The California Commission on Health and Safety and Workers' Compensation

Draft Understanding the Effect of SB 899 (Stats 2004, Chap 34) on the Law of Apportionment

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INTRODUCTION

Apportionment is the process in which an overall PD that was caused at least in part by an industrial injury is separated into the components that are and are not compensable results of that injury. SB 899, signed into law by Governor Schwarzenegger on April 19, 2005, profoundly changed the law of apportionment. Decades of interpretation of the old law of apportionment are called into question, with some principles still being applicable and others being reversed. This paper attempts to provide the available information on the effect of SB 899 on the prior law of apportionment, how apportionment is likely to be affected by the AMA *Guides to Evaluation of Permanent Impairment*, and what are the key issues remaining to be resolved.

THE PROBLEM

SB 899 repealed venerable Labor Code §§4663 and 4750.[1] The former provided that if a preexisting disease was aggravated by a compensable injury, compensation was allowed only for the portion of the disability due to the aggravation reasonably attributed to the injury. The latter provided that an employee "suffering from a previous PD or physical impairment" could not receive compensation for a subsequent injury in excess of the compensation allowed for the subsequent injury "when considered by itself and not in conjunction with or in relation to the previous disability or impairment" and that the employer was not liable "for the combined disability, but only for that portion due to the later injury as though no prior disability or impairment had existed."

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[1] The repealed text of Sections 4663, 4750, and 4750.5 of the Labor Code provided as follows:

> 4663. In case of aggravation of any disease existing prior to a compensable injury, compensation shall be allowed only for the proportion of the disability due to the aggravation of such prior disease which is reasonably attributed to the injury.
>
> 4750. An employee who is suffering from a previous permanent disability or physical impairment and sustains permanent injury thereafter shall not receive from the employer compensation for the later injury in excess of the compensation allowed for such injury when considered by itself and not in conjunction with or in relation to the previous disability or impairment.
>
> The employer shall not be liable for compensation to such an employee for the combined disability, but only for that portion due to the later injury as though no prior disability or impairment had existed.
>
> 4750.5. An employee who has sustained a compensable injury and who subsequently sustains an unrelated noncompensable injury, shall not receive permanent disability indemnity for any permanent disability caused solely by the subsequent noncompensable injury.
>
> The purpose of this section is to overrule the decision in *Jensen v. WCAB*, 136 Cal.App.3d 1042.

To replace the repealed sections, Senate Bill 899 reenacted §4663 in an extensively revised form and added a new Section 4664.[2]

The revised Section 4663 provides that "apportionment of permanent disability shall be based on causation."

Subdivision 4663(c) attempts to instruct medical evaluators on how to apportion to causation, i.e.,

> "A physician shall make an apportionment determination by finding what approximate percentage of the permanent disability was caused by the

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[2] The new sections effective April 19, 2005, provide as follows:

> 4663. (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) In order for a physician's report to be considered complete on the issue of permanent disability, it must include an apportionment determination. 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. If the physician is unable to include an apportionment determination in his or her report, the physician shall state the specific reasons why the physician could not make a determination of the effect of that prior condition on the permanent disability arising from the injury. The physician shall then consult with other physicians or refer the employee to another physician from whom the employee is authorized to seek treatment or evaluation in accordance with this division in order to make the final determination.
> (d) An employee who claims an industrial injury shall, upon request, disclose all previous permanent disabilities or physical impairments.
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> 4664. (a) 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.
> (b) 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.
> (c) (1) 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 percent over the employee's lifetime unless the employee's injury or illness is conclusively presumed to be total in character pursuant to Section 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 the body not listed in subparagraphs (A) to (F), inclusive.
> (2) 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 percent.

> direct result of [the industrial injury] 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."

A PD evaluation is not considered complete unless it includes an apportionment determination.

New §4664(a) was added to emphasize that the employer is only liable for the percentage of PD "directly caused" by the injury.

Subdivision 4664(b) provides:

> (b) 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.

Subdivision 4664(c) adds that the accumulation of all PD awards issued with respect to any one region of the body in favor of one individual employee may not exceed 100 percent over the employee's lifetime unless the employee's injury or illness is conclusively presumed to be total in character pursuant to §4662. "Regions of the body" are defined similarly to the chapters of the AMA *Guides.* The PD ratings from a single injury cannot exceed 100 percent.

On their face the repealed sections do not appear inconsistent with the new sections, but the case law interpreting the repealed sections considerably limited their application.

The problem facing members of the workers' compensation community is how the authors of this legislation intend permanent disabilities to be apportioned under the new law. The final Senate floor analysis says only that it was intended to "replace present law on apportionment with statement that apportionment of permanent disability is based on causation." It is clear, however, that the announced purpose of SB 899 was to reduce the cost of providing workers' compensation.

INITIAL PROCEDURE UNDER REPEALED STATUTES

The substance of both former §4750 and former §4663 were in the Workmen's Compensation Acts of 1913 and 1917, and, as amended, were codified in the Labor Code in 1937. Originally they were applied fairly literally. Apportionment was generally made in one of two ways, i.e., (1) rating the entire disability and the disability from other causes, and then subtracting the latter from the former; or (2) rating the entire disability and the assessing a percentage of the disability to the effects of the injury and the remaining percentage to other causes. *California Workmen's Compensation Practice* §17.30 (Cal CEB 1963).

