4663 and 4664 consider whether there are any non-industrial contributing factors to the applicant's vocational non-feasibility. (see also; *Van Allen v. City of Los Angeles/Registrar Recorder* 2013 Cal.Wrk.Comp. P.D. LEXIS 633 (WCAB panel Decision); *Duplessis v. Network Appliance, Inc.* 2014 Cal.Wrk.Comp. P.D. LEXIS 316 (WCAB panel decision).

## **THE LABOR CODE §4662 CONCLUSIVE PRESUMPTION**

**Practice Pointers & Commentary:** Over the last two years the overwhelming trend as reflected in the majority of cases with respect to the Labor Code §4662 conclusive presumption of permanent total disability, is that when proof of PTD is under §4662(b), “in accordance with the fact” (sic) there is no conclusive presumption of PTD and any substantial medical evidence of apportionment must be considered. The following cases all indicate that substantial medical evidence of apportionment must be applied under §4662(b) despite contrary arguments and contentions that if PTD is established “in accordance with the fact” apportionment is inapplicable as it is under §4662(a). (*So. Cal. Edison v. WCAB (Martinez)* (2013) 78 Cal.Comp.Cases 825; *Paz v. Marie Callenders* 2014 Cal.Wrk.Comp. P.D. LEXIS 468 (WCAB panel decision); *Joberg v. Illuminations, Inc.* 2014 Cal.Wrk.Comp P.D. LEXIS 717 (WCAB panel decision); *Edge v. Ralph's Grocery* 2013 Cal.Wrk.Comp. P.D. LEXIS 485 (WCAB panel decision); *Morris v. WCAB (San Gregonio Hospital)* (2014) 79 Cal.Comp.Cases 1348 (writ denied); *Dufresne v. Sutter Maternity* 2014 Cal.Wrk.Comp. P.D. LEXIS 710; *Kirkwood v. WCAB* (2015) 80 Cal.Comp.Cases 1082; 2015 Cal.Wrk.Comp. LEXIS 117 (writ denied).

An applicant can still prove PTD under §4662(b) “in accordance with the fact,” if there is no substantial medical evidence to support valid legal apportionment. However, even in the absence of apportionment, this section does not automatically operate as a “conclusive presumption” of PTD. The following cases all found PTD in “accordance with the fact” since there was no substantial medical evidence of apportionment. (*Monsanto Co., Ace American Insurance Co., v. WCAB* 2014 Cal.Wrk.Comp. LEXIS 68 (writ denied); *Conen v. Blue Star Ready Mix* 2015 Cal.Wrk.Comp. P.D. LEXIS 97(WCAB panel decision); *G4S Secure Solutions v. WCAB (Simone)* (2015) 80 Cal.Comp.Cases 823,2015 Cal.Wrk.Comp.LEXIS 96(writ denied); *Farren v. State of California, SCIF* 2015 Cal.Wrk.Comp. P.D. LEXIS 589 (WCAB panel decision); *Frese v. Cameron Builders, Inc., SCIF* 2013 Cal.Wrk. Comp. P.D. LEXIS 643 (WCAB panel decision).

**Enriquez v. County of Santa Barbara, PSI 2014 Cal.Wrk.Comp. P.D. LEXIS 375 (WCAB panel decision)**

**Issues:**

1. Does the finding of 100% permanent total disability in accordance with the fact under Labor Code §4662 preclude apportionment under Labor Code §4663 to nonindustrial contributing factors.
2. Whether a psychiatric injury alone automatically invokes a conclusive presumption of permanent total disability under Labor Code §4662(d) that would preclude apportionment.

**Procedural & Factual Overview:** There were two separate successive trials in this case. Following the first trial in February 2013, the WCJ found applicant suffered an industrial injury to her psyche as a result of a cumulative trauma injury causing 100% permanent total disability without apportionment. Defendant filed a Petition for Reconsideration which was granted by the WCAB. The Board set aside the award of 100% permanent total disability and remanded the case for the record to be further developed by way of an opinion from the AME regarding both causation and apportionment.

After the record was developed on remand there was a second Trial. In the Findings of Fact and Award dated May 15, 2014, the WCJ found permanent disability of 41% after apportionment again as a result of an industrial psychiatric injury attributable to a cumulative trauma. Predictably, applicant filed a Petition for Reconsideration contending the applicant should be deemed 100% permanently totally disabled based on the opinion of the AME in psychiatry. Applicant also argued that pursuant to Labor Code §4662(d) any permanent disability was not subject to apportionment. Moreover, applicant argued that if apportionment is found to be applicable, then permanent disability should be 60% as opposed to the 41% indicated by the WCJ. In a report and recommendation on Petition for Reconsideration, the WCJ recommended the WCAB increase permanent disability to 100% pursuant to Labor Code §4662 but to apply nonindustrial apportionment of 40% resulting in a 60% Award of Permanent Disability. The WCAB followed the WCJ's recommendation in the Report on Reconsideration and found applicant was 100% permanently totally disabled under Labor Code §4662 "In accordance with the fact" (sic) but there were nonindustrial contributing factors of 40%, leaving the applicant with an Award of 60% permanent total disability.

**Discussion:** The reporting AME in psychiatry in this case issued several reports and was also deposed three times. He concluded and opined that due to her psychiatric injury and the effect and amount of psychotropic medication, applicant could not compete in the open labor market as a whole. There was no vocational evidence or expert in the case.

The AME in psychiatry identified a plethora of nonindustrial contributing factors to the applicant's psychiatric disability including the following:

1. Growing up with an abusive grandmother,
2. Feelings of abandonment by her father and to some degree by her mother,
3. Eating disorder,
4. Abusive husband that led eventually to divorce and psychiatric hospitalization,
5. Diagnosis of anxiety, dysthymia and premenstrual dysphoric disorder,
6. Abuse of cocaine, amphetamines and marijuana,
7. Diagnosis of attention deficit disorder, inattentive, OCD,
8. Hoarding behavior.

The AME based on *Rolda* also specifically identified a number of industrial contributing factors to applicant's Permanent Disability which were predominant with respect to causation of injury AOE/COE.

### **The Labor Code §4662(d) Issue:**

Applicant argued on reconsideration and at trial that applicant should be afforded the conclusive presumption of permanent total disability pursuant to Labor Code §4662(d) that provides "an injury to the brain resulting in incurable mental incapacity or insanity."

Applicant argued that apportionment would be precluded due to the applicant's alleged brain injury. However, both the WCJ and the WCAB indicated that a psychiatric injury alone is not synonymous with an injury to the brain resulting in incurable mental incapacity or insanity. The WCAB distinguished a number of cases cited by the applicant in support of the argument of the conclusive presumption based on an injury to the brain resulting in incurable mental incapacity or insanity. In those cases unlike the instant case, there was more than just a psychiatric injury. The WCAB noted for example in one case, where an applicant received the benefit of the Labor Code §4662(d) conclusive presumption had suffered a stroke during an industrially related knee replacement surgery. The WCAB stated a stroke is addressed under Chapter 13 of the AMA Guides and not pursuant to the GAF scale which is applicable to psychiatric injuries. The WCAB also cited and distinguished another case where there was more than just an injury to the applicant's psyche but also a seizure disorder, neurologic disorder, cognitive disorder, language disorder, and behavior disorder. These additional body parts and conditions are also addressed under the AMA Guides in separate chapters but not pursuant to the GAF scale for psychiatric injuries.

The WCJ and the WCAB noted that applicant's inability to compete in the open labor market was not based on an injury to the brain, but based solely and exclusively on the applicant's psychiatric level of impairment as well as the effects of her psychotropic medications. As a consequence, applicant could not avail herself of the Labor Code §4662(d) conclusive presumption but that the 100% finding of permanent total disability would be based on the last paragraph of Labor Code §4662 "in accordance with the fact" (sic).

### **Permanent Total Disability Determined "In Accordance with the Fact" Does not Preclude Apportionment under Labor Code §4663:**

The WCAB indicated the opinion of the psychiatric AME on apportionment constituted

substantial medical evidence since he demonstrated and disclosed familiarity with the concepts of apportionment and described in detail the nature of the apportionable psychiatric disability and set forth the reasons and basis for his opinion on apportionment. With respect to whether or not Labor Code §4662 where permanent and total disability is determined in “accordance with the fact” precludes apportionment under Labor Code §4663 the WCAB stated:

Contrary to the WCJ’s statement at page three of his Report, Labor Code §4662 permanent total disability “in accordance with the fact” must still be apportioned to all causative factors of the permanent disability. As the Supreme Court held in *Brodie v. Workers’ Comp. Appeals Bd.* (2007) 40 Cal. 4<sup>th</sup> 1313, 1328 [72 Cal.Comp.Cases 565] “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.” In *Benson v. Workers’ Comp. Appeals Bd.* (2009) 170 Cal.App.4<sup>th</sup> 1535, 1560 Cal.Comp.Cases 113], the Court of Appeal held that “a system of apportionment based on causation requires that each distinct industrial injury be separately compensated based on its individual [\*14] contribution to a permanent disability.” Despite finding that the applicant was precluded from the labor market and was thus permanently totally disabled, the reporting physician and the WCJ were still required to parcel out the causative sources of the applicant’s permanent disability, including apportioning between current industrial injuries, prior industrial injuries, and nonindustrial factors.

The WCAB held that when permanent total disability under Labor Code §4662(d) is determined “in accordance with the fact” apportionment is not precluded which reflects the current trend in recent cases.

**Valenzuela v. State Of California-Department of Corrections, Legally Uninsured**  
**2013 Cal.Wrk.Comp. P.D. LEXIS 401 (WCAB panel decision)**

**Issue:** Whether apportionment pursuant to Benson/Labor Code §4663, applies to a case where permanent total disability was determined by virtue of the last sentence of Labor Code §4662, that provides that “in all other cases, permanent total disability shall be determined in accordance with the fact.”

**Facts:** Applicant suffered both an admitted specific and cumulative trauma injury. There were multiple reporting AMEs. The WCJ, relying on the last sentence of Labor Code §4662, found the applicant permanently totally disabled “in accordance with the fact.” The WCJ did not base the finding of permanent total disability on any of the four listed specific disabilities in sections (a) through (d) of Labor Code §4662. The WCJ reasoned that even if permanent total disability was determined “in accordance with the fact”, it operated to establish a conclusive presumption and therefore, apportionment pursuant to Labor Code §4663 did not apply.

The WCAB, in granting defendant's Petition for Reconsideration, rescinded the WCJ's decision and remanded it back to the trial level for further development for the record related to apportionment.

The WCAB, in construing the last sentence of section 4662, held that other than the four enumerated disabilities, "in all other cases", permanent total disability shall be determined in accordance with the fact. Thus, "in all other cases" where permanent total disability is determined, "in accordance with the fact" under section 4662, the permanent total disability is not conclusively presumed to be total. The Board emphasized that determination of permanent total disability in this case was based on the evidentiary record and there is no conclusive presumption. Therefore, permanent disability, even 100% permanent total disability, is subject to apportionment based upon causation. The WCAB cited the California Supreme Court's decision in Brodie and also the recent case Certified for Publication from the Court of Appeal, *Acme Steel v. WCAB (Borman)* (2013) 218 Cal.App.4<sup>th</sup> 1137; 78 Cal.Comp.Cases 751. "Thus, apportionment must be addressed regardless of whether the total permanent disability is determined by rating the employee's whole person impairment, or otherwise "in accordance with the fact" pursuant to the last sentence of section 4662".

**Ruling:** The last sentence of Labor Code §4662, that in "all other cases" permanent disability will be determined in accordance with the fact, does not operate to establish a conclusive presumption of 100% permanent total disability. As a consequence, the WCJ on remand must apply apportionment consistent with Labor Code §4663 if there is substantial medical evidence supporting it.

## **BENSON**

### **INTRODUCTORY COMMENTS AND RECENT CASES**

The *Benson* case and its holding as it relates to apportionment of disability between separate and successive injuries continues to be an area of intense litigation due to the fact its application which is required in the absence of “limited circumstances,” can impact the value of a case or cases significantly.

