

The New Apportionment Law

By

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January 2006

I Apportionment:

A. Generally:

1. **Changes:** Labor Code sections 4663, 4750, 4750.5 are repealed as of 4-19-04. As of 4-19-04 new sections are 4663 and 4664.
2. Apportionment of disability only applies to permanent disability benefits. Neither temporary disability indemnity, medical treatment, or death benefits can be apportioned. (*Granado v. WCAB, 33 CCC 647*).
3. It is necessary to distinguish apportionment of permanent disability from apportionment of liability between defendants, which can be apportioned as to all the benefits. Apportionment of liability can apply to specific injuries, or cumulative trauma injuries, or a combination of both. (See LC §§3208.1, 3208.2, 5303 and 5500.5). Apportionment of liability between defendants is allowed because it does not reduce the benefit to the employee, but merely divides liability percentages among defendants. In apportioning liability among defendants, a determination must be made as to what portion of the employee's disability is caused by each industrial injury when there are multiple employers or insurers.
4. The burden of proof as to apportionment of disability is on the defendant (*Pullman-Kellogg v. WCAB, 45 CCC 170*).
5. Must apportionment be raised as an issue? *Wilbur-Ellis co. v. WAB (flores)(Court of Appeal unpublished)(70 CCC 1096)* it was held when defendants raised PD and not apportionment at the MSC, initial trial and defendants did not raise apportionment at the second hearing or at the hearing to cross-examine the rater. Defendants filed a petition for reconsideration for the first time raising the issue of apportionment and asking the matter be remanded to apply the new apportionment law (SB 899). The WCJ recommended reconsideration be denied because defendants did not raise apportionment as an issue until reconsideration. The WCAB denied reconsideration. The court of appeal granted the writ and remanded to consider the new apportionment law (SB 899. The court did not explain the reason for its decision. We therefore do not know if the court of appeal felt that under the new law and its wording that raising permanent disability also raises the issue of apportionment because they are tied together or the court did not deal with this issue just deciding the new apportionment law applies.

B. Labor code Section 4663 apportionment to causation:

1. Apportionment of permanent disability shall be based on causation.
2. 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. The 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. 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.
3. 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.
4. 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.
5. An employee who claims an industrial injury shall, upon request, disclose all previous permanent disabilities or physical impairments.

C. Labor Code Section 4664 prior award of PD.

1. 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.

2. 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.

D. Labor Code Section 4664 Accumulation of PD:

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.
2. 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
 - h. all other systems or regions of the body not listed in subparagraphs(a) to (f), inclusive.
3. 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.

E. Effective Dates:

1.. Scheftner v. Rio Linda School District 69CCC 1281 (En Banc): The Board held that on the issue of which apportionment law to apply submission orders and orders closing discovery, that issued prior to the enactment of SB 899 on April 19, 2004, are "existing" orders that cannot be reopened due to the prohibition set forth in Section 47. The Board also hold that absent existing orders as so defined the amendments, additions, or repeals of SB 899 apply prospectively on or after April 19, 2004, to all cases, regardless of the date of injury, unless otherwise specified in SB 899.

If there was a submission order or an order closing discovery (Final MSC) that issued prior to enactment of SB 899 (4-19-04) the existing orders cannot be reopened due to the prohibition in set forth in section 47 and the apportionment law in effect prior to enactment applies. Absent and existing submission order or order closing discovery SB 899 applies

prospectively on or after April 19, 2004, to all cases, regardless of date of injury, unless otherwise specified in SB 899. The board rejected the argument that the statutes only applies to injuries occurring on or after date of enactment based on the language of section 47. The board concluded if the term “prospectively” meant the statutes only applied to injuries occurring on or after the date of enactment it would stand in absolute contradiction to the next phrase of section 47, “regardless of date of injury.” The board concluded that because of this contradiction, the legislative language is neither “clear” nor “unambiguous.”

The decision was 5-2. The dissent would conclude that a submission order or an order closing discovery would not be of sufficient substance to prevent the application of SB 899.