An example of the latter method of apportionment can be found in *Baker v. IAC* (1966) 243 CA2d 380, 31 CCC 228, where the injured employee's lung disability from emphysema was due in part to cigarette smoking and in part to inhalation of dust fumes at work. The commission's finding that 55 percent of his PD was industrially caused and

45 percent was caused by his smoking habit was affirmed by the Court of Appeal which said:

> The evidence before the commission sustains the finding that the petitioner suffers from a disability which derives from both industrial and nonindustrial causes. The employer is liable only for that part of the overall disability which is reasonably attributable to industrial causation. Separation of the industrial cause from the nonindustrial cause was a matter for the determination of the commission based upon the evidence before it.

Fourteen years later, *Baker v. IAC* was deemed by the Supreme Court to be no longer authoritative.

Apportionment was a proper subject for medical experts, but the IAC (now WCAB) was not required to follow the exact percentage recommended by the expert medical opinions as long as the percentage found was within the range of the evidence. *W.P. Fuller & Co. v. IAC* (Cassidy) (1962) 211 CA2d 9, 27 CCC 291.

JUDICIAL INTERPRETATION OF REPEALED STATUTES

In apportioning under former §4750, the IAC was not necessarily bound by the percentage of PD that it had previously awarded for a prior injury. *P.G. & E. v. IAC* (Burton) (1954) 126 CA2d 554, 19 CCC 152. There could be no apportionment to prior non disabling conditions or pathology. *Ferguson v. IAC* (1958) 50 C2d 469, 23 CCC 108. Employers took employees as they found them at the time of employment and when an injury lit up or aggravated a previously existing condition rendering it disabling, liability for the full disability without proration was imposed. *Colonial Ins. Co. v. IAC* (Pedroza) (1946) 29 C2d 79, 83, 11 CCC 226, 228; see also *Tanenbaum v. IAC* (1935) 4 Cal. 2d 615, 20 IAC 390

Beginning around 1966, the Appeals Board began apportioning more PD awards than had been the previous practice. In annulling many of those apportionments, the appellate courts issued a series of opinions that made proof of apportionment considerably more onerous. At the outset, the California Supreme Court markedly reduced the possibility of successful percentage apportionments by its decisions in *Berry v. WCAB* (1968) 68 C2d 786, 69 CR 68, 33 CCC 352 (medical opinion recommending apportionment merely on the basis of a previous pathological condition or disease that had not caused labor disablement was deemed to be based on incorrect legal theory and extending beyond the physician's expertise) and *Zemke v. WCAB* (1968) 68 C2d 794, 33 CCC 358 (medical opinion that does not rest on relevant facts or that assumes an incorrect legal theory is not substantial evidence). Thus, medical testimony that 80 percent of a worker's heart disability "would have been anticipated" absent industrial factors was insufficient to justify apportionment under §4663. *Creel v. Southern Cal. Rapid Transit Dist.* (1986) 14 CWCR 44.

Preexisting disability could not be established by a "retroactive prophylactic work restriction" postulated after the subsequent industrial injury, i.e., it was deemed speculative for a doctor to say that he would have imposed work restrictions on a

prophylactic basis if he had seen the worker before the injury. *Ditler v. WCAB* (1982) 131 CA3d 803, 814, 47 CCC 492, 499 (a medical witness must describe in detail the exact nature of the pre-existing disability and the rationale for its existence). A medical witness had to disclose adequate familiarity with the pre-injury condition. *Dorman v. WCAB* (1978) 78 CA3d 1009, 43 CCC 302.

Section 4663 required proof that a demonstrable part of the disability would have existed as the result of the normal progression of a non industrial condition if the industrial injury had not occurred. *Pullman Kellogg v. WCAB* (Normand) (1980) 26 C3d 450, 454, 45 CCC 170, 173. Evidence that the disease would have caused disability at some indefinite future date was not sufficient to justify apportionment, nor was a medical opinion apportioning to causation. *Franklin v. WCAB* (1978) 79 CA3d 224, 6 CWCR 72, 43 CCC 310. It was the disability resulting from the non industrial disease rather than the cause of the disease that was the proper subject of apportionment. *Pullman Kellogg v WCAB, supra,* (no apportionment to smoking for lung injury from inhalation of dust and fumes in absence of showing that disability would have resulted from his smoking even without any exposure to harmful substances in his employment.)

COMPUTING APPORTIONED PD AWARD BEFORE SB 899

Before 1972 four weeks of PD payments were allowed for each one percent of disability, and, except for life pension cases, it did not make any difference how apportionment was made between two injuries. The Appeals Board had, however, held that if the combined PD from successive injuries with the same employer exceeded 70 percent, the employee was entitled to a life pension if the PD payments for both injuries started on the same date. *Revere Copper & Brass, Inc. v. WCAB* (Dunlap) (1969) 34 CCC 532. Otherwise, the percentage of disability caused by each injury was independently determined, and the award in each case was for the number of weeks of PD indemnity provided by §4658 for that percentage of disability.

In 1972, however, §4658 was amended to provide for progressive increases in the number of weekly payments for each one percent of PD with the severity of the injury on a cumulative basis. After this change the total PD indemnity payable for a 60% rating was substantially greater than that for two 30% ratings. The California Supreme Court first faced this issue in *Fuentes v. WCAB* (1976) 16 C3d 1, 547 P.2d 449, 128 CR 673, 41 CCC 42, in which the following three solutions were proposed:

> Formula A, subtract from the total disability that portion that is non industrial, the remainder being the amount of compensable disability. Thus, in that case, 24.25 percent, representing non industrial origin would be deducted from the 58 percent total disability with a net compensable disability of 33.75 percent. [An award of $10,027.50.]
>
> Formula B, determine the number of weekly benefits authorized under Lab C §4658 for a 58 percent disability, multiply it by the percentage of industrially related disability, and award the resulting number of weeks. [An award of $12, 127.50.]