### **OVERVIEW OF ESSENTIAL PRINCIPLES:**

Under *Benson*, when multiple separate and successive industrial injuries combine to cause permanent disability, the permanent disability caused by each injury must be separately awarded, unless there are “limited circumstances” where the evaluating physician cannot parcel out with reasonable medical probability, the approximate percentages to which each separate and successive distinct industrial injury has causally contributed to the employee’s overall permanent disability. (*Benson v. The Permanente Medical Group* (2007) 72 Cal.Comp.Cases 1620 (Appeals Board en banc), affirmed sub nom. *Benson v. WCAB* (2009) 170 Cal.App.4<sup>th</sup> 1535 [74 Cal.Comp.Cases 113].) Prior to *Benson*, separate and successive injuries involving a common body part were routinely combined into a single award of permanent disability when they became permanent and stationary on the same date, in accordance with the now overruled case of *Wilkinson v. WCAB* (1977) 19 Cal.3<sup>rd</sup> 491 [42 Cal.Comp.Cases 406 (*Wilkinson*)]. However, with the enactment of Senate Bill 899 (SB 899), a new regime of apportionment was adopted by the Legislature which operated in part to change the *Wilkinson* rule by repealing former Labor Code §4750 and mandating as required by new §4663, that permanent disability be apportioned by parceling it out based upon all causative factors and sources. In *Benson* the Court of Appeal opined, “We cannot conceive that the Legislature would intend to “replace” or “repeal and recast” the rules of apportionment, but still retain the *Wilkinson* doctrine.”

Apportionment of disability between separate and successive injuries is legally and conceptually a subspecies of Labor Code §4663 apportionment. The primary focus of Labor Code §4663 apportionment is parceling out permanent disability for each body part, condition or system based on all contributing factors, both industrial and non-industrial. In contrast, apportionment under *Benson*, deals with the apportionment of disability between separate and successive injuries. Analytically, Labor Code §4663 primary apportionment must be determined or calculated first, and then the resulting industrial disability component apportioned between and among separate and successive injuries as required by *Benson* unless there are “limited circumstances” in which the evaluating physician cannot parcel out with reasonable medical probability, the approximate percentages to which each separate and distinct industrial injury causally contributed to the employee’s overall permanent disability.

It is important to note that the *Benson* decision itself only uses the phrase “limited circumstances” without reference or mention of the phrase “inextricably intertwined” which has

evolved into a short hand “mantra” characterizing an exception to the requirement that the permanent disability resulting from separate and successive injuries not be combined. In the author’s opinion, there should be “limited circumstances” (few in number) where the residual permanent disability after application of Labor Code §4663 apportionment, which are truly “inextricably intertwined,” and therefore the resultant permanent disability cannot be reasonably apportioned or attributed to more than one separate and successive injury. However, many evaluating physicians in cases involving separate and successive injuries merely state in a conclusory cryptic manner that the disability is “inextricably intertwined” without any detailed analysis or reasoning as to why the residual disability cannot be apportioned or parceled out between multiple injuries. If the phrase “limited circumstances” as used in *Benson* is to have any meaning in terms of its application, then evaluating physicians should be required to explain in detail why the residual permanent disability cannot be allocated to more than one injury and is truly “inextricably intertwined.”

### **RECENT CASES:**

There are a number of recent cases reflecting disparate holdings in analyzing and applying *Benson*.

In *Zuniga v. County of Los Angeles* 2014 Cal.Wrk.Comp. P.D. LEXIS 549, (2014) 43 CWCR 277, the WCJ issued separate awards of permanent disability for two separate injuries of 74% related to a CT and 64% to a specific injury after applicable apportionment. On reconsideration the WCAB in reversing the WCJ’s finding of separate awards, determined that the permanent disability caused by the two separate injuries was “inextricably intertwined” and awarded the applicant one combined permanent disability award of 75%. The WCAB found the WCJ had improperly apportioned permanent disability between the two separate injuries when there was no medical evidence or opinion that apportioned the permanent disability between the CT and specific injury.

In *Northrop Grumman v. WCAB (Dileva)* (2015) 80 Cal.Comp.Cases 749; 2015 Cal.Wrk.Comp. LEXIS 78 (writ denied), there were three separate injuries consisting of one CT and two specific injuries. The WCJ issued a combined award of 96% PD for all three injuries despite an opinion from the AME in orthopedics that applicant's PD was attributable 25% to the two specifics and 75% to the CT. The WCJ’s reasoning in disregarding the opinion of the AME was that applicant's PTP in psychiatry opined that the psychiatric disability from all three injuries was “inextricably intertwined” and could not be parceled out between the injuries since the overall PD was due to the combined effects of the three injuries, and therefore it would be speculative to apportion the PD. The WCJ indicated that in these unique circumstances a joint/combined award of PD was appropriate since “if disability to different body parts is inextricably linked, such as with applicant’s lumbar and psychiatric disability, a combined award of PD for different dates of injury may be justified even if disability for some of the body parts (here, applicant’s lumbar disability) can be apportioned between injuries.” (*Delia v. County of Los Angeles*, 2010 Cal.Wrk.Comp. P.D. LEXIS 282 (WCAB panel decision).

In *Fuentes v. World Variety Produce* 2015 Cal.Wrk.Comp. P.D. LEXIS 280 (WCAB panel decision), there were opinions from three AMEs in different specialties as to whether applicant's PD could be allocated or apportioned among two separate injuries. The WCJ found 78% PD in a combined award without apportionment of PD among the two injuries. The AME in orthopedics opined that applicant's lumbar spine disability was wholly attributable to the CT and the cervical spine disability one third to the specific, one third to the CT, and one third non-industrial. In contrast, the AMEs in psychiatry and internal medicine although finding some non-industrial apportionment, opined that the resultant PD was "inextricably interwoven" and could not be apportioned among or between the two injuries. On reconsideration the WCAB rescinded the WCJ's award and remanded the case back for further development of the record on *Benson*, with specific instructions that the AMEs in psychiatry and internal medicine "were to consult with applicant's treating physician, and if necessary refer applicant to a treating physician for a final determination on the issue of applicant's disability caused by his psychiatric and internal injuries."

A graphic example of the impact *Benson* can have on the value of a case is found in *Delao v. State of California, SCIF* (2015) 80 Cal.Comp.Cases 287; 2015 Cal.Wrk.Comp. LEXIS 21, (writ denied), where a potential combined award of 100% for two specific injuries after application of *Benson* resulted in two 50% awards. There seemed to be no dispute that applicant was 100% PTD. However, the AME indicated the disability should be apportioned equally between both specific injuries. The AME was deposed twice with no change in his opinion. The WCJ issued an order allowing for a third deposition of the AME. Defendant filed for reconsideration, which was granted by the Board, dismissing the Petition for Reconsideration and granting a Petition for Removal rescinding the WCJ's order. In addition, the Board held that that the AME's opinion apportioning applicant's 100% PTD, 50% equally to both specific injuries constituted substantial evidence and was final. The WCAB on remand directed the WCJ to issue rating instructions consistent with that determination. (see also *Duplessis v. Network Appliance, Inc.*, 2014 Cal.Wrk.Comp. P.D. LEXIS 316 (WCAB panel decision) (Valid apportionment under *Benson* of 40% of applicant's orthopedic disability to a 2002 injury and 45% to a separate and successive 2003 specific injury.)

**Morris v. WCAB (2014) 79 Cal.Comp.Cases 1348, 2014 Cal. Wrk. Comp. LEXIS 130 (writ denied)**

**Issues:** 1) Whether there was substantial evidence related to three separate and successive injuries to apply *Benson* and apportion disability among the three cases, 2) Whether under Labor Code §4662 applicant was able to show she was 100% permanently totally disabled "in accordance with the fact," and apportionment did not apply, 3) Whether under *Ogilvie* and

*LeBoeuf* applicant could rebut the scheduled rating under the 2005 PDRS with no vocational expert testimony.

**Holding:** There was substantial evidence to support apportioning permanent disability among three separate and successive injuries. Apportionment of applicant's permanent disability was still applicable even if applicant was able to show she was permanently totally disabled under Labor Code §4662 "in accordance with the fact." Also, applicant was unable to rebut the scheduled rating under the 2005 PDRS without expert vocational evidence.

**Procedural & Factual Overview:** Applicant, a registered nurse, suffered three separate and successive injuries. The first was a specific injury of May 11, 2004, to her back. The second was a September 10, 2004, specific injury to her head, neck, low back, psyche, colon, and also high blood pressure. The third separate and successive injury was a cumulative trauma from November 2, 2003 to November 2, 2004. With respect to the September 10, 2004 injury, applicant was brutally assaulted by a patient high on methamphetamine. She was unable to return to work after the September 10, 2004 injury.

Applicant also underwent multiple cervical surgeries, and during one of the surgeries she suffered from a lack of oxygen resulted in her having a stroke. The cervical surgery and the adverse consequences related primarily to the September 10, 2004 specific injury.

During the course of litigation, applicant was evaluated by five AMEs in different specialties. All three injuries were consolidated for trial. The primary reporting AMEs were in the fields of orthopedics, neurology, and psychiatry. In addition to the reports from the AMEs, the AMEs were also deposed. The AMEs were in agreement applicant was permanently totally disabled from her injuries. Applicant argued that she was entitled to an unapportioned award of 100% permanent total disability "in accordance with the fact" under Labor Code §4662 and apportionment was therefore inapplicable." This was based solely on the specific injury of September 10, 2004.

Following trial, the WCJ in applying *Benson* issued three separate Findings and Awards. Applicant's permanent disability was apportioned 90% to the September 10, 2004 specific injury, 23% to the cumulative trauma injury, and 6% to the May 11, 2004 specific injury. Predictably, applicant filed a Petition for Reconsideration.

Applicant's primary arguments on reconsideration were that the judge should not have apportioned permanent disability between the three separate and successive injuries, but should have either combined the permanent disability and not applied *Benson* and, moreover, the applicant was 100% permanently totally disabled based exclusively on the September 10, 2004, injury. Applicant argued it was the specific injury of September 10, 2004 that caused applicant to be unable to compete in the open labor market.

**Expert Vocational Evidence was Required to Rebut the 2005 PDRS:** The WCJ recommended and the Board also acknowledged the record did not support a finding of 100%

permanent total disability attributable to the September 10, 2004, injury due to the fact applicant failed to produce sufficient evidence to rebut the scheduled rating. A number of cases were cited indicating that “an injured worker must present vocational expert evidence, in addition to medical evidence, proving that his or her diminished future earning capacity is greater than that reflected in the schedule.” Both the WCJ and the Board quoted from the *Blackledge* case as follows:

...Applicant has not introduced evidence of medical reports detailing industrially caused work restrictions showing an inability to perform job duties, coupled with the opinion of a vocational rehabilitation expert on how the applicant’s restrictions preclude competition in the open labor market. It is improper for a doctor to deem an applicant 100% permanently disabled based on the doctor’s opinion that the applicant is unable to compete on the open labor market. The role of the medical evaluator in a workers’ compensation case is to provide an assessment of work restrictions and resulting permanent impairment. (*Blackledge v. Bank of America (2010 En Banc) 75 Cal.Comp. Cases 613.*)

**Apportionment:** The WCAB and the Court of Appeal pointed out that although the three primary AMEs in their respective specialties indicated the applicant was permanently totally disabled, they all found apportionment to some degree related to nonindustrial factors as well as apportionment to the other successive and separate industrial injuries. Interestingly, applicant’s need for spinal surgery arose from multiple combined factors, including preexisting non-industrial degenerative disc disease, which included stenosis. The orthopedic AME apportioned 60% of applicant’s spine PD to the specific injury, 20% to the cumulative trauma, and 20% to nonindustrial, preexisting factors.

The AME in psychiatry when deposed, indicated he did not believe applicant could manage the responsibility associated with gainful employment, but also indicated there was a basis for nonindustrial apportionment based on applicant’s preexisting nonindustrial factors, including preexisting kidney disease, loss of a son and stepson, failed marriage, and several failed relationships which all made the applicant more vulnerable to psychiatric impairment. The application of these nonindustrial factors resulted in 20% of applicant’s psychiatric disability to be nonindustrial pursuant to Labor Code §4663. The WCAB and Court of Appeal also indicated that apportionment is applicable to a preexisting condition even when the condition was previously asymptomatic and is only “lit up” by the current industrial injury or injuries.

**The Labor Code §4662 Permanent Disability “In Accordance with the Fact”:** The WCAB and the Court of Appeal opined that even where an applicant is 100% permanently totally disabled in accordance with the facts, apportionment is still applicable, including *Benson* as manifested in apportionment among separate and successive injuries or under Labor Code §4663 to nonindustrial factors.

**Laster v. City and County of San Francisco 2014 Cal.Wrk.Comp. P.D. LEXIS 201 (WCAB panel decision)**

**Issue:** Whether applicant's award of 100% permanent total disability should have been subject to apportionment between multiple/separate injury dates and whether there was a valid legal basis to apply apportionment to preexisting factors under Labor Code §4663 or a prior award under Labor Code §4664(b).