2. Kleemann vs. WCAB (Department of Justice)(70 CCC133)

Gregory Kleemann, claimed industrial injuries from work as a special agent for the State of California. At trial the parties raised the issue of apportionment. After his claim was tried and submitted to the workers’ compensation administrative law judge for a decision the Legislature enacted Senate Bill (S.B.) 899 and required apportionment based on causation under new Labor Code sections 4663 and 4664.

The WCJ vacated submission to address the new apportionment requirements. Kleemann petitioned Workers’ Compensation Appeals Board for a ruling that new Labor Code sections 4663 and 4664 did not apply but the WCAB remanded to the WCJ for a final decision.

Kleemann contended before the court of appeal that new Labor Code sections 4663 and 4664 are inapplicable because his injuries preceded enactment of S.B. 899 and the Legislature did not intend, and could not legally require, retroactive application of those provisions. The Court of Appeal concluded that the Legislature intended new Labor Code sections 4663 and 4664 to apply to pending cases such as Kleemann’s, prospectively from the date of enactment of S.B. 899, regardless of the date of injury. Accordingly, the decision of the WCAB was annulled and the matter was remanded for further proceedings consistent with their opinion.

The Court of Appeal first found that new Sections 4663 and 4664 Creates both Substantive and Procedural Changes in the law.

The amendments to the Labor Code at issue in this case make both procedural and substantive changes to the statutory scheme governing workers’ compensation. New section 4663, subsections (b), (c) and (d) are primarily procedural changes. New subsections (b) and (c) address physician reporting requirements regarding apportionment, while subsection (d) instructs injured workers to disclose prior permanent disability or impairment upon request. These subsections mainly concern how or what to do, and are not substantive changes in existing rights,

compensation or liability. The portion of this statute that affects procedural and not substantive rights may be applied to pending cases without further analysis, as it is applied prospectively to procedures that subsequently arise.

In contrast, new sections 4663, subsection (a) and 4664 are primarily substantive changes. Permanent disability is now apportioned on the basis of causation, with employer's liability limited to the "percentage of permanent disability directly caused by the injury arising out of and occurring in the course of employment". (New section 4664, subsection (a).) Under former section 4663, permanent disability from the industrial "lighting up" of a pre-existing non-disabling disease process could be compensable. Liability for compensation may now be changed or even eliminated where permanent disability is caused by a prior non-disabling condition or has been previously awarded. Thus, apportionment based on causation under new sections 4663, subsection (a) and 4664 is a substantive change.

With respect to substantive changes, new legislation is generally applied prospectively unless it is clear from the statutory language or extrinsic sources that the Legislature intended retroactive application. Prospective application is also indicated if the statute is ambiguous. Here the court indicated the at least as to the portion of the statutes changing substantive rights, determine whether the Legislature intended retroactive application.

In the opinion of the court the Legislature Intended New Sections 4663 and 4664 to Apply to Pending Cases. The court stated that Section 47 Expresses the Legislature's Intent. Section 47 unambiguously states that any amendment, addition or repeal under S.B. 899 applies prospectively from the date of enactment, regardless of the date of injury, unless otherwise specified. With respect to new sections 4663 and 4644, there is no provision specifying any different treatment. Thus, the statutory language literally includes the injuries claimed by Kleemann, whether characterized as retroactive application under Aetna Casualty or prospective under Section 47.

Kleemann argues that the language of Section 46 is the Legislature's expression that retroactive application is intended, which would be unnecessary if all provisions of S.B. 899 are applied retroactively under the prospective language of Section 47. However, the difference in language reflects the fact that Sections 46 and 47 apply differently. Section 46 eliminates the treating physician's presumption of correctness in all cases, even if the presumption arose before enactment of S.B. 899. Therefore, any effect on collateral rights or obligations must be determined as if the presumption had never been in effect. In contrast, the language in Section 47 indicates that other statutory changes such as apportionment based on causation will apply only to pending cases as of the date of enactment of S.B. 899. As a result, the retroactive repeal in Section 46 is not superfluous to the provisions of Section 47. In any

event, the Legislature's intent is clearly stated in Section 47 and includes Kleemann's injuries under the analysis of Aetna Casualty and Graczyk.