Formula C, subtract the dollar value of the non industrial disability from the dollar value of the combined disability. [An award of $14,367.50.]

The court selected formula A. It reasoned that to do otherwise would have been contrary to former §4750, which limited liability of an employer for a subsequent injury to the compensation allowed for that injury when considered by itself and not in conjunction with, or in relation to, the previous disability or impairment.

Although *Fuentes* continued to be good law, it was rarely applied because most successive injury cases fell within the rule of *Wilkinson v WCAB* (1977) 19 C3d 491, 138 CR 696, 42 CCC 406, that permitted combining disabilities. In *Wilkinson*, the Supreme Court held that if successive injuries to the same part of the body cause permanent disabilities that cannot be separated because they became permanent and stationary at the same time, the worker was entitled to an award based on the combined disability. The *Wilkinson* opinion explained that the decision was not inconsistent with *Fuentes* because *Fuentes* was concerned with apportionment of disabilities that fell within former §4750, and was not applicable to injuries that did not fall within the scope of that section because when both injuries become permanent and stationary at the same time, there is no "previous disability or impairment". *Wilkinson, supra,* 19 C3d at 500, 5 CWCR at 88, 42 CCC at 411. *Wilkinson* was followed by numerous cases explaining and expanding it.

INTERPRETING SB 899 AND APPORTIONING UNDER IT

Because cases interpreting former §§4663 and 4750 extended over a half century, it is likely to be some time before the effect of the new legislation is fully resolved. A few cases interpreting the new §§4663 and 4664 have now become final. Numerous others are currently pending before the WCAB and the appellate courts.

DEFINITION OF APPORTIONMENT TO CAUSATION

The first issue requiring resolution is how medical evaluators are to apportion PD based on causation. The statute tells physicians only that they must make apportionment determinations by finding what approximate percentage of the PD was caused by the direct result of the industrial injury and what "approximate" percentage of the PD was caused by other factors. The apparent intent is to overrule cases, such as *Ferguson, supra,* precluding apportionment to prior non disabling conditions or pathology, and such as *Franklin, supra,* saying that PD is not apportionable to causation. The Appeals Board agreed that this was the result in *Escobedo v. CNA Ins. Co. (Marshalls)* (2005) 70 CCC 604, 33 CWCR 100 (WCAB en banc).

In *Escobedo, supra,* the WCAB said that the other "factors both before and subsequent to the industrial injury" that may be found to cause PD include pathology, asymptomatic prior conditions, and retroactive prophylactic work restrictions and apportioned 50 percent of the applicant's PD to preexisting asymptomatic degenerative arthritis. It appears, therefore, that *Baker v. IAC, supra,* is again good law.

The *Escobedo* decision stressed, however, that the §4663(a) requirement that the apportionment be based on "causation" refers to the cause of the PD and not the cause of the injury.

Physicians evaluating PD are required to produce an impairment rating based on the AMA Guides to the Evaluation of Permanent Impairment, 5th Edition (DWC Form PR-4). Adm Dir Rule 9785(g). This gives rise to another enigma for evaluating physicians because the 2005 Schedule for Rating Permanent Disabilities requires them to make *impairment* ratings, but §§4663 and 4664 require them to apportion *disability* that is not established until a disability evaluation specialist has applied the rating schedule to the impairment ratings determined by the physician. See 1 *California Workers' Compensation Practice* §§5.49E-5.49G (4th ed., Cal CEB 2006).

DWC Form PR-4 (Primary Treating Physician's Permanent and Stationary Report) is designed to be used by the primary treating physician to report the initial evaluation of permanent *impairment* to the claims administrator, but it also asks the physician in statutory language to provide the approximate percentage of the PD that is due to factors other than the injury.

In *Escobedo, supra*, the WCAB held that WCJs and the Appeals Board must make apportionments in the same manner as prescribed for evaluating physicians in §4663(c)**, i.e.,** §4663(c) not only prescribes the determinations an evaluating physician must make with respect to apportionment, but also the standards the WCAB must employ in deciding apportionment issues. It is, therefore, the duty of the WCAB to find what percentage of the PD was directly caused by the injury and what percentage was caused by other factors.

On the facts in *Escobedo, supra*, apportionment to causation could fairly be applied. It has been observed, however, that although apportionment by cause makes sense when there are independent causes contributing to an outcome, such as smoking and asbestos in lung disease cases, it does not always produce the fairest result. Guidotti, *Considering Apportionment by Cause: Its Methods and Limitations,* 7 Journal of Work. Comp., No. 4. p. 55. An example of a case that might not "produce the fairest result" would be a diabetic employee whose normally trivial toe injury at work becomes infected. Because of the diabetes the infection spreads resulting in an amputation of the leg. It may well be that the spread of the infection was caused 95 percent by the diabetes, but would it be equitable to apportion the amputation? That could be the result if the "injury" is the toe injury, and the injury was only a small contributing cause to the loss of the leg. Other questions raised in the *Editor's Note* following the summary of *Escobedo at* 33 CWCR 105 are, "Will the Board resolve this by saying that the loss of the leg is the disability not the diabetes? Or that diabetes was a cause of the injury but not a cause of the disability?"