**Procedural & Factual Overview:** Applicant alleged a specific injury of April 23, 1999, related to his knees, back, and psyche. He also filed a separate and distinct cumulative trauma injury related to those same body parts and conditions for a period ending April 23, 1999. Following trial, the WCJ on the specific injury of April 23, 1999, found applicant to be 100% permanently totally disabled. With respect to the cumulative trauma injury, the WCJ found 20% permanent partial disability after apportionment. Defendant filed a Petition for Reconsideration.

In addition to the April 23, 1999, specific injury and cumulative trauma injury, applicant also had a history of prior industrial injuries. He had a specific injury to his left wrist and arm on June 21, 1999, resulting in a stipulated award of 17.1% on March 9, 1995. On July 16, 1994, he suffered injury to his back, neck, right arm, elbow, and hand, which resulted in a stipulated award of 20% (22% total). That award issued on July 1, 1996.

In the instant case, both the April 23, 1999, specific injury to the knees, back, and psyche as well as the cumulative trauma injury were admitted. Applicant had a number of surgeries to his right knee, and one of the surgeries consisted of a total knee replacement.

Medical reporting consisted of AMEs in orthopedics and psychiatry. The orthopedic AME found the applicant medically unable to return to any type of work. He characterized the applicant as medically permanently disabled. Rating was under the 1997 PDRS. Evidence introduced at trial reflected the applicant used either, or both a walker and a motorized scooter.

A review of the AME's reports in orthopedics indicate the AME experienced some confusion in correctly applying Labor Code §4663 apportionment, in terms of parceling out the industrial and nonindustrial contributing factors to the applicant's orthopedic disability related to various body parts and conditions. Instead he applied what was characterized as a "*Benson*" analysis, which in fact is a subset of Labor Code §4663 related to apportionment of disability between separate successive distinct injuries.

The AME in orthopedics then backtracked from *Benson*, finally indicating there would be no greater than 10% nonindustrial apportionment related to the specific injury of April 23, 1999. He then indicated the applicant's dysfunctional knees and his low back status were intertwined and, therefore, there would be no basis for apportionment between separate successive injuries.

With respect to the psychiatric injury, the AME in psychiatry in discussing apportionment under Labor Code §4663, identified a number of nonindustrial factors, including applicant having an

eighth grade education, a history of dyslexia, very limited job experience, a prior history of alcohol abuse, and a history of posttraumatic stress disorder. However, the AME in psychiatry went on to indicate that after the specific injury of April 23, 1999, applicant had a number of failed surgeries and developed chronic pain with medication complications, which the AME characterized as overshadowing all of the prior industrial and nonindustrial causes. Rather than identify and parcel out all of the contributing industrial and nonindustrial factors of the applicant's psychiatric disability, the AME concluded applicant's permanent psychiatric disability was 100% caused by the specific April 4, 1999, injury and its consequences.

The WCAB in adopting and incorporating all but one part of the WCJ's Report on Reconsideration noted that defendant failed to prove valid legal apportionment with respect to the cumulative trauma injury, especially with respect to psychiatric disability. The WCAB pointed out the psychiatric AME indicated it was the specific April 1999, injury that caused psychiatric total permanent disability, with no basis for apportionment to nonindustrial causative factors. However, the WCAB did not adopt the finding of the WCJ that the psychiatric disability should be apportioned 90% to the specific injury and 10% to the cumulative trauma injury as the AME in orthopedics attempted to do. It was error for the WCJ to apply the orthopedic AME's apportionment between the specific and cumulative trauma injuries since the conclusions and reasoning of the orthopedic AME were not related to psychiatric permanent disability, which was outside of the orthopedic AME's field of expertise.

**Overlap:** With respect to defendant's contention there should be apportionment under Labor Code §4664(b), the mere fact that defendant proved there were prior awards, does not satisfy their burden on apportionment under Labor Code §4664. Defendants failed to prove up overlap.

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

In this case, defendant could not prove the March 9, 1995, stipulated award related to the applicant's left wrist and arm for a June 21, 1990 injury, overlapped the admitted injury of 1999 to the applicant's knees, back, and psyche. By the same reasoning, defendant failed to present substantial evidence showing that any part of the applicant's injury in 1994 to his back, neck, right arm, elbow, and hand overlapped with the permanent disability caused by the specific or cumulative trauma injury in the new cases. Moreover, since the injury to the psyche in and of itself caused total permanent disability, there was no prior award for injury to the psyche that would support apportionment pursuant to §4664.

**McGready v. WCAB 2014 Cal.Wrk.Comp. LEXIS 109 (writ denied)**

**Issue:** Whether a reporting physician and a WCJ in a case involving six successive separate injuries is required to assess disability for each separate and successive specific injury and also to give separate awards for each of six injuries in the absence of a medical opinion that adequately explains why the physician would be unable to segregate and separate the permanent disability attributable to each separate injury.

**Procedural & Factual Overview:** The applicant employed as a Firefighter, filed six separate and successive injuries related to his back and heart.

There were AMEs in the fields of orthopedics and cardiology. Notwithstanding the fact there were six separate injuries, the WCJ awarded permanent disability for both the back and the heart conditions related only to two of the six injuries based on the opinion from the two AMEs in the case.

The AME in orthopedics rendered an opinion on permanent disability and apportionment for the back. However, he failed to give separate opinions on each of the six cases on the cause of permanent disability any related apportionment.

More importantly, the AME in orthopedics failed to discuss, analyze, or explain under *Benson* why he was unable to apportion the orthopedic back disability between the six separate successive injuries and whether his inability to do so was based on the fact the disability was “inextricably intertwined”.

**Wausau Underwriters Insurance Company v. WCAB (Sanchez) 2014 Cal. Wrk.Comp. LEXIS 40 (writ denied)**

**Issue:** Whether the permanent disability from three separate injuries should be the basis of three separate awards or combined under the “inextricably intertwined” exception to the *Benson* case.

**Holding:** Applicant filed claims related to two separate specific injuries and one cumulative trauma injury involving dates of injury before 2005. Based on an AME’s opinion, which was consistent with the opinions of two of applicant’s treating physicians, both the WCJ and the WCAB found applicant was entitled to a combined 91% permanent disability award without apportionment for all three injuries, as opposed to separate awards based on the *Benson* exception that the permanent disability from all three injuries was “inextricably intertwined.”

**Comment:** Based on the large number of cases at the trial level and from the Board on whether permanent disability related to separate and successive dates of injury should be combined or separated, it appears the trend is that the exception to *Benson*, i.e. “inextricably intertwined” has undermined and in some cases eviscerated the *Benson* requirement that permanent disability be

separated or segregated between separate dates of injury. (See also, *Zuniga v. City of Los Angeles* (2014) 42 CWCR 277 (WCAB panel decision) WCAB on reconsideration reversed WCJ and found combined award of 75% disability based on “inextricably intertwined” rationale. WCJ had issued separate awards for a specific injury of 64% and a cumulative trauma injury of 74%. Both reporting physicians in the case failed to apportion disability between the two separate injuries, which may explain the WCAB’s decision.)

**City of Cathedral City v. WCAB (Fields) (2013) 78 Cal.Comp.Cases 696; 2013 Cal.Wrk.Comp. LEXIS 84 (writ denied)**

**Issue:** Whether applicant was entitled to a combined award of 74% permanent partial disability as a result of separate and successive specific and cumulative injuries or whether the permanent disability should have been apportioned between the two separate and successive injuries under *Benson*.

**Holding:** When there is substantial evidence to support a conclusion that disability caused by two separate and successive injuries is so inextricably intertwined they could not be rated or apportioned separately, applicant is entitled to a combined award and neither the WCJ nor the WCAB are required to appoint another physician in such a situation to make a separate apportionment determination.

**Factual & Procedural Overview:** Applicant, a police officer, suffered two separate successive injuries consisting of a specific injury of March 18, 2009, and a cumulative trauma injury also ending on March 18, 2009. The reporting physicians were AMEs in internal medicine and orthopedics.

The orthopedic AME indicated that 90% of the applicant’s orthopedic disability should be apportioned to the specific injury and 10% to the cumulative trauma injury under *Benson*. However, the AME in internal medicine, while apportioning applicant’s GERD condition to 50% nonindustrial factors consisting of intermittent cigarette use, personal dietary habits, and caffeine use and the other 50% to industrial factors, indicated he could not apportion any resultant permanent disability between the specific and cumulative trauma injuries since they were in his opinion “inextricably intertwined.”

Predictably, the AME was deposed, and he again articulated that he believed the permanent disability resulting from the two injuries was inextricably intertwined and could not be apportioned between the specific and cumulative trauma injuries. Defense counsel during the course of the deposition pressed him and advised or informed the AME that Labor Code §4663 would require that he “put a number on it” in terms of apportioning by an approximate percentage number between the specific and the cumulative trauma injury. The AME articulated he did not agree with it, but if that is what the law required, he would follow the same apportionment formula as the AME in orthopedics did, i.e., 90% permanent disability to the specific injury and 10% to the cumulative trauma injury.

Following trial, the WCJ issued separate awards consisting of 65% permanent disability to the cumulative trauma injury and 23% to the admitted specific injury. The WCJ also concluded the medical evidence did not support a single joint unapportioned award of permanent partial disability.

Applicant filed a Petition for Reconsideration, which was granted by the WCAB. The WCAB reversed the WCJ ruling applicant was entitled to a single combined award of permanent disability based on the reports and deposition testimony of the AME in internal medicine. The WCAB indicated the WCJ should not have relied on the revised deposition opinion of the AME in internal medicine that was based on an incorrect characterization by the defense attorney of the apportionment requirements set forth in Labor Code §4663 and *Benson*. The WCAB stated as follows:

The WCAB concluded that, because Dr. Hyman initially found that Applicant's injuries could not be separately rated and his subsequent apportionment determination was based on the incorrect assumption that he was required to "provide a number," the record did not support the WCJ's apportionment findings. Persuaded by Dr. Hyman's medical reporting that the effects of Applicant's injury could not be separately rated, the WCAB amended the WCJ's decision to reflect a single, combined PD award of 74 percent.

The defendant then filed a Petition for Reconsideration of the WCAB's reversal of the WCJ's decision. The WCAB granted reconsideration, but only to correct a technical error, but otherwise affirmed its prior decision that a combined award was warranted in this case. Defendant then filed a Petition for Writ of Review, which was denied by the Court of Appeal. Moreover, both the WCAB and the Court of Appeal indicated the fact a reporting physician indicates that he cannot apportion permanent disability between separate and successive injuries based on the exception they are inextricably intertwined does not necessitate the appointment of a "regular physician" under Labor Code §5701 to make a separate apportionment determination.

**Comments/Analysis:** This is another case indicating that the "inextricably intertwined" exception to the *Benson* decision still is an area of intense litigation by both sides. The author notes that the "inextricably intertwined" rationale is an exception to the *Benson* decision requiring separate Awards and should only be applied as indicated by the WCAB and the Court of Appeal in "limited circumstances." Unfortunately, in some cases the exception seems to have swallowed up the rule that separate Awards should be the norm in most cases.

**Hull's Walnut Creek Chapel v. WCAB (Maghuyop) 2013 Cal.Wrk. Comp. P.D. LEXIS 110 (writ denied)**

**Case Summary:** The parties stipulated that applicant, a mortician, suffered a specific back injury on December 16, 1999, and also a cumulative trauma injury ending in April of 2000, involving his neck, psyche, bladder incontinence and erectile dysfunction. Medical reporting was by AMEs in psychiatry and orthopedics.

Following the first Trial, the WCJ found applicant's injuries caused permanent and total spinal disability, before apportionment, based on the orthopedic AME's opinions. However, all other issues including apportionment were deferred. Defendant filed a Petition for Reconsideration of the WCJ's first decision, which was denied.

At the second Trial, additional evidence was submitted related to the issues of the nature and extent of applicant's injuries, permanent disability, and apportionment. The WCJ issued a second Findings & Award finding applicant suffered a cumulative trauma injury including organic brain disorder, irritable bowel syndrome, stool incontinence, dysphagia and chronic pain. In determining disability, the WCJ applied the 1997 Permanent Disability Rating Schedule. The WCJ found the combination of applicant's disability to different body parts in the cumulative trauma injury caused 100% permanent total disability, after apportionment, to applicant's specific back injury and to non-industrial causes. In essence, the WCJ found applicant's cumulative trauma was the sole industrial cause of applicant's psychiatric disability based on the opinion of the AME in psychiatry. The AME in psychiatry opined that applicant was 100% permanently totally disabled from a psychiatric stand point even without consideration of his orthopedic injuries. Moreover, the AME in psychiatry concluded disability could not be apportioned between applicant's specific and cumulative trauma injuries resulting in a Combined Award.