Section 47 also provides that amendments, additions or repeals made by S.B. 899 "shall not constitute good cause to reopen or rescind, alter, or amend any existing order, decision or award". However, there is no such "existing order, decision or award" in this case.

Generally, statutory rights end during litigation with repeal or amendment of the statute, unless appeals were exhausted and there is a final judgment. We conclude that the Legislature intended the statutory language in Section 47 to be consistent with this final judgment rule.

Reopening in workers' compensation generally refers to reopening orders, decisions or awards for new and further disability under section 5410. Language regarding good cause to rescind, alter, or amend incorporates similar language of good cause needed under the WCAB's continuing jurisdiction to rescind, alter, or amend any order, decision, or award under sections 5803 and 5804. Sections 5410, 5803 and 5804 normally apply to orders, decisions or awards that are beyond the reconsideration period under sections 5900 et seq., or where appeals have been exhausted and a decision is final and no longer pending.

Sections 5410, 5803 and 5804 do not apply in this matter. As indicated by the WCAB, Kleemann has the ability to petition for reconsideration of the final decision by the WCJ under sections 5900 et seq. In addition, applying apportionment under new sections 4663 and 4664 does not in this case reopen, rescind, alter or amend a previous "existing order, decision, or award" of permanent disability. There is no reimbursement of previously awarded compensation under the new statutes, Kleemann petitioned to reopen the Stipulations, and rehabilitation from permanent disability under Robinson and "lighting up" a preexisting nondisabling disease process are questions of fact under former law and not vested rights. Therefore, Kleemann's claims are still pending and not final judgments, and sections 5410, 5803 and 5804 are not relevant. Consequently, application of S.B. 899 is not precluded by Section 47.

Public Policy Did Not Preclude application of New Sections 4663 and 4664. Kleemann also argues that application of new sections 4663 and 4664 will require further litigation of apportionment under new rules, as well as additional medical reports or discovery. He asserts that imposition of such delays and costs is contrary to the expeditious and inexpensive resolution of workers' compensation claims required by the California Constitution.

While further litigation under new rules and discovery may be required, there is no evidence in this record of the extent of delay or cost that could allow us to determine that these provisions violate section 4 of Article XIV of the California Constitution. The court indicated they cannot decide this issue as an abstract principle. The balance between long term savings in time and money, and enactment of additional procedural complexities, is, in the first instance, a policy consideration

within the province of the Legislature.

In denying removal, the WCAB reasoned that there is no substantial prejudice or irreparable harm in requiring Kleemann to petition for reconsideration of the WCJ's final decision whether new sections 4663 and 4664 apply. The court concluded that the WCAB should have decided the issue. Rights end with a statute's repeal during litigation, and the tribunal is obligated to apply the laws in effect. As the court explained new sections 4663 and 4664 became applicable upon enactment of S.B. 899, before the WCAB denied removal. Requiring litigation of issues basic to liability of compensation, under what may turn out to be incorrect law, invites avoidable delays, costs and error, and can create substantial prejudice and irreparable harm.

The Court of Appeal held Apportionment was not Moot. Kleemann also contended that apportionment was moot because Dr. Ainbinder addressed causation of the right knee disability and section 3212 precludes apportionment of heart disability for public safety personnel. However, Dr. Ainbinder apparently based apportionment on Kleemann's alleged recovery from his previous industrial right knee injury and permanent disability, and on former apportionment statutes. Given that the court was remanding the matter to apply apportionment under new sections 4663 and 4664, they also instructed the WCAB to determine the need for additional discovery and application of section 3212.

The decision of the WCAB was annulled and the matter was remanded for further proceedings consistent with the courts opinion.