It is an accepted adage among lawyers that "hard cases make bad law." How the Supreme Court eventually defines apportionment by causation may well depend upon the facts in the case first presenting the issue to the court. If the first case is a "hard" one, it is not inconceivable that the Court will say that the medical evidence on which the apportionment is based is not substantial evidence as it did in *Berry, supra,* and *Zemke, supra.*

DEFINITION OF "DIRECTLY CAUSED"

A major issue that the facts in *Escobedo, supra,* did not require the Board to resolve is the definition of "directly caused." Sections 4663 and 4664 require that to be compensable, PD must be "caused by the direct result of injury" and be "directly caused by the injury." There is lack of agreement on the definition of "caused by the direct result of injury" and "directly caused by the injury," but there is considerable authority, including the 7th edition of Black's Law Dictionary, that "direct cause" is synonymous with "proximate cause."

Proximate cause in workers' compensation law, moreover, differs from proximate cause in tort law. See *Truck Ins. Exch. v. IAC* (Dollarhide) (1946) 27 C2d 813, 11 CCC 94; *Maher v. WCAB* (1983) 33 CA3d 729, 734 n3, 11 CWCR 109, 48 CCC 326, 329; and *State Comp. Ins. Fund v. IAC* (Wallin) (1959) 176 CA2d 10, 24 CCC 302 (the employment need not be the sole cause of the injury; it need only be a substantial contributing cause). Until now, proximate cause in workers' compensation law has been interpreted liberally by the courts with the purpose of extending benefits for the protection of injured workers. Labor Code §3202 (undisturbed by SB 899).

Although Justice Moore in *Pacific Indem. Co. v. IAC* (Raymond) (1948) 86 CA2d 726, 13 CCC 173, commented that decisions fixing the limits of causation in other fields of law were not persuasive because their authors had not applied "the social philosophy which supports the workmen's compensation statutes but were still fettered by the common law rules as to 'proximate cause' involving personal injuries," it is conceivable that the authors of *SB 899* had the common law concepts in mind when providing that the employer shall only be liable for the percentage of PD "directly caused" by the injury. Accordingly, a brief summary of the common law concepts may provide some guidance.

If the harm is the direct result of an event, the event is the proximate cause whether or not foreseeable, but if the harm is an indirect result of the event, it must have been foreseeable to be a proximate cause. See *Hadley v. Baxendale* (1854) 9 Ex. 341, 26 Eng. L. & Eq. 396; *Palsgraf v. Long Island R. R. Co.* (1928) 248 NY 339, 162 NE 99. A direct cause is one that results in the harm without any intervening cause. See *In re Polemis* (1921) 3 KB 560.

A myriad of cases attempting to apply the basic rules of causation can be found, but in his concurring opinion in *Mosley v. Arden Farms Co.* (1945) 26 C2d 213, 157 P2d 372, Justice Traynor warned:

> Although the doctrine of proximate cause is designed to fix the limitations upon liability, it has not yet been so formulated as to have a fair degree of predictability in its application in marking the boundary between liability and nonliability.

How "directly caused" is defined in a particular case may well depend on the court's perception of the justice and fairness of the injured worker's claim and the court's interpretation of the social policy that "seeks (1) to ensure that the cost of industrial injuries will be part of the cost of goods rather than a burden on society, (2) to guarantee

prompt, limited compensation for an employee's work injuries, regardless of fault, as an inevitable cost of production, (3) to spur increased industrial safety, and (4) in return, to insulate the employer from tort liability for his employees' injuries." *S.G. Borello & Sons, Inc. v. Dept. Ind. Relations* (1989) 48 Cal.3d 341,354, 54 CCC 80.

PROCEDURE

In addition to holding that apportionment to causation refers to the causation of the PD rather than to causation of the injury and that "other factors both before and subsequent to the industrial injury" may include disability that formerly could not have been apportioned (e.g., pathology, asymptomatic prior conditions, and retroactive prophylactic work restrictions), the *Escobedo* decision delineated some procedural aspects of apportionment determinations. The applicant has the burden of establishing the percentage of PD directly caused by the industrial injury, and the defendant has the burden of establishing the percentage of disability caused by other factors.

Section 4663(c) not only prescribes the determinations an evaluating physician must make with respect to apportionment but also prescribes the standards the WCAB must follow in resolving apportionment issues, i.e., both evaluating physicians and the WCAB must determine the percentage of the PD that was directly caused by the injury and the percentage caused by other factors.

It is not enough that a PD report "addresses" the causation issue and makes an "apportionment determination" by finding the approximate relative percentages of industrial and non-industrial causation under §4663(a), the report must also constitute substantial evidence.

Found to be substantial evidence in *Escobedo, supra,* was a medical opinion stating that given the trivial nature of the injury and the almost immediate onset of symptoms, there was a reasonable basis for apportionment. There was significant degenerative arthritis in both knees, and the applicant had been working in a fairly congenial environment. It was, therefore, "medically probable that she would have fifty percent of her current level of knee disability at the time of today's evaluation even in the absence of [the injury]."

To be substantial evidence, 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. Lab C §4663(c) requires no more than that a doctor make a determination of the approximate percentage of PD caused by a degenerative condition based on his medical expertise. *E. L. Yeager Construction v WCAB* (Gatten) (2006) 145 CA4th 922, 71 CCC 1687. A medical evaluator's opinion does not, however, constitute substantial evidence of apportionment unless it discuses "how and why" the pre-existing condition was a cause of the PD. "Best estimate" that apportionment is reasonable without giving any reasons for it is insufficient. *Franey v. State Farm Ins. Co.* (2006) 34 CWCR 186.