In determining that he could not apportion between applicant's specific and cumulative trauma injuries, the AME questioned whether the Combined Values Chart (CVC) should be used or whether applicant's multisystemic problems were synergistic. He stated:

“At issue here is whether or not the combined values chart is to be used or whether the patient's multisystemic problems are synergistic. To cut through this quite quickly, it is my opinion from the above, that in deferring to Dr. Conrad's opinion that he is 100% disabled on orthopedic grounds alone, absent this, the synergistic impact caused by the associated, well-documented psychiatric problems would certainly have otherwise added up to 100% anyway, in my opinion.

In conclusion, [Applicant's] total level of psychiatric disability indeed is inextricably intertwined with the four dates of injury established by Dr. Conrad. It would be impossible to separate these out from a psychiatric standpoint in terms of residual disability.”

Predictably, defendant filed a Petition of Reconsideration contending the opinion of the AME in psychiatry did not constitute substantial medical evidence and the WCJ erred in finding applicant's cumulative trauma injury caused permanent total disability since the AME in psychiatry mistakenly and erroneously believed and opined that applicant had suffered four injuries instead of two injuries.

The WCJ, in his Report on Reconsideration, indicated that since the AME in psychiatry attributed all of applicant's psychiatric injury to his cumulative trauma, it was immaterial as to whether or not he believed applicant sustained four orthopedic injuries or two injuries. The WCJ also discounted any psychiatric apportionment since the AME was unable to parcel out any of the disability to the applicant's prior December 16, 1999, specific back injury. Since he could not apportion any of the applicant's permanent disability to the earlier specific injury, the WCJ recommended to the WCAB that applicant should receive a Combined Award, since disability between the specific injury and the cumulative trauma injuries were inextricably intertwined and that even combining applicant's disabilities using the MDT produced a permanent disability rating of 100%.

The more provocative issue in the case is whether or not the Multiple Disabilities Table contained in the 1997 PDRS is only a guide or is mandatory. There was a cite to the *Mihesuah v. WCAB* (1976) 55 Cal. App. 3d 720, 127 Cal. Rptr. 688, 41 Cal. Comp. Cases 81 for authority that the Multiple Disabilities Table contained in the 1997 PDRS is only a guide and does not require strict adherence. In response, the WCJ noted the AMEs had both opined applicant was unemployable and that applying the *Mihesuah* court's opinion the "entire picture of disability and possibility of employability" must be examined in terms of the synergistic effect of both of applicant's injuries.

The WCAB denied defendant's Petition for Reconsideration and adopted and incorporated the WCJ's report without further comment. Defendant filed a Petition for Writ of Review, which was denied by the Court of Appeal. Moreover, the Court of Appeal found no reasonable basis for the Petition and remanded the matter for a determination of reasonable appellate court costs to be paid by defendant.

## FAILURE OF PROOF/DEVELOPMENT OF THE RECORD

### Porter v. Mondelez International 2015 Cal.Wrk.Comp. P.D. LEXIS 503 (WCAB panel decision)

**Issue:** Whether an evaluating physician's failure to explain how and why applicant's obesity was a contributing cause of her current PD is a basis to further develop the record.

**Holding:** Development of the record on apportionment is warranted when an evaluating physician fails to explain how and why he apportioned 50% to non-industrial factors, including obesity.

**Factual Overview:** Applicant suffered a CT injury ending in January 2014, to both knees. The WCJ awarded 54% PD without apportionment even though there were diagnostic studies indicating the applicant had severe degenerative osteoarthritis in both knees with bone on bone findings confirmed by diagnostic studies. The PQME opined that these findings combined with applicant's obesity supported 50% non-industrial apportionment. Defendant filed for reconsideration which was granted. The Board in a split panel decision rescinded the WCJ's decision and remanded for further development of the record. The Board stated that ".....[W]e are not persuaded that Dr. Pattison's opinion is substantial evidence because he did not provide any reasoning whatsoever for his finding of 50% apportionment, as opposed to any other percentage. The Appeals Board has discretionary authority to develop the record when the medical record is not substantial evidence or when appropriate to provide due process or fully adjudicate the issues." (citations).

**Comment:** Given the magnitude of the applicant's severe osteoarthritis in both knees with bone on bone findings, there is no doubt there was a basis for non-industrial apportionment of the applicant's bilateral knee disability. However, due to the inability of the evaluating PQME to explain "how and why" this along with the applicant's obesity were contributing factors of the applicant's permanent disability, defendant could not meet their burden of proof. The more provocative issue as articulated by Commissioner Sweeney in dissent, is whether the Board should develop the record to rescue the defendant from their failure of proof in this case.

**Caires v. Sharp Healthcare 2014 Cal.Wrk.Comp. P.D. LEXIS 145 (WCAB panel decision)**

**Issue:** Whether development of the record is warranted when all of the reporting physicians in a case fail to demonstrate a basic understanding of the core concepts and principles related to Labor Code §4663 apportionment, thereby preventing a defendant from meeting its burden of proof.

**Holding:** When it is clear from the record that multiple reporting physicians' opinions on apportionment do not constitute substantial medical evidence, there is a good cause for the WCAB to remand the case for further development of the record since it would be impossible for a defendant to meet their required burden of proof under Labor Code §4663.

**Procedural & Factual Overview:** Applicant, a registered nurse, suffered a specific injury on August 7, 2006. Following trial the WCJ found applicant sustained injury to her left hip, left elbow, low back, and psyche. The WCJ found applicant suffered 9% permanent partial disability after apportionment. Without apportionment the applicant would have been entitled to an unapportioned award of 45%.

Applicant filed a Petition for Reconsideration contending the PQME in orthopedics and the AME in psychiatry's opinions did not constitute substantial medical evidence on the issue of apportionment.

The reporting physicians in this case included a primary treating physician in orthopedics, a PQME in orthopedics, and an AME in psychiatry.

The WCAB granted applicant's Petition for Reconsideration and rescinded the WCJ's Findings and Award of 9% permanent disability and remanded the matter to the trial level for further proceedings, including possible development of the record under Labor Code §5701.

**The PQME in Orthopedic Surgery:** Based primarily on the injury to the applicant's lumbar spine the PQME in orthopedics determined applicant had 24% whole person impairment. As to apportionment, he noted applicant had an underlying degenerative condition, specifically, degenerative scoliosis as well as spondylolisthesis. With respect to his 24% WPI determination the orthopedic PQME determined that 87.5% of the 24% WPI was attributable to nonindustrial factors and only 12.5%, i.e. 3% of the 24% related to the industrial specific injury of August 7, 2006.

The primary flaw was not in the orthopedic PQME's determination of overall WPI at 24%, but rather his analysis as to applicable industrial and nonindustrial apportionment. He explained his apportionment determination 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 in 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 Reporting of the Primary Treating Physician in Orthopedics:** Applicant's primary treating physician and orthopedist opined that the applicant suffered 26% whole person impairment related to the lumbar spine as opposed to 24% by the SPQME. However, the PTP's apportionment determination was much different than the PQME's. The PTP indicated that 25% of applicant's permanent disability related to the lumbar spine was related to nonindustrial factors, including underlying spondylolisthesis and lateral listhesis and scoliosis. He concluded that 75% of the patient's current disability was related to the specific injury of August 7, 2006, and 25% to the underlying degenerative conditions. However, it appears the reason the PTP did not find greater nonindustrial apportionment was attributable to his misunderstanding of the key principles and concepts related to apportionment under Labor Code §4663. The PTP's rationale for not apportioning greater than 25% was that applicant had no evidence of any prior need for treatment or disability prior to the injury, and the underlying condition in and of itself would not be considered disabling.

**The Psychiatric AME:** The AME in psychiatry concluded the applicant's psychiatric condition caused 9% whole person impairment, and then without detailed discussion simply followed the apportionment formula used by applicant's primary treating physician in orthopedics, which was 75% industrial and 25% nonindustrial. Her reasoning simply was that the psychiatric injury was a compensable consequence of the orthopedic injury and so, therefore, she was following the apportionment formula of applicant's primary treating physician orthopedist.

However, the AME in psychiatry did indicate the applicant had a number of potential nonindustrial psychiatric factors, including pre-existing characterological dynamics and nonindustrial factors that merited some degree of apportionment. However, during her deposition, the psychiatric AME clarified that she did not apportion any disability to nonindustrial psychological conditions.

The parties stipulated that if the WCJ followed the opinions of the SPQME and the psychiatric AME after apportionment, PD would be 9%. However, if the WCJ relied on applicant's primary treating physician orthopedist and the AME in psychiatry, the applicant's permanent disability after apportionment would be 44%.

**The WCAB's Opinion and Analysis on Reconsideration:** The Board began their analysis with a comprehensive overview reviewing the key apportionment cases of *Gatten*, *Brodie*, and *Escobedo*. Moreover, they threw a little bit of the *Blackledge* case in for "seasoning." The Board noted the lack of prior disability or evidence of modified work performance is no longer a

prerequisite to valid legal apportionment. If so there would have been no purpose in changing the law in terms of enacting Labor Code §4663 and Labor Code §4664. “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.”

More importantly the WCAB emphasized that it is the WCJ’s responsibility to determine whether there is substantial medical evidence as to what percentage of an applicant’s permanent disability is directly caused by the industrial injury and what percentage of disability is caused by other factors. In order for a medical report to constitute substantial medical evidence on apportionment there is the requirement that:

“[T]he 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, so that the Board can determine whether the physician is properly apportioning under correct legal principles. [Citations.]

“Thus, to be substantial evidence on the issue of the approximate percentages of permanent disability due to the direct results of the injury and the approximate percentage of permanent disability due to other factors, a medical opinion must be framed in terms of reasonable medical probability, it must not be speculative, it must be based on pertinent [\*14] facts and on an adequate examination and history, and it must set forth reasoning in support of its conclusions.” (70 Cal.Comp.Cases at p.621)

The Board then applied these principles and in case law to indicate that the reporting PQME in this case failed to understand the correct legal standards and principles under Labor Code §4663 and related case law and instead simply used the AMA Guides to determine apportionment of the applicant’s spinal disability. The Board conceded that the AMA Guides are to be used to determine whole person impairment, i.e., “within the four corners” of the AMA Guides. However, the AMA Guides are not controlling with respect to apportionment. In dealing with and determining whether there is valid legal apportionment or not, a reporting physician must render an opinion that is in accordance with Labor Code §4663 and Labor Code §4664 which define apportionment without reference to the AMA Guides. As the WCAB pointed out in Footnote 3, “The Guides acknowledge that “most states” have their own customized methods for calculating apportionment.” (AMA Guides § 1.6b, p.12)

Even if the AMA Guides were controlling on the issue of apportionment which they are not, the Board noted the SPQME’s example on how he determined apportionment in this case did not fit the facts of the case.

The Board then went on to analyze the primary treating physician’s apportionment analysis and pointed out the flaw in the PTP’s apportionment analysis was the physician did not explain why

he would apportion 25% of the applicant's permanent disability to nonindustrial factors. The WCAB also noted the PTP applied the wrong legal principles and standards in requiring as a basis for legal apportionment the applicant had no prior need for medical treatment or disability before the specific injury and the underlying degenerative conditions were not labor disabling before the current industrial specific injury. All these are inapplicable in analyzing and applying apportionment under Labor Code §4663. "As discussed above, under the new apportionment regime, prior disability and need for medical treatment are only relevant insofar as they illuminate the present causes of an applicant's permanent disability." As a consequence the PTP's opinions on apportionment did not constitute substantial medical evidence.

With respect to the psychiatric AME's opinion on apportionment, the Board noted that while it is intuitively appealing to apportion psychiatric permanent disability in a compensable consequence orthopedic injury along the same lines as the reporting orthopedist did it is not analytically correct. Each reporting physician, including psychiatrists, must consider and apply any nonindustrial contributing factors of permanent disability in their specialty fields without necessarily referencing apportionment determinations in other specialty fields. The Board stated:

While it may be intuitively appealing to apportion permanent disability pertaining to different body parts in identical fashion, a medical evaluator in a particular field is tasked with parceling out industrial and non-industrial causation of permanent disability for the body parts or body systems that are within his or her area of expertise. Thus, the medical-legal evaluator should provide an analysis of industrial and non-industrial causes of permanent disability for that particular body part or system. This does not necessarily rule out psychiatric apportionment in the same percentage as orthopedic apportionment, but it must be explained and justified.