3. Marsh v. WCAB (70 CCC 787) : In march 2001 the parties stipulated to an award of 46% PD based on an AME. Marsh petitioned to reopen. On April 9, 2004 (before SB 899, April 19 effective) WCJ issued F and A based same AME increasing PD to 70% and no basis for apportionment based on law in effect 4-9-05. Defendant filed a timely petition for reconsideration on issue of apportionment following April 19, 204 arguing SB 899 applied. WCAB granted reconsideration and remanded the matter for WCJ to consider weather new apportionment should apply. Applicant filed a writ. The court citing Kleemann stated that a WCAB determination is final for purposes of considering apportionment under SB 899 once the WCAB has issued a final judgment and the appellate process has been exhausted. The court rejected reliance on the WCAB's en banc decision in Scheftner. The court concluded the WCAB's decision to remand the matter to consider whether applicants disability award should be apportioned under new sections 4663 and 4664 enacted by SB 899 is affirmed. (question applicant petitioned to reopen PD, is apportionment a separate issue and does the WCAB have jurisdiction, this issue was not raised)

4. c. Petitions to reopen and new apportionment law: *National Staff Network v. WCAB (Mann-Harrison)* (certified for nonpublication) (33 CWCR 295): Applicant filed a workers compensation claim in 1995. The applicant and the defense evaluators found that the applicant had a congenital condition that was aggravated by the work injury. The law of apportionment at provided that apportionment to pathology was not allowed. The parties stipulated to an award of 26% PD without apportionment. Applicant filed a petition to reopen. At the hearing on the petition to reopen, in 2001, the WCJ found the applicant TD and in need of treatment and declined to rule on PD, but stated the congenital conditions were not apportionable. In December of 2003 the WCJ again declined to rule on PD an indicated the congenital condition was not a basis for apportionment. The WCJ directed the parties to use an AME. The AME found the applicant not capable of gainful employment and apportioned 85% to the congenital condition. The WCJ in December 2004 awarded 100% PD without apportionment applying the pre SB 899 apportionment law. The WCAB denied reconsideration. The court of appeal indicated that SB 899 allowed apportionment to causation. The court pointed out that under *Kleeman* the new apportionment law applied to all cases still pending on April 19, 2004, except those finally decided but still subject to the continuing jurisdiction. In this case the court indicated applicants petition to reopen PD was still pending on April 19, 2004 and was therefore subject to the new apportionment law. The WCJ should have reconsidered the apportionment decision under the original stipulation based on the change in law and the new AME report. The court indicated that the language in SB 899 that provided that changes under SB 899 shall not constitute good cause to reopen, rescind, alter or amend any existing order, decision or award showed the legislature intended to exempt only matters that had proceeded to final judgment before April 19, 2004. Thus in this case the WCJ erred in finding that apportionment could only be decided on the record closed prior to the stipulated Findings and award. The court indicated that once the petition to reopen was filed the judgment was not final and the SB 899 apportionment law must be applied. The matter was reversed and remanded for further proceedings consistent with the decision. The court did not decide how to apply the new law. If the applicant is now 100% disabled with 85% industrial which is 15% and the stipulation is for 26% do you find no new and further PD or do you take 15% of the increase from 26% to 100% PD and add that to the 26%.

5. *Rio Linda Union School District v. WCAB (Scheftner)* (2005): follows *Kleemann* and *Marsh* and explicitly overrules *Scheftner (en banc)*.

F. The sections on apportionment contained in SB 899 do not affect the determination of compensability of an industrial injury pursuant to sections 3600 or section 3208.3.

1. *Reyes v. Hart Plastering; Fremont, CIGA*; (significant Panel decision)(70 CCC 223):