APPORTIONMENT IN AGGRAVATION CASES

As previously observed, the former law of apportionment developed on a case by case basis during a period of over 40 years. Experience has shown that it is impossible to anticipate every issue likely to arise in cases requiring interpretation of the language of §§4663 and 4664, and it is preferable to resolve them as they arise on a case by case basis. It may be helpful, therefore, to contemplate how their language might apply to specific factual situations.

One example might be a claim by a worker with no apparent disability or symptoms who bumps his knee on a desk while hurrying to answer the telephone in the course of his employment. The knee becomes swollen, painful and full of fluid. The illness is diagnosed as a disseminated fungus disease that had previously disseminated through his body but it had been dormant, the injury precipitated the localization of the fungus resulting in progression of the disease. It is conceivable that medical evaluators, following their understanding of SB 899, would say that the primary cause of the disability was the fungus disease and the bump was a minor cause and apportion 10 percent to the injury and 90 percent to "other factors both before and subsequent to the industrial injury." Because former §§4663 and 4750 have been repealed, there is no longer any bar to "apportionment of pathology or causative factors." When the Legislature deletes a statutory provision, it is assumed that a substantial change in the law was intended. *Lockheed Martin Corp. v. WCAB* (McCullough) (2002) 96 CA4th 1237, 30 CWCR 65, 67 CCC 245.

Arguments against such an apportionment are that (1) when disability results from the lighting up of a pre-existing condition, the employer is required to compensate for the entire disability even though the injury might have caused little or no disability in a healthier person (See*Tanenbaum v. IAC* (1935) 4 C2d 615, 20 IAC 390), and former §4663, which allowed apportionment to the portion of the disability not due to the aggravation, has been repealed, (2) asymptomatic fungus disease is not a ratable impairment, (3) the entire PD was proximately caused by the injury because "but for" the bump there would have been no PD, and (4) the injury was the "direct cause" of the PD because it set in motion a chain of events that led to the PD without the intervention of any independent cause.

Without citing *Tanenbaum,* the Board affirmed an award of unapportioned PD to an injured worker whose dormant seronegative rheumatoid arthritis had been “lighted up” by her injuries. Although her trauma did not cause the rheumatoid arthritis, it lit it up and allowed it to emerge and be diagnosed. *Sherman v. Los Angeles Unif. School Dist.* (2005) 33 CWCR 300. Successful reliance on rule described in *Tanenbaum v. IAC, supra,* is dependent on substantial medical evidence, as was present in *Sherman,* that none of the PD resulted from independent progression of the fungus disease.

Some hint of the Board’s concept of causation may possibly be gleaned from a case that the Board remanded to WCJs for further proceedings and new decisions. In *Lamotte v. UCSF*, SF 469155 (back injury to housekeeper with degenerative changes in spine), the WCJ had applied the "but for" rule and refused to apportion to "other factors."

Although the former Industrial Medical Council instructed physicians before SB 899 that if the disability would not now exist in its present form “but for” the injury, the injury

will be considered to be the cause of the disability even though there may have been other contributing causes (*Physician's Guide to Medical Practice in the California Workers' Compensation System, p. 22*) and some WCJs have reasoned similarly, the "but for" rule is a rule of exclusion, not a rule of liability. For example, "but for" the injured worker's birth, he would not now have disability, but the birth is too remote to be considered a proximate cause of the disability. Thus, it does not necessarily follow that the entire PD was proximately caused by the injury because "but for" the injury it would not have existed.

The argument that the injury was the "direct cause" of the PD because it set in motion a chain of events that led to the PD without the intervention of any independent cause is also of questionable validity. The bump would not have resulted in any disability without the intervention of the fungus disease.

APPORTIONMENT TO PREEXISTING DISABILITY

How PD is apportioned to preexisting disability depends upon whether there was a prior award of PD. If there was, §4664(b) is applicable because it provides that if the applicant has received a prior award of PD, it is conclusively presumed that the prior PD exists at the time of any subsequent industrial injury. *Kopping v WCAB* (2006) 142 CA4th 1099**,** 48 CR3d 618, 48 CR3d 618, 71 CCC 1229. If there was no prior award §4663(a) is applicable, and the preexisting disability is an "other factor." *Escobedo, supra.*

Read in the light of Evidence Code §601, there is an apparent ambiguity in Lab C §4664(b). The first sentence says that it shall conclusively be presumed, but the second sentence says that it is a presumption affecting the burden of proof. According to Evid C §601 a presumption is either conclusive or rebuttable.

The court of appeal in *Kopping v WCAB, supra,* resolved the problem by assuming that the Legislature did not use the terms "conclusive" and "rebuttable" in the same manner as in the Evidence Code. The court said that despite the second sentence of Lab C §4664(b), the Legislature intended the presumption to be conclusive, not rebuttable. It did not intend the phrase "presumption affecting the burden of proof" to have the same meaning that it has under the Evidence Code.

Read without reference to the Evidence Code, the two sentences of §4664(b) can be reconciled if the conclusive presumption of is actually a presumption affecting the burden of proof. It affects the claims administrator's burden of proving apportionment by establishing that the PD resulting from a previous industrial injury still exists. Although the conclusive presumption affects the claims administrator's burden of proving apportionment by establishing that the prior disability still exists, it does not completely carry that burden because the claims administrator still has to prove the overlap, if any, between the previous disability and the current disability in order to establish that apportionment is appropriate.