The Board concluded that since there was an absence of substantial medical evidence from all of the reporting physicians it had no choice but to remand the case for further development of the medical record. The Board strongly suggested to the WCJ on remand that due to the manifest lack of familiarity with the correct legal principles and concepts of apportionment by all the reporting physicians the parties may wish to consider AMEs especially in orthopedics. If they could not agree on an AME or AMEs, then appointment of a "regular physician" under Labor Code §5701 would be warranted.

**Comment:** This is a very important case even though it is a panel decision. The applicant gained something on reconsideration as well as the defendant. By successfully prevailing on reconsideration applicant was able to undermine if not eviscerate the determination there was only 9% permanent partial disability after apportionment, rather than the 44% or 45% that was potentially applicant's permanent disability without valid legal apportionment. Clearly the applicant had significant underlying preexisting degenerative conditions that any competent physician familiar with the basic core concepts and principles of apportionment would have apportioned to. What defendant gained in this case was a basically a second bite of the apple in proving up apportionment. The WCAB could have ruled that defendant failed to meet its burden

of proof on apportionment and awarded the applicant 45% permanent disability without remanding the case for further development of the record. The critical issue in this case is the question of how a defendant who has the burden of proving up apportionment under Labor Code §4663, can meet their burden when none of the reporting physicians or two out of three reporting physicians appeared to be totally unfamiliar with the key core standards and principles of apportionment under Labor Code §4663. From a due process standpoint it would seem defendant is entitled to have a reporting physician be familiar with the core principles and concepts of applying apportionment correctly under Labor Code §4663.

**Consolidated Disposal Service, ACE USA v. WCAB (Cazares) 2014 Cal. Wrk.Comp. LEXIS 43 (writ denied)**

**Issue:** Where the record is defective or incomplete on apportionment and other related issues, both the WCJ and the WCAB have the power and authority to develop the record.

**Facts:** This case involves two trials. Applicant sustained two pre-2005 dates of injury. There was a specific injury of March 7, 2003, and a cumulative trauma injury from November 2003 through February 2004. Following the first trial the WCJ found that applicant sustained injury AOE/COE to his lumbar spine, psyche, sexual dysfunction, and sleep disorder, but not to his right hip and left lower extremity. Also, various periods of TTD were found. As part of the Findings and Award the judge ordered the parties to develop the record on issues of permanent disability, apportionment, as well as aspects of the psychiatric injury and periods of TTD. Defendant filed a Petition for Reconsideration.

In the WCJ's Report on Reconsideration it was stressed that applicant's physician failed to provide Benson apportionment and another reporting physician had not provided the Eight Work Function Impairments to determine the extent of permanent disability for a pre-2005 psychiatric injury. On reconsideration, the primary issue raised by defendant was that applicant was being given a second bite of the apple to develop the record and was being "bailed out" on issues of causation and permanent disability.

The WCAB granted reconsideration and returned the matter back to the WCJ for development of the record and a new decision. Specifically, the Board indicated the parties should try to reach an agreement on an AME, or in the alternative, if they could not reach an agreement, the WCJ should appoint a "regular physician" under Labor Code §5701. On remand, the parties could not agree on an AME and the WCJ appointed a "regular physician" in psychiatry.

Following a second trial the WCJ found with respect to the specific injury, 76% permanent disability after apportionment. There was 50% non-industrial apportionment with respect to the applicant's lumbar spine disability. With respect to the cumulative trauma, applicant was awarded 35% permanent disability after apportionment.

Defendant again filed a Petition for Reconsideration claiming, once again, that the WCJ had engaged in an abuse of discretion by appointing a regular physician and developing the record and applicant was being given a second bite of the apple by being bailed out with respect to their

burden of proof. Interestingly, as part of their argument on Recommendation, defendant quoted Commissioner Sweeney in a talk she gave at the 2013 Applicant Attorneys Association Convention, indicating that workers' compensation judges should not use their power to perfect or develop the record to help out an unprepared applicant attorney.

The WCAB denied reconsideration and adopted and incorporated the WCJ's Report on Reconsideration. The WCAB pointed out defendant's apparent misunderstanding of its prior decision on remand, and was attempting to re-litigate the issues that were resolved by that decision. Defense counsel was also admonished for "inappropriate reliance" on an Appeals Board's Commissioner's comments at an educational conference as a substitute for legal authority.

**Comment:** In reality, the defendant dodged a bullet in this case since there was Benson apportionment between the specific and cumulative trauma injuries. If there had been a ruling applying the Benson exception that both injuries were inextricably intertwined, then there may have been an award of 100% permanent total disability. However, in this case even though the PD on the specific injury exceeded a life pension, i.e. 76%, the cumulative trauma injury had 35% permanent disability, and with this finding the total value of the case was much lower than a potential 100% total permanent disability finding if there had been a combined award.

**Peters v. Panera Bread 2013 Cal.Wrk.Comp. P.D. LEXIS 573  
(WCAB panel decision)**

**Issue:** Whether there is good cause to develop the record when the reporting AME fails to render an opinion on apportionment that constitutes substantial medical evidence resulting in both applicant and defendant being unable to meet their respective burdens.

**Procedural & Factual Overview:** Applicant, a catering manager, sustained an admitted injury to her cervical spine, lumbar spine, and right knee. Following trial, the WCJ issued a Findings and Award of 45% permanent disability without apportionment to nonindustrial factors, pursuant to Labor Code §4663.

The reporting AME opined and concluded that 80% of the applicant's cervical and lumbar spine disability was attributed to nonindustrial factors and only 20% to industrial related factors. The WCJ in issuing her award of 45% permanent disability without apportionment, basically concluded the AME's report and opinion on apportionment did not constitute substantial medical evidence.

Defendant filed a Petition for Reconsideration, arguing the WCJ should have followed the AME's opinion on apportionment, or, in the alternative, should have further developed the record pertaining to both permanent disability and apportionment. The WCAB granted reconsideration and amended the Findings and Award and remanded the matter back for development of the record in the form of a suggested agreement by the parties on another AME,

or if they could not agree on an AME, the WCJ appointing a “regular physician” under Labor Code §5701.

**Discussion:** This is an interesting case, in that it appears both applicant’s counsel and defense counsel agreed that the AME’s report did not constitute substantial medical evidence on the issue of apportionment. As early as the Mandatory Settlement Conference, applicant raised the issue, and requested the WCJ refer the case out to an “IME.” The Minutes of Hearing related to the trial also indicate applicant’s counsel raised the issue that the AME’s report did not constitute substantial medical evidence under *Escobedo*, and requesting for a second time the case be referred out to an IME.

However, when the WCJ issued his Findings and Award, he found the AME’s apportionment determination did not constitute substantial medical evidence and simply issued an unapportioned award without any discussion in the Findings and Award as to why there was no good cause to further develop the record.

The WCAB on reconsideration discussed the dual burden under Labor Code §4663.

“Under §4663, the applicant has the burden of establishing a percentage of permanent disability directly caused by the industrial injury, and the defendant has the burden of establishing the percentage of disability caused by other factors.” (*Escobedo v. Marshalls* (2005) 70 Cal. Comp.Cases 604, 607 [Appeals Board en banc].)

Since the AME’s opinion on apportionment did not constitute substantial medical evidence neither party was able to meet his burden, and as indicated by the WCAB, further development of the record was appropriate.

In discussing the WCJ’s and WCAB’s duty to develop the record the Board stated:

The WCJ and the Appeals Board have a duty to further develop the record in circumstances such as this one when there is a complete absence of (*Tyler v. Workers’ Comp. Appeals Bd. (1997) 56 Cal App. 4<sup>th</sup> 389, 393-395 [162 Cal.Comp. Cases 924]*) or even insufficient (*McClune v. Workers’ Comp. Appeals Bd. (1998) 62 Cal. App. 4<sup>th</sup> 1117, 1121-1122 [63 Cal.Comp.Cases 2611]*) medical [\*6] evidence on an issue. The WCAB has a constitutional mandate to ensure “substantial justice in all cases.” (*[Kuykendall v. Workers’ Comp. Appeals Bd. (2000) 79 Cal. App. 4<sup>th</sup> 396, 403, [65 Cal.Comp.Cases 264].*) Since, in accordance with that mandate, “it is well established that the WCJ or the Board may not leave undeveloped matters” within its acquired specialized knowledge (*id.* at p. 404), pursuant to *Labor Code section 5906*, we will return this matter to the trial level for development of the record and decision by the WCJ on the issue of permanent disability and apportionment.

Although in *McDuffie v. Los Angeles County Metropolitan Transit Authority*

(2003) 67 Cal. Comp. Cases 138 (Appeals Board en banc) we stated that generally, the preferred method to follow when the record is in need of further development is to seek supplemental reporting from physicians that have already reported in the case, Labor code section 5701 allows “[t]he appeals board [to] direct any employee claiming compensation to be examined by a regular physician. We do not believe that further evaluation by or opinions from Dr. Silverman will be useful.

Clearly, the WCAB had no confidence that the AME had an adequate working familiarity with the fundamental concepts and principles related to apportionment in order to render a medical opinion that constituted substantial medical evidence. Therefore, they strongly recommended that on remand, the WCJ elicit from the parties an agreement of whether they would select a new AME or if they could not, in the alternative the WCJ was to appoint a regular physician under Labor Code §5701 to develop the record.

**Comment:** This case and the *Caires* case underscore a critical dilemma in medical reporting on the issue of apportionment. That dilemma is manifested whether the reporting physician is an AME, treating physician, PQME, or QME. In essence, if a reporting physician, especially an AME who is supposedly chosen for his or her expertise as well as being neutral and objective, is not familiar with the fundamental critical key concepts and principles related to apportionment, how can either party meet their burden of proof as mandated by Code §4663. This is especially true for a defendant who has the ultimate burden of proof on apportionment to nonindustrial factors meeting their burden. If it is clear from the substance of a medical report that the reporting physician is not familiar with, or misunderstands critical key concepts and principles related to apportionment or is applying an incorrect legal standard, then both WCJ’s and the WCAB should exercise their discretion to ensure that substantial justice is being done in all cases by developing the record as was done in this case.

**Warner Bros. Studios Inc. v. WCAB (Crocker) 2013 Cal.Wrk.Comp.  
P.D. LEXIS 164 (writ denied)**

**Case Summary:** Applicant was employed as a motion picture laborer. During the course of his long employment with the studios, applicant suffered a number of injuries. He suffered a specific injury on October 23, 2002, which was a medical only claim, and after a short period of recovery returned to work with no restrictions. He then suffered another specific injury on January 19, 2007, and filed a workers’ compensation claim. An orthopedist declared the applicant MMI on May 21, 2007, with no permanent disability but a need for future medical care and treatment. Applicant also filed additional claims for an alleged injury on August 17, 2007, where he was temporarily totally disabled for approximately three months before returning to work. He also suffered another alleged injury on January 5, 2008. Finally, applicant filed a cumulative trauma claim for the period of January 1, 2007 through January 5, 2008 as well as another cumulative trauma claim with a beginning date of 2002 and an end date of January 5, 2008.

In terms of reporting physicians, applicant was evaluated by a number of doctors including several QMEs. However, the parties used an AME in orthopedics. Initially, the AME in orthopedics found that applicant was permanent and stationary as to the cumulative trauma and provided for future medical care and treatment including lumbar surgery. At the time of his initial finding, the AME indicated 95% orthopedic disability to the cumulative trauma injury and 5% non-industrial. Subsequent to the AME's initial opinion, applicant had a two level lumbar fusion surgery. The AME re-evaluated the applicant and found him Permanent and Stationary on September 1, 2010, and modified his initial apportionment determination. The AME in orthopedics determined that 5% of the applicant's orthopedic disability was attributable to non-industrial factors, 5% to the October 23, 2002 specific injury, 60% to a January 19, 2007 injury, and the remaining 30% to the cumulative trauma injury.