The WCJ found that applicant did not sustain an industrial injury. The applicant filed a petition for reconsideration arguing that although an idiopathic seizure is not compensable, the injuries sustained hitting the ground at work is compensable. The WCJ in his report on reconsideration opined that Labor code Section 4663 (Amended by SB 899) requires a physician to address the issue of apportionment to causation, that applicants injury was precipitated by his preexisting seizure disorder and therefore should be denied because applicants condition was caused by the pre-existing seizure disorder. The WCAB concluded that sections 4663 and 4664, which concern apportionment of permanent disability, have not affected the statutes governing the determination of whether an injury arises out of and occurs in the course of employment, i.e., sections 3600 and 3208.3, or the case law interpreting those statues. Labor Code Sections 4663 and 4664 enact new standards for the determination of the liability of the employer for permanent disability. They call into question the continuing viability of the case law interpreting the repealed apportionment statutes. But the matter of new sections 4663 and 4664 is the same subject matter of former sections 4750, 4750.5 and 4663. These sections do not affect the determination of compensability of an industrial injury pursuant to sections 3600 or section 3208.3. Therefore, they are not relevant to the issue of whether applicant's injury arose out and occurred in the course of employment. The board indicated the leading case on idiopathic conditions resulting in an injury from the fall is the Supreme Court case of Gideon and held such injuries are compensable. The board indicted the case was on all fours with Gideon and therefore found the case compensable.

G. Apportionment to Causation:

1. Escobedo vs. Marshals and CAN Insurance company, (2005) (WCAB *en banc*): Applicant sustained injury to her left knee on October 28, 2002, when she fell at her job as a sales associate at retail clothing store. As a compensable consequence of that injury, she also developed right knee problems. Applicant testified that, prior to her fall, she had never had any knee problems or limitations, and she had never consulted a doctor about her knees. Although her treating physician, Dr. Cronin, had diagnosed her as having arthritis about ten years earlier, he did not impose any work restrictions as a consequence of her arthritis.

Applicant was treated for her industrial injury by Daniel Woods, M.D., who performed arthroscopic surgery on February 12, 2003, to repair the medial meniscus in the left knee. On June 5, 2003, Dr. Woods prepared a report declaring applicant to be permanent and stationary with bilateral knee disability resulting in a limitation to semi-sedentary work. With regard to the issue of apportionment, Dr. Woods noted that applicant had no history of any previous problems with her left knee, and thus he concluded that all of her disability was attributable to her industrial injury.

Defendant's qualified medical evaluator ("QME"), Daniel Ovardia, M.D.,

evaluated applicant on March 15, 2004 and prepared a report on that date. He noted that a pre-surgical MRI of applicant's left knee revealed degenerative changes, in addition to the medial meniscus tear, and that post-surgical x-rays showed osteoarthritis in both knees. Dr. Ovadia concluded, based on applicant's bilateral knee condition: that she was limited to four hours of weight bearing in an eight-hour day; that she should avoid very heavy work; that she should avoid more than occasional kneeling, squatting, or walking on uneven ground; that she should avoid stair, incline and ladder climbing; and that she is totally precluded from running or jumping. With regard to apportionment, Dr. Ovadia stated:

Ms. Escobedo's left knee residuals are directly related to the October 28, 2002 injury. The Applicant developed right knee problems as a derivative of the left knee and not as a result of any subsequent cumulative trauma. In my opinion, there is a medically reasonable basis for apportionment given the trivial nature of the injury that occurred on October 28, 2002 and the almost immediate onset of right knee symptoms that occurred shortly after the left knee injury. The Applicant has obvious, significant degenerative arthritis in both knees and essentially worked in a fairly congenial environment. Although denying any prior problems with her knees, it is medically probable that she would have had fifty percent of her current level of knee disability at the time of today's evaluation even in the absence of her employment at the retail store. Dr. Woods did not take this into account when he discussed the issue of apportionment. Furthermore, when he saw the Applicant, he thought she had a lateral meniscus tear which was clearly not the case based on his operative findings (leading edge tears are of no clinical significance and would not have accounted for the Applicant's pathology and disability which relate to the medial and patellofemoral compartments).

Dr. Woods responded to Dr. Ovadia's conclusions on May 22, 2004, after he re-examined applicant. Dr. Woods found no basis for apportionment, stating:

The patient prior to her industrial injury of October 28, 2003, was not suffering from any disability relative to her knees. She indicates that she was able to walk in unlimited fashion and had been able to work. She clearly has disability at this time which I have, in the absence of previously documented disability, attributed to her industrial injury.