This construction of §4664(b) has the virtue of giving meaning to every word. It simply prevents an injured employee from defeating apportionment by proving medical rehabilitation. The claims administrator, however, continues to bear the burden of proof

on apportionment. It must first prove the existence of the earlier award and then prove that the PD on which that award was based overlaps the current PD. The claims administrator is entitled to apportionment only to the extent that some, or all, of the prior PD overlaps the current PD. The burden of proving overlap is part of the claims administrator's overall burden of proving apportionment that was not altered by §4664(b) except for the creation of the conclusive presumption that the prior PD still exists.

Illustrating how cases of preexisting disability are to be treated in the absence of former §4750, would be the case of a laborer that had sustained a back injury for which PDI was awarded based on a 30 percent PDR for a preclusion from heavy work. Two years later the laborer sustains another back injury. The disability from the subsequent injury becomes P&S in 2005, and the medical evidence is that the overall impairment is 45 percent of the whole person and that one half was a direct result of second injury and the other half was caused by the prior industrial injury. Applicant produces substantial evidence that he had fully recovered from the earlier injury and was doing strenuous work without any restrictions when the second injury occurred. A 50 percent PDR after adjustment for earning capacity, occupation, and age is recommended by a disability evaluation specialist for the combined PD.

These facts suggest the arguments that (1) the employer for the subsequent injury should not be liable for more than a 20% PDR because it is conclusively presumed that applicant already had a 30% PD when injured, (2) the presumption is not conclusive but one affecting the burden of proof and therefore rebuttable, (3) the presumption was rebutted by substantial evidence, (4) the prior PD should be rerated under the 2005 schedule and adjusted for age and occupation at the time of the second injury, (5) because applicant's PD was already 30% at the time of the subsequent injury, the PD award for that injury should begin at 30% and go up to 50%, and the award should, therefore, be for the dollar value of a 50% PDR less the dollar value of a 30% award.

Depending upon the answer to the argument that the prior PD should be rerated under the 2005 schedule, the first three arguments are answered by *Kopping v WCAB, supra.* There is merit in the argument that determining whether there is overlap between injuries rated under different PDR schedules is like comparing apples and oranges. In *Sanchez v. County of Los Angeles* (2005) 33 CWCR 278, 70 CCC 1440 (WCAB en banc), the Board recognized that differences between PDs rated under the 1997 schedule and PDs rated under the 2005 schedule "may present novel overlap questions" that it was unnecessary for it to resolve in that case.

With regard to the final point, there is currently lack of agreement among WCJs, commissioners, and appellate courts on which of the three *Fuentes* formulae should be used in computing the amounts of PD awards. The issue is now pending before the Supreme Court in *Welcher v WCAB*, S147030 (and consolidated cases). As of 2/9/2007, oral argument had not yet been scheduled.

In Arizona, the total impairment is determined first, the preexisting impairment is then determined and deducted, and the remaining impairment is the basis for the award. *Vargas v. Indust. Comm.* (1996) 926 P2d 533. It is reported, however, that a West Virginia court has approved apportioning out a PDR based on a more generous system

when rating the subsequent injury under the AMA Guides. Babitski et al., *Understanding the AMA Guides in Workers' Compensation* (3d ed., Aspen 2002) p. 39. Section 4664, however, expressly requires deducting the prior PD, not the prior PDR.

The Administrative Director promulgated a rule to govern this situation, but then withdrew it before it was to take effect. The reasons for withdrawing this part of the rule were not stated but it was probably because the Legislature directed the AD to adopt a new PD schedule but did not direct her to interpret the apportionment statutes. In the withdrawn rule, the AD would have provided that is conclusively presumed that the percentage of PD specified in a prior award exists at the time of any subsequent injury if (1) the percentages of PD attributable to both the current injury and the prior award are based on the 2005 schedule, or (2) the percentages of PD attributable to both the current injury and the prior award are based on the 1997 schedule. If neither of those conditions is true, apportionment would be determined in accordance with §4663. Although this rule was not adopted, it nevertheless provides a plausible solution.

SUCCESSIVE PDs P&S AT SAME TIME

Assume the same fact situation except that there was no prior award and the disability from both injuries became permanent and stationary at the same time. It is arguable that (1 the award should not be computed pursuant to *Fuentes, supra*, because, having been based on former §4750, *Fuentes* is no longer good law, and (2) the award should be computed based on the combined disability as provided in *Wilkinson, supra.*

It is now pretty well agreed that one of the *Fuentes* formulae is to be used in apportioning between two injuries. The question of both injuries being P&S at the same time has not been raised and resolved New §§4663 and 4664 do not provide for apportionment to "previous disability or impairment," but require that apportionment be made by finding what approximate percentage of the PD was caused by "other factors both before and subsequent to the industrial injury, including prior industrial injuries." The date that the disability from the prior injury becomes P&S appears to be irrelevant under §4663.

Although §5303 has previously been pretty much ignored, it provides that there is but one cause of action for each injury and that no injury may form a part of another injury. Sections 4658-4661, moreover, appear to contemplate that computation of PD awards shall be made with reference to disability resulting from the injury in question. In determining the percentages of PD, account is taken of the nature of "*the*" injury. §4660. On the other hand, the same arguments could have been made based on §5303 and §4660 as they existed in 1977 when *Wilkinson* was decided. Any departure from the *Wilkinson* rule will more likely be based on the differences between former §4750 and new §4663.