Following Trial, the WCJ found applicant sustained a cumulative trauma injury to various orthopedic body parts and also to his psyche, urological dysfunction, and contents of the bladder and bowel, impotence, sleep disorder, neurogenic bladder and peripheral neuropathy for the period of January 1, 2007 through January 7, 2008. Contrary to the AME's opinion with respect to apportionment, the WCJ found the cumulative trauma injury caused 100% permanent total disability and based on Labor Code §4664(b), 0% permanent disability existed for any specific injuries and defendant failed to demonstrate any apportionment attributable to the cumulative trauma injury. Defendant filed a Petition for Reconsideration essentially arguing that applicant had failed to prove he was permanently totally disabled under Ogilvie and also the WCJ should have found apportionment. In essence, defendant was arguing that applicant should only be deemed to have suffered 30% permanent disability, not 100% permanent disability.

The WCJ in his Report on Reconsideration, which the WCAB adopted and incorporated, noted the testimony of applicant's vocational expert was unrebutted in that applicant could not work in the open labor market and applicant had a totally diminished future earning capacity.

The vocational evidence was buttressed by the orthopedic and neurological AME's opinions that the applicant was not capable of working in the open labor market.

The WCJ noted defendant's analysis and argument pursuant to Labor Code §4664(b) was faulty since the only Award that pre-existed the cumulative trauma was for 0%. In essence, the WCJ found that under Labor Code §4664(b) you could not apportion to a prior 0% Award! Moreover, the WCJ noted a LeBoeuf analysis and application was one of the methods allowed in the Ogilvie case for an applicant to prove permanent total disability. He noted the operative effect of both Labor Code §4664(a) and 4664(b) did not prevent any LeBoeuf finding or determination and based on the facts in this particular case, the unrebutted testimony of applicant's vocational expert was that applicant could not compete in the open labor market and had a totally diminished future earning capacity.

**Gomez v. WCAB (San Juan Unified School District) (2013) 78 Cal.Comp. Cases 891: 2013 Cal.Wrk.Comp. LEXIS 124 (writ denied)**

**Issue:** Where a percentage or portion of non-industrial factors related to the applicant's psychiatric disability resolved by the time of the rating they could not be used to support a valid legal apportionment determination.

**Factual and Procedural Overview:** Prior to Trial the parties stipulated applicant was 100% permanently totally disabled and the only significant issue to be resolved was apportionment. The reporting physicians were an orthopedic SPQME and an AME in psychiatry. The orthopedic SPQME found 80% of the applicant's orthopedic disability was industrial and attributable to a January 24, 2005, specific injury and the other 20% non-industrial. After apportionment the orthopedic permanent disability was 19%.

With respect to the applicant's psychiatric disability, the AME's opinion on apportionment was that 10% of the applicant's psychiatric disability was attributable to non-industrial factors related to her husband's gambling and lack of a job.

However, the WCJ found the AME's opinion on apportionment related to applicant's psychiatric disability did not constitute substantial medical evidence because the non-industrial factors of the applicant's husband's gambling and lack of a job had resolved by the time of the rating. Therefore, the WCJ found no valid apportionment related to the applicant's psychiatric disability and only to her orthopedic claim. Applicant received a combined orthopedic and psychiatric disability Award of 77% after apportionment. Both the WCAB and the Court of Appeal affirmed the WCJ's decision.

**Discussion:** Although this is only a writ denied case it illustrates an important principle. In some cases while there may be non-industrial factors established that would support apportionment if those non-industrial factors are resolved prior to either the MMI evaluation, or by the time of rating, then apportionment may not be warranted.

## PETITIONS TO RE-OPEN/VARGAS

### **Charon v. WCAB (Ralph's Grocery Company) (2013) 78 Cal.Comp.Cases 869; 2013 Cal.Wrk.Comp. LEXIS 126 (writ denied)**

**Issue:** Whether in an admitted psychiatric injury case on a Petition to Reopen, non-industrial factors related to problems with the applicant's daughter and grandchildren, constituted substantial medical evidence to support apportionment related to a subsequent Award on the Petition to Reopen for New and Further Disability.

**Facts:** Applicant was a victim of an August 15, 1997, robbery. There was a reporting AME in psychiatry. On February 14, 2000, applicant received a Stipulated Award related to the psychiatric injury of 48% permanent disability and future medical care.

Applicant filed a timely petition to reopen for new and further disability and in a 2011 Findings & Award on the Petition to Reopen for New and Further Disability, the WCJ found 100% permanent total disability based on the AME report, but found the AME's opinion that there was 15% non-industrial factors did not constitute valid legal apportionment and therefore, awarded the applicant an unapportioned 100% permanent total disability Award.

Defendant filed a Petition for Reconsideration on the apportionment issue. The WCJ in her Report on Reconsideration recommended there should be 10% valid apportionment under Labor Code §4663 and not the 15% indicated by the AME in psychiatry. The WCAB granted defendant's Petition for Reconsideration and agreed the AME's opinion supported 10% non-industrial apportionment.

The non-industrial factors relied on by the AME in psychiatry to support apportionment of the new and further disability were applicant's on-going issues related to her daughter and grandchildren which occurred after the original February 14, 2000 award, and the MMI/P&S exam by the AME in psychiatry on the Petition to Reopen for New and Further Disability. Although applicant had chronic unremitting family problems prior to the February 14, 2000, Award and prior to the Petition to Reopen for New and Further Disability, those family problems continued and some problems were new. Applicant's Award was reduced from 100% to 90%.

**Discussion:** The WCAB found that the AME's opinion on apportionment was legally adequate under Escobedo, Vargas, and Marsh. The fact the percentage of apportionment is an approximation is not fatal to its constituting substantial medical evidence. Quoting from the case of Anderson v. WCAB (2007) 149 Cal. App.4<sup>th</sup> 1369, 1382 [57 Cal. Rptr. 3<sup>rd</sup> 839, 72 Cal. Comp. Cases 389], "the fact that an apportionment determination is "not precise and require[s] some intuition and medical judgment...does not mean [the] conclusions are speculative [where the physician] stated the factual bases for his determinations based on his medical expertise."

## LABOR CODE §4663 (GENERAL ISSUES)

### **Rice v. City of Jackson 2015 Cal.Wrk.Comp. P.D. LEXIS 57 (WCAB panel decision).**

**Issue:** Whether apportionment by a SPQME to an applicant's general genetic makeup without reference to specific identifiable factors constitutes valid apportionment and also whether such apportionment based on the facts of this case related to causation of injury as opposed to causation of disability.

**Holding:** Apportionment to applicant's alleged genetic makeup as it relates to degenerative cervical spine disability does not constitute substantial evidence since there was no reference or reliance on specific identifiable factors that were contributing to applicant's cervical spine disability, and also the SPQME's opinion related to causation of injury as opposed to causation of disability.

**Factual Overview & Discussion:** Applicant suffered an admitted CT injury to his neck resulting in two cervical surgeries. Following trial the WCJ awarded applicant 20% PD after apportionment of 49% to applicant's "personal history, including genetic issues." Applicant filed for reconsideration which was granted by the WCAB amending the WCJ's determination and remanding the matter back to the trial level for an unapportioned award of PD.

The SPQME in opining that a contributing factor to applicant's cervical spine disability was genetic, cited and relied on several articles in scientific journals. There was no reference by the SPQME to any specific identifiable genetic factor actually existing or manifesting itself that was contributing to applicant's cervical spine disability or making or causing applicant's spinal disability to be worse or greater than it would be otherwise.

The WCAB in finding this did not constitute substantial medical evidence, stated that the SPQME was assigning causation to applicant's genetic makeup and to specific debilitating factors causing his current level of cervical spine disability. Moreover, such an opinion fails to state "how and why" these alleged general genetic factors are a contributing cause of the applicant's cervical spine disability. "...finding causation on applicant's genetics opens the door to apportionment of disability to impermissible immutable factors. Further, relying upon applicant's genetic makeup leads.....to apportion the causation of applicant's injury rather than apportionment of the extent of his disability."

**Comment:** In contrast to this case is *Costa v. WCAB* (2011) 76 Cal.Comp.Cases 261, a writ denied case where applicant suffered a cervical spine injury, but had a pre-existing asymptotic congenital cervical spinal stenosis. Multiple evaluating physicians found the applicant to be 100% PTD, but apportioned 20% of the applicant's cervical spine disability to the pre-existing asymptomatic congenital cervical spinal stenosis based on the fact that applicant's cervical spine

disability would not be as great but for this condition. The distinguishing feature in *Costa* versus the instant case is that the evaluating physicians were able to explain in detail “how and why” this genetically based pre-existing condition was not just a general genetic condition or risk factor, but an actual contributing cause of the applicant’s cervical spine disability. It exemplifies a situation where a risk factor or underlying genetic condition can become an actual contributing cause of PD as opposed to a potential cause of PD. Moreover, there may be scenarios or situations where an underlying pre-existing condition may be aggravated or lit up by an industrial injury, and under SB 899/Labor Code §4663, still serve as a valid basis for legal apportionment so long the evaluating physicians pursuant to *Escobedo*, can explain “how and why” it is a contributing cause of the applicant's current PD. See also *Gerletti v. Santa Maria Airport District* 2009 Cal.Wrk.Comp. P.D. LEXIS 300 (WCAB panel decision). (WCAB upheld WCJ’s determination that 50% of applicant’s cervical spine disability was non-industrial based on a cervical spine MRI confirming foraminal stenosis and degenerative spondylosis consistent with both age and genetic changes in the applicant’s spine).

**Comment:** If the apportionment in this case was based solely on age and “genetic factors,” it would not constitute valid apportionment. However, the cervical spine MRI clearly established the presence of the non-industrial conditions which were clearly contributing factors of applicant’s cervical spine disability. In a writ denied case, *Sierra Bible Church v. WCAB (Clink)* (2007) 72 Cal.Comp.Cases 20, 2007 Cal.App.Unpub. LEXIS 826, the WCAB reversed a WCJ’s finding that 75% of applicant’s spinal disability was non-industrial. The WCAB awarded applicant 77% PD without apportionment on the basis the AME’s non-industrial apportionment solely to general age and genetic factors was invalid. There was no medical evidence that applicant “personally” suffered from the genetic pathology discussed by the AME.

**Hernandez v. WIS International 2015 Cal.Wrk.Comp. P.D. LEXIS 525 (WCAB panel decision)**

**Issue:** Whether a physician’s apportionment determination based on obesity and degenerative disc disease in a 53 year old female constitutes substantial evidence.

**Holding:** Failure of the evaluating physician to provide a detailed discussion as to how and why the applicant's obesity was a contributing cause of the applicant’s PD and a cursory reference that degenerative disc disease is to be expected in a 53 year old woman does not meet the *Escobedo* “how and why” standard in order to support valid legal apportionment.

**Factual Overview:** Applicant suffered both a specific and a CT injury. The WCJ found 10% PD attributable to the specific injury and 24% PD to the CT injury without apportionment. Defendant filed for reconsideration arguing that the WCJ should have applied the non-industrial apportionment found by the SPQME. The SPQME opined that with respect to the applicant's left

knee there was 40% non-industrial apportionment related to obesity and degenerative disease. (applicant was 5'4" and weighed 240-250 pounds). As to the cervical spine, the SPQME indicated 40% non-industrial apportionment based on X-rays and an MRI. However, he also stated that "some degree of degenerative disc disease would be expected in a 53 year-old female."

The Board denied the defense Petition for Reconsideration based on the fact the SPQME did not sufficiently set forth the reasoning behind his apportionment determination. "With regard to both conditions, there is an insufficient discussion regarding how the supposed non-industrial factors developed and how they are contributing to applicant's present permanent disability." "...[T]here is no discussion regarding how the obesity has caused permanent disability."

**Comment:** There is no question that both obesity and confirmed degenerative disease conditions can support valid legal apportionment. However, as this case demonstrates, the evaluating physician must be able to provide an opinion that states how and why either or both conditions are a contributing causal factor to the applicant's current PD. In this case the physician failed to meet the *Escobedo* "how and why" standard.

**Larsen v. Southwest Airlines, ACE USA 2014 Cal.Wrk.Comp. P.D. LEXIS 26 (WCAB panel decision)**

**Issue:** Whether a defendant's failure to prove apportionment based on Labor Code §4664(b) related to a prior award precludes or prevents them from alternatively establishing valid legal apportionment under Labor Code §4663.

**Holding:** a defendant's failure to prove apportionment under Labor Code §4664(b) with respect to a prior award does not preclude or prevent them from alternatively establishing legal apportionment under Labor Code §4663 if there is substantial medical evidence in support of such a determination.