The WCJ determined that overall, applicant's bilateral knee disability rated 53%, based on the factors of disability outlined in Dr. Ovadia's March 14, 2004 report. The WCJ, however, also apportioned 50% of applicant's permanent disability to non-industrial causation under section 4663, relying on Dr. Ovadia's opinion that one-half of the disability was caused by her preexisting degenerative arthritis. The WCJ also found that the provisions of Labor Code section 4663, as enacted by Senate Bill 899 ("SB 899") and effective on April 19, 2004 applied in making this 50% apportionment determination.

In her petition for reconsideration, applicant contends in substance: (1) new section 4663 cannot be retroactively applied to cases where the date of injury was prior to the effective date of SB 899; (2) new section 4663 does not authorize the apportionment of disability to pathology in the absence of express legislative intent; and (3) the medical report relied upon by the WCJ to justify apportionment to applicant's preexisting arthritis does not constitute substantial medical evidence because it fails to explain in adequate detail how that condition caused permanent disability.¹

Defendant filed an answer to applicant's petition, and the WCJ prepared a Report and Recommendation on Petition for Reconsideration ("Report") recommending that the petition be denied.

The WCAB en banc found as follows:

1. Section 4663(a)'s statement that the apportionment of permanent disability shall be based on "causation" refers to the causation of the permanent disability, not causation of the injury, and the analysis of the causal factors of permanent disability for purposes of apportionment may be different from the analysis of the causal factors of the injury itself.

2. Section 4663(c) not only prescribes what determinations a reporting physician must make with respect to apportionment, it also prescribes what standards the WCAB must use in deciding apportionment; that is, both a reporting physician and the WCAB must make determinations of what percentage of the permanent disability was directly caused by the industrial injury and what percentage was caused by other factors.

3. Under section 4663, the applicant has the burden of establishing the 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.

4. Apportionment of permanent disability caused by "other factors both before and subsequent to the industrial injury, including prior industrial injuries," may include not only disability that could have been apportioned prior to SB 899, but it also may include disability that formerly could not have

been apportioned (e.g., pathology, asymptomatic prior conditions, and retroactive prophylactic work preclusions), provided there is substantial medical evidence establishing that these other factors have caused permanent disability.

5. Even where a medical report “addresses” the issue of causation of the permanent disability and makes an “apportionment determination” by finding the approximate relative percentages of industrial and non-industrial causation under section 4663(a), the report may not be relied upon unless it also constitutes substantial evidence.

The WCAB first briefly addressed applicant’s contention that new section 4663 does not apply to injuries sustained before the April 19, 2004 effective date of SB 899. That issue has been resolved by *Kleemann v. Workers’ Comp. Appeals Bd.* (2005) 127 Cal.App.4th 274 [70 Cal.Comp.Cases133], which held that the procedural and substantive aspects of new section 4663 apply to all cases that were pending as of the date of SB 899’s enactment on April 19, 2004, as here.

Section 4663 as amended by SB 899 provides:

(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.

Also, newly enacted section 4664(a) states:

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.”

Section 4663(a)’s Statement That The Apportionment Of Permanent Disability Shall Be Based On “Causation” Refers To The Causation Of The Permanent Disability, Not Causation Of The Injury, And The Analysis Of The Causal Factors Of Permanent Disability For Purposes Of Apportionment May Be Different From The Analysis Of The Causal Factors Of The Injury.

Section 4663(a) states that “[a]pportionment of permanent disability shall be based on causation.” The plain reading of “causation” in this context is causation *of the permanent disability*. This reading is consistent with other provisions of section 4663 and 4664. That is: (1) section 4663(b) provides that a physician’s report on permanent disability shall address “the issue of *causation of the permanent disability*,” (2) section 4663(c) provides that a physician’s report shall find “what approximate percentage of the *permanent disability was caused* by the direct result of injury ... and what approximate percentage of the *permanent disability was caused* by other factors,” and (3) section 4664(a) provides that an employer “shall only be liable for the percentage of *permanent disability* directly *caused* by the injury” (Emphases added.)²

The issue of the causation of permanent disability, for purposes of apportionment, is distinct from the issue of the causation of an injury. (See *Reyes v. Hart Plastering* (2005) 70 Cal.Comp.Cases 223 (Significant Panel Decision).) Thus, the percentage to which an applicant’s *injury* is causally related to his or her employment is not necessarily the same as the percentage to which an applicant’s *permanent disability* is causally related to his or her injury. The analyses of these issues are different and the medical evidence for any percentage conclusions might be different.