APPORTIONMENT TO PRIOR UNCOMPENSATED CUMULATIVE INJURY

Apportionment in cumulative injury cases is still governed by §5500.5(a) which was not affected by SB 899. That section provides that liability for a cumulative injury or occupational disease may not be apportioned to prior or subsequent years of harmful exposure but may be apportioned to disability from a specific injury, disability due to non

industrial causes, and disability previously compensated by an award, compromise and release, or voluntary payment. The result is that, in a cumulative trauma case, there can be no apportionment to a prior uncompensated cumulative injury. *Hartford Accident & Indem. Co. v. WCAB* (Barrett) (writ denied, 1978) 43 CCC 858.

EFFECT OF AMA GUIDELINES

As has already been discussed, the §4660(b)(1) requirement that calculations of PD begin with the descriptions and measurements of physical impairments and the corresponding percentages of impairments in the American Medical Association (AMA) Guides to the Evaluation of Permanent Impairment (5th Edition) affects the apportionment process in at least three respects:

> (1) In making the initial determination of the impairments resulting from an injury, the evaluating physician may well eliminate impairments caused by other factors without consciously "apportioning."
> (2) Physicians evaluating PD are required to produce an impairment rating, but §§4663 and 4664 require them to apportion disability that is not established until a disability evaluation specialist has applied the rating schedule to the impairments found by the physician.
> (3) The subtraction method of apportionment "requires accurate and comparable data for both impairments." AMA Guides, p. 12. This may require redetermination of the prior PD when a subsequent injury is rated under the AMA Guides.

The question remains, however, whether use of the AMA Guides requires any basic changes in the apportionment process itself.

It is anticipated by the AMA Guides that an evaluating physician will be asked the cause of a particular factor to determine liability for an injury or for permanent impairment and defines "cause" as:

> An identifiable factor (e.g., accident or exposure) that results in a medically identifiable condition. (p. 600.)

Similarly, "apportionment" is defined as:

> A distribution or allocation of causation among multiple factors that caused or significantly contributed to the injury or disease and existing impairment. (p. 599.)

On page 12, however, the medical evaluator is instructed that "cause" and "apportionment" have "unique legal definitions in the context of the system in which they are used" and that the terminology accepted by the state or system should be used. For example, in Idaho if the PD resulting from the injury is less than total and is increased or prolonged because of a preexisting impairment, the employer is only liable for the additional disability from the injury. Under the Utah impairment guides, an impairment rating for any preexisting spinal condition is computed and subtracted from the current spinal impairment rating.

Even though a state bases its PD awards on the AMA guides, the rules on apportionment may be similar to the pre 2005 law in California. See Babitski et al., *Understanding the AMA Guides in Workers' Compensation* (3d ed., Aspen 2002) pp. 39-40. For example,

in Colorado, there can be no apportionment to a preexisting asymptomatic degenerative condition. *Askew v. Industrial Claim Appeals Office* (1996) 927 P2d 1333. So also in Utah, *Crosland v. Bd of Review Ind. Comm.* (1992) 828 P2d 528. Arizona apparently follows the doctrine described in *Tanenbaum, supra.* See *Southwest Gas Corp. v. Ind. Com. of Ariz.* (2001) 25 P3d 1164. In Kansas apportionment was denied in the case of a heavy smoker with pulmonary disease. *Burton v. Rockwell Int'l* (Kan 1998) 967 P2d 290. In New Mexico no apportionment was allowed to a preexisting spinal cancer in a twist and fall back injury. *Edmiston v. City of Hobbs* (NM 1997) 944 P2d 883.

Thus, it is safe to say that using AMA Guides to determine PD does not necessarily affect a state's basic law of apportionment.

GUIDANCE FOR PHYSICIANS

When CHSWC initiated this project, it was informed that the DWC Medical Unit was being inundated with requests from physicians seeking directions on how to "make an apportionment determination by finding what approximate percentage of the PD was caused by the direct result" of the injury and "what approximate percentage of the PD was caused by other factors." Attorneys were reported as being "exasperated by the lack of a rule." Lack of a statutory definition of "apportionment to causation" made it difficult for insurers to estimate the impact of apportionment on PD and to set adequate reserves. The Board and appellate decisions discussed above answer some of the questions raised by SB 899, but until further official clarification is available, treating physicians, QMEs, and AMEs could be instructed that:

(1) Although §§4663 and 4664 require an apportionment of disability, his or her report should apportion the impairment.

(2) Apportionment is a distribution or allocation among the multiple factors that caused *or significantly contributed* to the *resulting impairment.* Factors include preexisting or subsequent illness, impairment, pathology, asymptomatic conditions, retroactive prophylactic work restrictions, and injury. See *Escobedo, supra.*

(3) Before expressing an opinion on apportionment, the following facts must be ascertained and verified:

(a) There is documentation of a prior or subsequent factor.

(b) The current permanent impairment is greater as a result of the prior or subsequent factor.

(c) There is evidence, based on reasonable probability (greater than 50% likelihood) that the prior or subsequent factor caused or contributed to the impairment.

(4) The total current impairment and the impairment caused by factors other than the injury must be calculated. The difference is the impairment due to the injury, but calculation of the resulting disability is a matter for determination by the WCAB.

(5) A detailed explanation of the apportionment must be included that:
(a) considers the nature of the impairment and its relationship to each alleged factor;
(b) explains the medical basis for the physician's conclusions;
(c) explains "how and why" the other factors contribute to the disability. *Franey v. State Farm Ins. Co., supra.*

(6) If conditions that would constitute impairments have been disregarded in determining the impairment, that fact should be stated and explained.