**Procedural and Factual Overview:** Applicant, a cargo agent, suffered a December 1, 2010, low back injury. However, he had a prior award of 32% permanent disability for a September 21, 2000, low back injury with the same employer. Following trial, the WCJ issued a November 25, 2013, Findings and Award in which the WCJ found 75% of the applicant's present residual permanent disability was attributable to the prior September 21, 2000, injury under Labor Code §4663 with the same employer. Applicant filed a Petition for Reconsideration.

Applicant's primary argument on reconsideration was that if a defendant fails for any reason to prove apportionment under Labor Code §4664(b), including overlap, then a defendant could not alternatively try to prove apportionment under Labor Code §4663 and applicant would be entitled to an unapportioned award.

The WCAB on reconsideration adopted and incorporated the WCJ's Report on Reconsideration. The WCJ in her report noted that the reporting PQME indicated that he had not been provided with the settlement documents related to the prior 32% permanent disability award for the September 21, 2000, injury to the low back and, and therefore, utilized Labor Code §4663 to apportion 75% of the applicant's present residual permanent and partial disability to the September 21, 2000, date of injury. The WCJ found the PQME's report constituted substantial medical evidence under Labor Code §4663. The WCJ also noted that applicant's counsel provided no legal authority, let alone persuasive legal authority to support the argument that a defendant's failure to prove apportionment under Labor Code §4664(b) precludes them from asserting valid legal apportionment alternatively under Labor Code §4663. The WCJ cited the case of *Ruybal v. State of California* (2012), 2012 Cal.Wrk.Comp. P.D. LEXIS 436 (WCAB panel decision) as well as *Robinson v. WCAB* (2011) 76 Cal.Comp.Cases 847, that allows for application of Labor Code §4663 apportionment if Labor Code §4664(b) apportionment could not be reasonably ascertained or proven.

**SASCO Electric v. WCAB (Anemone) 2014 Cal. Wrk. Comp. LEXIS 127 (writ denied)**

**Issues:**

1. Whether apportionment to a compensable consequence injury must follow the same percentage of apportionment found in the underlying injury in another medical specialty.
2. Whether combining permanent disability using the multiple disabilities table is determined by calculating an applicant's overall combined permanent disability for various body parts and conditions and then subtracting apportionment or whether the correct formula is to apportion each distinct disability separately and then apply the multiple disabilities table under the 1997 PDRS.

**Procedural & Factual Overview:** The applicant suffered a cumulative trauma injury to various orthopedic body parts including his hands, upper extremities, feet, ankles, and shoulders while working as an electrician. In addition, as a compensable consequence of the orthopedic cumulative trauma, applicant also suffered injuries to his psyche and internal in the form of irritable bowel syndrome (IBS).

There were a number of reporting physicians in this case including AMEs in orthopedics and psychiatry as well as QMEs in internal medicine.

Summary of the rating instructions submitted to the DEU were as follows:

1. 41% permanent disability for the psychiatric injury without apportionment.
2. 45% permanent disability for the upper extremities after apportionment.

3. 46% for the irritable bowel syndrome without apportionment.
4. 62% permanent disability for the lower extremities after apportionment.

In determining applicant's overall permanent disability the WCJ combined the permanent disability caused by each of applicant's disabilities as indicated hereinabove and applied the Multiple Disabilities Table (MDT) under the 1997 PDRS and awarded applicant 100 permanent total disability. Defendant filed a Petition for Reconsideration arguing that the maximum permanent disability that should be awarded to the applicant was 88% relying on the California Supreme Court's decision in *Brodie*, and cited *Benson*.

**Proper Calculation of Apportionment Related to Multiple Disabilities Under the 1997 PDRS:**

The formula or approach used by the WCJ and approved by the WCAB on reconsideration was that each separate disability i.e., separate body part or condition was assessed including whether apportionment applied or not. Once each distinct disability including any apportionment was separately determined they were then combined using the multiple disabilities table to determine the applicant's overall permanent disability which in this case was 100%.

Defendant unsuccessfully argued the WCJ and the WCAB should have calculated applicant's overall combined permanent disability and then subtracted or applied apportionment from the overall disability rather than each separate and distinct disability. The WCAB rejected this formula.

**Apportionment for a Compensable Consequence Injury or Injuries will not always follow the Apportionment formula or percentage related to the underlying injury specially were there are two different medical specialties involved.**

Neither the WCAB on reconsideration and the Court of Appeal with respect to the writ, found merit in defendant's argument or contention that a compensable consequence injury or injuries must be apportioned in the same manner and to the same percentage degree as the underlying injury which in this case was the orthopedic injury to various body parts.

Defendant unsuccessfully argued applicant's psychiatric disability and Irritable Bowel Syndrome disability should follow the same apportionment formula as the underlying orthopedic apportionment which was rejected by the court and the WCAB.

Moreover, defendant argued that there was a nonindustrial condition specifically congenital polydactyl (a condition causing development of extra fingers and toes) that should be regarded as a valid basis for Labor Code §4663 nonindustrial apportionment. However, there was no substantial evidence indicating this nonindustrial congenital condition was a contributing cause of the applicant's orthopedic disability or the disability related to the compensable consequence body parts and conditions.

The WCAB acknowledged defendant correctly cited and relied on the legal principles and

concepts set forth in both *Brodie* and *Benson* related to the apportionment based on causation and disability. However, defendant incorrectly applied those principles to the facts of this case.

The Court of Appeal in denying defendant's writ found no reasonable basis for the Petition and awarded supplemental attorney's fees to applicant.

**Porter v. City & County of San Francisco 2014 Cal.Wrk.Comp. P.D. LEXIS 77 (WCAB panel decision)**

**Issue:** It was reversible error for a WCJ under Labor Code §4663 in a case involving 100% permanent total disability to apply nonindustrial apportionment of 10% to the standard rating rather than the adjusted rating.

**Procedural & Factual Overview:** In one of two cases following trial, the WCJ issued a Findings, Award, and Orders related to a specific injury of April 10, 2013, finding applicant had sustained injury to her bilateral knees, causing 93% permanent disability after apportionment. Applicant filed for reconsideration alleging applicant should be deemed 100% permanently totally disabled and the WCJ's apportionment determination was not based on substantial medical evidence. Defendant also filed a Petition for Reconsideration alleging the applicant was not 100% permanently totally disabled and, alternatively, if she was, the WCJ erred in apportioning applicant's permanent disability rating before adjusting applicant's permanent disability rating for age and occupation.

In reversing, the WCJ related to the specific injury case, the WCAB found applicant sustained 90% permanent partial disability after 10% apportionment, as opposed to the 93% the WCJ found.

The medical reporting in the case consisted of an AME in orthopedics. The focal issue related to how to properly calculate apportionment under the 1997 Permanent Disability Rating Schedule in a potential or actual 100% permanent total disability case. The WCAB opined that under the 1997 PDRS, ratings of 100% are not modified for age or occupation. They noted that any adjustment for age and occupation occurs before the application of apportionment. They noted that the WCJ's proposed rating was incorrect because he apportioned the standard rating rather than the adjusted rating.

In essence, what the WCJ did was to apply the apportionment indicated by the AME to the "standard" disability, which was 100%, and then adjusted the apportioned "standard" by the age and occupation of the injured worker. Under the 1997 PDRS as well as the 2005 PDRS, adjustments for age and occupation apply for all permanent and partial disability up to 99%, but no adjustments are provided for 100% "standard" permanent disability.

In arriving at his erroneous calculation the WCJ essentially indicated that in his belief and view, the 1997 PDRS discriminated against an injured worker with a 100% "standard" by not allowing

adjustment for age and occupation. His creative but erroneous remedy was to apply a “novel rating method” by applying the apportionment of permanent disability to the “standard” rating and then adjust the apportioned “standard” for age and occupation.

**NBC Universal Media, LLC v. WCAB (Andramos) (2014) 79 Cal.Comp.Cases 191; 2014 Cal.Wrk.Comp. LEXIS 4 (writ denied)**

**Issue:** Whether it was an abuse of discretion for a WCJ to use “range of the evidence” in determining permanent disability and apportionment based on portions of two separate medical reports when combined, constituted substantial medical evidence.

**Procedural & Factual Overview:** Applicant, a sales clerk, suffered two specific injuries and a cumulative trauma injury. The primary issue at trial and after trial was orthopedic permanent disability and apportionment. Applicant relied on her primary treating physician and defendant relied on a report from a PQME. Applicant’s primary treating physician indicated 12% permanent disability related to the lumbar spine, 16% to the right knee, and 8% to the left knee. He concluded there was no apportionment with respect to applicant’s knee impairment/disability on the basis there was “no evidence any degenerative changes caused the ligamentous tears in applicant’s knees or any disability would have resulted from degenerative changes.” Applicant’s primary treating physician did find that with respect to applicant’s lumbar spine disability, 20% was attributable to nonindustrial degenerative disc disease.

The PQME, using the ROM method for rating applicant’s lumbar spine disability, found 29% permanent disability with 10% to the applicant’s right knee and 12% permanent disability to the left knee. With respect to apportionment, the PQME found 50% nonindustrial apportionment related to applicant’s lumbar spine disability. With respect to apportionment related to the applicant’s bilateral knee disability, the PQME using the *Benson* approach apportioned 25% to each specific date of injury and 50% to nonindustrial factors, which included degenerative joint disease and an aggravation from morbid obesity. However, the PQME failed to explain how or why he used these particular percentage figures and did not discuss how degenerative joint disease was a contributing factor to applicant’s permanent disability.

Following trial, the WCJ issued a Findings, Award, and Order of 71% permanent disability after apportionment based on a “range of evidence” in the record. The WCJ relied on the orthopedic reports from the applicant’s primary treating physician in finding knee disability and apportionment, but relied on the reporting of the PQME in finding spinal permanent disability. In doing so the WCJ indicated that the PQME’s discussion of apportionment could not be relied on, as it did not constitute substantial medical evidence.

Defendant filed a Petition for Reconsideration arguing that the WCJ should not have used the ratings from both the reports of the applicant’s primary treating physician and the PQME to determine applicant’s disability and apportionment, and by using the “range of the evidence”

approach, the WCJ concocted a “witches brew” to improperly maximize applicant’s permanent disability award.

On reconsideration, the WCJ explained why he relied on portions of each of the medical reports in evidence. By applying the “range of the evidence” standard the WCJ indicated the result was a higher overall rating for the spine, but without apportionment and a higher rating for the right knee and less apportionment and a lower overall rating for the left knee with less apportionment. The WCJ also indicated that unlike the decision in *Bracken* there was no reliance or consideration of only a portion of one physician’s opinion in reaching a decision while ignoring the remainder of the record. In this case the judge considered all of the medical reporting, which together painted an accurate portrait of applicant’s overall impairment.

Here, there are serious deficiencies in both doctors’ reports that are cured by reference to the other. Dr. Hay’s report fails to explain how he arrives at 10% impairment to the right knee and 12% to the left knee. The chart at the end of his 22 June 2012 report contains little explanation and the figures do not add up to the amounts found. The undersigned is unable to discern how he arrives at those figures except to say that 5% impairment of each [knee] is due to removal of cartilage and that some amount of disability to the left knee is due to muscle atrophy. By contrast, Dr. Hay does a very good job with the spinal impairment. He agrees with Dr. Greenspan that the lumbar spine would normally be a DRE category III but that the MRI in this case compels one to use the range of motion method instead. He also notes what Dr. Greenspan missed, that there is impairment to the thoracic spine which he measures using the DRE method.

By contrast, Dr. Greenspan does a fine job of explaining his range of motion impairment figures to the knees. He comes to a higher result than Dr. Hay with respect to the right knee and a lower figure with respect to the left knee. More importantly, he explains his reasoning with respect to the knees.

With respect to the spine, however, he does not discuss the thoracic spine. Furthermore, with respect to the use of the DRE method, he notes (correctly) that normally the DRE method will be used unless there is a reason not to do so. He does not discuss the MRI results and why they might give rise to use of the range of motion method for the lumbar spine as Dr. Hay did.

As a result, the judge concluded that both the applicant’s primary treating physician and the PQME’s reports were incomplete, but by using the complete portions of each report that constituted a substantial medical evidence, the judge was able to “graft a complete picture” of both permanent disability and apportionment using the “range of evidence.”

**Comment:** There is some question in the editor’s mind as to whether or not the applicant’s primary treating physician, at least with respect to the bilateral knee disability and apportionment, applied the correct standard. Applicant’s primary treating physician indicated

there was no apportionment with respect to the bilateral knee impairment because there was no evidence that any degenerative changes caused the ligamentous tears in applicant's knee or that any disability would have resulted from degenerative changes. In essence, he indicates or argues that although there were preexisting degenerative changes in the knees there was no evidence these changes would have resulted in apportionment but for the injury. However, the correct legal standard is whether or not preexisting confirmed degenerative changes were a contributing factor to the applicant's knee disability. Applying the correct standard, there should have been some percentage of nonindustrial apportionment even if the specific injuries aggravated or accelerated the underlying preexisting degenerative conditions in both knees.