Section 4663(c) Not Only Prescribes What Determinations A Reporting Physician Must Make With Respect To Apportionment, It Also Prescribes What Standards The WCAB Must Use In Deciding Apportionment; That Is, Both A Reporting Physician And The WCAB Must Make Determinations Of What Percentage Of The Permanent Disability Was Directly Caused By The Industrial Injury And What Percentage Was Caused By Other Factors.

Section 4663(c) provides, in part:

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.

Section 4663(c) refers only to *a reporting physician's* duty to make an apportionment determination by finding what approximate percentage of the permanent disability was caused by the direct result of the injury and what approximate percentage was caused by other factors. The WCAB concluded the same standards apply to the *adjudication* of permanent disability and apportionment, i.e., the WCAB must find what percentage of the permanent disability was directly caused by the injury and what percentage was caused by other factors. That conclusion was consistent both with the statement in section 4663(a) that “[a]pportionment of permanent disability shall be based on causation” and with the statement in section 4664(a) that “[t]he employer shall only be liable for the percentage of permanent disability directly caused by the injury.”

The Applicant Has The Burden Of Establishing The Percentage Of Permanent Disability Directly Caused By The Industrial Injury, While The Defendant Has The Burden Of Establishing The Percentage Of Disability Caused By Other Factors.

Under SB 899, the applicant continues to have the initial burden of establishing an industrial injury by a preponderance of the evidence. (Lab. Code §§3202.5, 5705; *McAllister v. Workers' Comp. Appeals Bd.* (1968) 69 Cal.2d 408, 416 [33 Cal.Comp.Cases 660].) In addition, he or she still has the burden of proving, by a preponderance of the evidence, both the overall level of permanent disability and that at least some of this permanent disability was industrially-caused. (Lab. Code, §§3202.5, 5705; see *Peter Kiewit Sons v. Industrial Acc. Com. (McLaughlin)* (1965) 234 Cal.App.2d 831, 838 [30 Cal.Comp.Cases 188]; *Sweeney v. Industrial Acc. Com.* (1951) 107 Cal.App.2d 155, 158-159 [16 Cal.Comp.Cases 264].)

In accordance with section 4663(c), however, they concluded the applicant now also has the burden of establishing the approximate percentage of permanent disability directly caused by the industrial injury. The assignment

of this burden to the applicant is consistent with Labor Code section 5705, which provides in relevant part: “The burden of proof rests upon the party ... holding the affirmative of the issue.” It is also consistent with Evidence Code section 500, which provides that “a party has the burden of proof as to each fact the existence or nonexistence of which is essential to the claim for relief or defense that he is asserting.” Because it is the applicant who claims permanent disability benefits, and because the applicant can be compensated only for industrially-caused permanent disability, it is incumbent upon him or her to present evidence establishing the percentage of permanent disability directly caused by the industrial injury.

The conclude, in accordance with section 4663(c), that the defendant has the burden of establishing the approximate percentage of permanent disability caused by factors other than the industrial injury. Again, the assignment of this burden to the defendant is consistent with Labor Code section 5705 and Evidence Code section 500. It is also consistent with the longstanding principle that, because it is the defendant that benefits from a finding of apportionment, it bears the burden of demonstrating that apportionment is appropriate. (Pullman Kellogg v. Workers’ Comp. Appeals Bd. (Normand) (1980) 26 Cal.3d 450, 456 [45 Cal.Comp.Cases 170].)