The resulting report must disclose familiarity with the concepts of apportionment, describe in detail the exact nature of the apportionable disability, and give the basis for the opinion. The opinion must be framed in terms of reasonable medical probability and based on pertinent facts, an adequate examination, and a sufficient history.

CONCLUSION

It is likely to be several years before the workers' compensation community can have definitive answers to all of the questions discussed in this paper and to numerous other issues that will undoubtedly arise as claims with different facts are processed. Even if the Supreme Court seasonably defines "apportionment of PD based on causation," it may take numerous additional cases with different fact situations to refine the definition with a degree of finality.

It is clear, however, that the legislative intent was to (1) reduce the cost of workers' compensation, and (2) replace the existing apportionment rules with apportionment of PD based on causation. The WCAB and appellate courts will be constrained to bear those objectives in mind when interpreting SB 899.

Commissioner James C. Cuneo recognized this obligation in his dissenting opinion in *Scheftner v. Rio Linda School Dist*. (2004) 32 *CWCR* 283, 69 CCC 1281. In support of his position (later approved by the court of appeal in *Kleemann v. WCAB* (2005) 127 CA4th 274, 33 *CWCR* 35, 70 CCC 133) that the Legislature intended SB 899 to take effect immediately, he said that faced with staggering worker's compensation costs, the Legislature set out to fix the "effects of the current workers' compensation crisis at the earliest possible time." Part of the skyrocketing cost was due to the existing law on apportionment. As *SB 899* moved through the legislative process, it was apparent that the issue of causation and apportionment was a key area of the law that the Legislature wanted to change.

Logicians define "cause" as an agent without which a result would not have occurred, and medical experts can identify the causes of a medical condition. It is likely, however, that the courts will interpret "apportionment by causation" primarily in the context of California legal history as summarized above with only secondary reliance on the AMA guides or other medical explanations.

A germane portion of that legal history is the case law that specified the kind and quality of evidence required to justify apportionment. Apportionment was a question of fact, and

it was the employer's burden to prove the proportion of disability attributable to nonindustrial factors. Although the Board normally relied on medical opinion in resolving apportionment issues, an opinion that did not rest upon relevant facts or that assumed an incorrect legal theory was not substantial evidence on which the Board could base an apportionment finding. The Board and WCJs have embraced these principles in denying apportionment in numerous cases where the claims administrator has failed to carry its burden of demonstrating that a portion of the injured worker's PD was caused by "other factors.

The WCAB and Appellate cases discussed in this paper have resolved a few of the problems raised by SB 899 with respect to apportionment. Many other issues, including the definition of "directly caused," remain to be resolved although some cases such as *Sherman v. Los Angeles Unif. School Dist., supra,* have hinted at it. Because there has not been a clear issue of remote causation in any of the reported decisions to date, the Board has not been faced with defining "directly caused." Sections 4663 and 4664 require that compensable PD be "caused by the direct result of injury" and "directly caused by the injury." There is authority, however, that "direct cause" is synonymous with "proximate cause."

Disability caused by an injury's acceleration, aggravation, or lighting up of a pre-existing condition is a proximate result of the injury to the extent that it would not have existed in the absence of the injury. The Board in *Sherman v. Los Angeles Unif. School Dist., supra,* assumed that it was a "direct" result without saying so in so many words.

The apparent inconsistency in §4664(b) has been resolved by *Kopping v. WCAB, supra* (presumption carries defendant's burden of proving the continuation of the previously found PD but defendant still has burden of proving the award and overlap with the current PD).

Whether an order approving a compromise is an award within the meaning of §4664(b) was answered by the Board in *Pasquotto v Connecticut Indem. Ins. Co.* (2006) 71 CCC 223 (WCAB en banc) (§4664(b) presumption only applicable if the applicant has received a prior award of PD; order approving a compromise and release is not a "prior award of permanent disability" within the meaning of that section).

Because most injuries are now being rated by use of the 2005 schedule, the Board will soon have to answer the question that it ducked in *Sanchez v. County of Los Angeles, supra,* i.e., the "novel overlap questions" presented when the prior PD was rated under the 1997 schedule and the current disability is rated under the 2005 schedule. Query: will it adopt the suggestion in the withdrawn AD rule and apportion pursuant to §4663?

If the prior rating was based on pain or work limitations, how is it converted to an impairment rating? If the prior PD is rerated, will future earning capacity, occupation, age, and earnings at the time of the subsequent injury in accordance with cases decided under former §4750?

The issue of how a PD award after apportionment is calculated is before the Supreme Court, but a decision is not likely before the middle of 2007. Meanwhile, claims

administrators can only safely, but must, pay the amount calculated as provided in *Fuentes, supra.*

Except for a few cases, such as *E & J Gallo Winery v. WCAB* (Dykes) (2005) 134 CA4th 1536, 34 CWCR 1, 70 CCC 1644, that got away from it when a panel adopted the WCJ's report and summarily denied reconsideration, the Board has established the practice of resolving cases interpreting SB 899 in thoroughly reasoned en banc decisions. The result is that the appellate courts have the benefit of the Board's expertise and knowledge of the workers' compensation law and system. Although the ultimate interpretation of a statute is for the appellate courts, the WCAB's interpretation of a statute that it is charged with enforcing is accorded great respect by the courts and followed if not clearly erroneous. *Judson Steel Corp. v. WCAB* (Maese) (1978) 22 C3d 658, 6 CWCR 215, 43 CCC 1205.