**Huber v. Laboratory Corporation of America, 2015 Cal.Wrk.Comp. P.D. LEXIS 195 (WCAB panel decision)**

**Issue:** Whether an AME in finding 50% non-industrial apportionment to applicant's injury to her bilateral wrists to medication she was taking for a hypothyroid condition for twenty years constituted substantial evidence.

**Holding:** AME's apportionment of 50% of applicant's bilateral carpal tunnel syndrome did not constitute substantial evidence since it related to causation of injury as opposed to causation of disability.

**Factual Overview & Discussion:** Applicant suffered a CT injury to her wrists and a compensable consequence psychiatric injury. The WCJ found valid non-industrial apportionment to applicant's psychiatric disability, but not to the bilateral wrist orthopedic disability. The AME in orthopedics apportioned 50% of the applicant's bilateral wrist carpal tunnel disability primarily to her use of Synthroid medication for her hypothyroid condition for over 20 years. Defendant filed for reconsideration which was denied by the Board.

In finding the AME's 50% non-industrial apportionment did not constitute substantial evidence, the Board noted that it appeared applicant's hypothyroidism and use of medication was a risk factor for developing carpal tunnel and not necessarily related to causation of the resultant permanent disability. Also, the AME did "...not explain how and why hypothyroidism, that applicant had for over 20 years and for which applicant was taking Synthroid, was responsible for an approximate percentage of the current sensory and motor deficit impairments of the median nerve. After review of the entire record, it is determined that defendant failed in their burden of proof to establish apportionment of permanent disability to causes other than industrial injury."

## **PROPER APPORTIONMENT DETERMINATIONS WHEN THERE ARE DIFFERENT MEDICAL SPECIALISTS REPORTING IN THE SAME CASE.**

**INTRODUCTION:** Over the past two years there has been an emerging trend in apportionment cases involving reports from physicians in different medical specialties making apportionment determinations. For many years it was an accepted practice for different medical specialists reporting in the same case to automatically track or adopt an apportionment determination from a reporting physician in a completely different medical specialty, especially in compensable consequence cases. Until recently, trial judges and the Board did not seem to question or have a problem with this widespread and questionable analytical process. The best examples involve cases where the primary underlying injury was orthopedic and there were reporting physicians in psychiatry and internal medicine and other medical specialties. The reasoning of the non-orthopedic specialists in making their apportionment determinations was premised on the fact that since the primary injury was orthopedic, any apportionment percentage determinations by the orthopedist should be controlling and automatically followed and adopted exactly by the psychiatrist and internist without any need for them to make their own independent determination in their own respective medical specialties. What seemed to evade analysis and close scrutiny for so long was that industrial and non-industrial factors contributing to permanent disability in psychiatry and internal medicine and other specialties can be completely different than non-industrial factors contributing to orthopedic permanent disability. As will be seen from the cases hereinafter, the WCAB has in a large number of recent cases rejected this pervasive erroneous analysis and now requires that each reporting medical specialist make their own independent apportionment determination unless they can convincingly explain why they are merely adopting, following, or tracking an apportionment percentage determination by a physician in another medical specialty.

In *Caires v. Sharp Healthcare* 2014 Cal.Wrk.Comp. P.D. LEXIS 145 (WCAB panel decision), the WCAB reversed the WCJ, finding in part that the apportionment determination of the AME in psychiatry was invalid based on the fact the AME simply followed and adopted the erroneous and invalid apportionment percentage of the PTP in orthopedics of 75% industrial and 25% non-industrial. The WCAB stated:

While it may be intuitively appealing to apportion permanent disability pertaining to different body parts in identical fashion, a medical evaluator in a particular field is tasked with parceling out industrial and non-industrial causation of permanent disability for the body parts or body systems that are within his or her area of expertise. Thus, the medical-legal evaluator should provide an analysis of industrial and non-industrial causes of permanent disability for that particular body part or system. This does not necessarily rule out psychiatric apportionment in the same percentage as orthopedic apportionment, but it must be explained.

Also, in *ATC/VANCOM, Inc. v. WCAB (Navarro)*, 2014 Cal.Wrk.Comp. LEXIS 129 (writ denied), the WCAB rejected and found invalid a derivative apportionment determination made by the QME in psychiatry since it simply followed and aligned itself with the apportionment determination made by the QME in orthopedics without an independent analysis of possible non-industrial factors of psychiatric disability that could be much different than the orthopedic non-industrial factors contributing to applicant's orthopedic permanent disability. The WCAB cited *Jackson v. County of Los Angeles* (2013) Cal.Wrk.Comp. P.D. LEXIS 558 (WCAB panel decision), holding that apportionment of permanent disability related to one body part or condition under Labor Code §4663, such as an orthopedic injury, does not require that each and every body part be similarly apportioned. See also, *Sasco Electric v. WCAB (Anemone)* 2014 Cal.Wrk.Comp. LEXIS 127 (writ denied) where both the WCJ, the WCAB and the Court of Appeal rejected defendant's argument that a compensable consequence psychiatric injury must be apportioned in the same manner as the underlying causal orthopedic injury. There are a number of additional recent cases finding apportionment determinations by medical specialists in compensable consequence cases erroneous, where they merely followed and adopted the apportionment determination of another medical specialist rather than making independent apportionment determinations in their own medical specialties. (see, *Northrop Grumman v. WCAB (Dileva)* (2015) 80 Cal.Comp.Cases 749; 2015 Cal.Wrk.Comp. LEXIS 78 (writ denied); *Aima v. Buestad Construction, Inc., SCIF* 2015 Cal.Wrk.Comp. P.D. LEXIS 62;(WCAB panel decision); *Conen v. Blue Star Ready Mix* 2015 Cal.Wrk.Comp. P.D. LEXIS 97 (WCAB panel decision); *Maverick v. Marriott* 2015 Cal.Wrk.Comp. P.D. LEXIS 50 (WCAB panel decision).

Also, in *Mayorga v. Dexter Axle Chassis Group* 2015 Cal.Wrk.Comp. P.D. LEXIS 359 (WCAB panel decision), a very complex case involving medical reporting from nine different doctors in four different medical specialties, the WCAB in amending and remanding the case back to the WCJ for further development of the record on the issues of apportionment and permanent disability, discussed in detail the issue of evaluators in different medical fields simply adopting the apportionment determinations of other medical specialists as follows:

It is the responsibility of each medical evaluator to determine apportionment for the body parts or body systems within his or her area of expertise. Where a sequela is caused by the combined effects of multiple orthopedic injuries, each individual doctor must independently determine whether apportionment from the orthopedic injuries carries over to the sequela. If apportionment is found, the doctor must provide an independent and substantial opinion. Doctors cannot simply mirror the apportionment opinions of other doctors in a case without providing independent justification for their opinion. To do so fails to meet the requirements of substantial evidence. (*Escobedo v. Marshalls* (2005) 70 Cal.Comp.Cases 604, 620-621 (Appeals Board en banc opinion) and *E.L. Yeager Construction v. WCAB (Gatten)* (2006) 145 Cal.App.4<sup>th</sup> 922,928, 71 Cal.Comp.Cases 1687].) In some cases apportionment may mirror; in other cases it may differ; in some cases the doctor may find no apportionment or that the disability is inextricably intertwined between the dates of injury such that apportionment cannot be stated with reasonable medical probability. However,

the apportionment opinion of each doctor must be an independent judgment and must meet the requirements of substantial medical evidence.

However, if an evaluator in a particular medical specialty can persuasively explain in detail why he or she is following or adopting the apportionment determination of an evaluator in another medical specialty, it may constitute substantial medical evidence. (see, *Vivirito v. City of Glendale* 2015 Cal.Wrk.Comp. P.D. LEXIS 371 (WCAB panel decision), (AME in internal medicine explained in detail why he apportioned the internal disability in the same manner as the orthopedic disability of 80% industrial and 20% non-industrial, since applicant's internal injury and resultant disability flowed directly from the medication he was taking as a result of his orthopedic condition.)

**ATC/VANCOM, Inc. v. WCAB (Navarro) 2014 Cal.Wrk.Comp. LEXIS 129 (writ denied)**

**Issue:** Whether a psychiatric report finding 60% nonindustrial apportionment relying exclusively on the same percentage of nonindustrial apportionment in the orthopedic report constitutes substantial medical evidence, and whether a reporting physician in each specialty field must apportion based on contributing factors of disability in their particular specialty field.

**Holding:** It is improper for a psychiatrist to incorporate a percentage of nonindustrial apportionment found in another specialty i.e., orthopedics, and simply adopt that same percentage without a specific analysis of industrial and nonindustrial, contributing factors of psychiatric disability.

**Procedural & Factual Overview:** Applicant, a reservation agent, suffered a cumulative trauma ending in 2003, to her hands, elbows, neck, and shoulders. She also alleged she suffered a psychiatric injury as a compensable consequence of her orthopedic injuries.

The reporting physicians included QMEs in psychiatry and orthopedics. The orthopedic QME found 60% nonindustrial apportionment.

The reporting QME in psychiatry found applicant suffered a psychiatric injury as a compensable consequence of her orthopedic injury or injuries and that actual events of employment were the predominant cause of the psychiatric injury, for purposes of Labor Code §3208.3. One of the psychiatric QMEs found that all of the applicant's permanent partial disability was nonindustrial. The other QME determined that 60% of the applicant's psychiatric disability was apportionable

to nonindustrial factors based solely on the orthopedic apportionment. In doing so, the QME stated:

It is medically reasonable to apportion residual permanent partial psychiatric disability along the same lines that Ms. Navarro's permanent orthopedic disability is apportioned as her residual permanent partial psychiatric disability is a derivative psychiatric injury that arose subsequent to her industrial orthopedic injuries. Apportionment of Ms. Navarro's residual permanent partial psychiatric disability will be applied along the same lines that her industrial orthopedic permanent disability is apportioned...

In essence, the psychiatric QME indicated that apportionment of psychiatric disability should "align" with the apportionment assigned by the orthopedic evaluators.

The WCJ issued a Findings and Award that applicant had combined permanent disability of 85% based on her orthopedic and psychiatric injuries. However, while the WCJ concluded that the psychiatric QMEs reporting on AOE/COE constituted substantial medical evidence the WCJ indicated the same reporting physician's determination of apportionment did not constitute substantial medical evidence and was insufficient since it merely aligned itself and tracked the apportionment found by the orthopedic evaluator.

Defendant filed a Petition for Reconsideration, contending the entire report from the psychiatric QME the WCJ relied on did not constitute substantial medical evidence. This argument was based on the fact the psychiatric QME did not review the medical records thoroughly and did not have an accurate history related to a variety of nonindustrial factors as well as issues impacting on the applicant's credibility.

In the WCJ's Report on Reconsideration, she pointed out there was substantial evidence on an orthopedic basis to support apportionment of 60% to nonindustrial factors. However, with respect to nonindustrial factors contributing to the applicant's psychiatric disability, it was not supported by substantial evidence since it merely tracked or aligned itself with the orthopedic nonindustrial apportionment.

The WCJ cited *Jackson v. County of Los Angeles*, 2013 Cal.Wrk.Comp. P.D. LEXIS 558 (WCAB panel decision), holding that apportionment of permanent disability of one body part under Labor Code §4663, such as an orthopedic injury, does not require that each and every body part be similarly apportioned.

**Comment:** Before the case went up on a writ to the Court of Appeal there was a strong dissenting opinion by Chairwoman Caplane. She asserted that the psychiatric QME's report in its entirety did not constitute substantial medical evidence both on causation and apportionment. Chairwoman Caplane noted the psychiatric QME did not have a history that applicant was traveling regularly to Mexico annually to care for her mother, even though the psychiatric QME indicated the applicant was "limited in her ability to travel." Moreover, Chairwoman Caplane

pointed out applicant filed a claim on the same day she settled her workers' compensation against a prior employer and had not worked since 2003, but had been able to travel to Mexico to help care for her sick mother. She also stressed applicant's pain had worsened despite the lack of any industrial sources of injury since 2003, and she had received no psychiatric care, notwithstanding the allegedly high degree of psychiatric permanent disability. Defendant filed a writ which was denied by the Court of Appeal.

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