These burdens apply whether there is one reporting physician (e.g., an agreed medical evaluator or a panel QME) or more than one reporting physician. Where a dispute arises on the issue of apportionment to industrial or non-industrial causation, a party’s options include but are not limited to: (1) doing nothing, based on a belief that the assessment of the relative industrial and non-industrial causation percentages by the physician(s) upon whom it intends to rely is the most persuasive substantial medical evidence; (2) obtaining a supplemental report to clarify or bolster the percentage causation determination of the physician upon who it intends to rely or, if there is more than one physician, to rebut the opposing physician’s percentage causation determinations; or (3) cross-examining the physician(s) by deposition for the same reasons.

If the reporting physicians disagree regarding the overall level of permanent disability and/or regarding the approximate percentages of industrially and non-industrially caused permanent disability, or if a party disagrees with the opinion of a reporting physician, then the WCJ (or the Appeals Board) must weigh the evidence appropriately and determine these issues based on the most persuasive substantial medical evidence.

The criteria that a medical opinion must meet in order to constitute substantial evidence on the issue of the overall level of permanent disability and, in particular, on the issue of the relative percentages of industrial and non-industrial causation will be discussed below, in Section II-E.

Apportionment Of Permanent Disability Caused By “Other Factors Both Before And Subsequent To The Industrial Injury, Including Prior Industrial Injuries,” May Include Not Only Disability That Could Have Been Apportioned Prior To SB 899, But It Also May Include Disability That Formerly Could Not Have Been Apportioned (e.g., Pathology, Asymptomatic Prior Conditions, And Retroactive Prophylactic Work Preclusions), Provided There Is Substantial Medical Evidence Establishing That These Other Factors Have Caused Permanent Disability.

Prior to SB 899, the apportionment of permanent disability was based largely on the grounds specified in former sections 4663, 4750, and 4750.5. (*Fresno Unified School Dist. v. Workers’ Compensation Appeals Bd. (Humphrey)*, *supra*, 84 Cal.App.4th at p. 1305; *Franklin v. Workers’ Comp. Appeals Bd.* (1978) 79 Cal.App.3d 224, 236 [43 Cal.Comp.Cases 310].)

SB 899 repealed former sections 4663, 4750, and 4750.5 and it enacted new sections 4663 and 4664. (Stats. 2004, ch. 34, §§34, 35.) There is no doubt that, in taking this action, the Legislature intended to significantly change the law relating to apportionment of permanent disability. (See *People v. Mendoza* (2000) 23 Cal.4th 896, 916 (the repeal of a prior statute, together with enactment of a new law on the same subject with important changes, strongly suggests the Legislature intended to change the law); *In re Lance W.* (1985) 37 Cal.3d 873, 887 (general rule is that a new enactment reflects a legislative purpose to change existing law); *Mosk v. Superior Court* (1979) 25 Cal.3d 474, 493 (a substantial change in the language of a statute by an amendment indicates an intention to change its meaning).)

The WCAB concluded that, in repealing former sections 4663, 4750, and 4750.5 and in adopting new sections 4663 and 4664(a), the Legislature intended to expand rather than narrow the scope of legally permissible apportionment. This legislative intent is established not only by its declaration in adopting SB 899, but also by the language of section 4663 itself. That is, section 4663(c) provides for apportionment based on “what approximate percentage of the permanent disability was caused by *other factors both before and subsequent to the industrial injury, including prior industrial injuries.*” (Emphasis added.) The language stating that apportionment may be based on “other factors both before and subsequent to the industrial injury” does not limit what non-industrial factors may be considered as a cause of permanent disability purposes of apportionment. Thus, this language appears to require apportionment based on *any* “other [non-industrial] factor,” either pre- or post-injury. Similarly, because section 4663(c) states that the non-industrial factors are *inclusive* of “prior industrial injuries,” this language appears to reflect a legislative intent to enlarge the range of factors that may be considered in determining the cause of permanent disability. The word “including” is ordinarily a word of enlargement, not of limitation. (*Shell Oil Co. v. Winterthur Swiss Ins. Co.* (1993) 12 Cal.App.4th 715, 749; *Patricia J. v. Rio Linda Union Sch. Dist.* (1976) 61 Cal.App.3d 278, 286; *Estate of Johnson* (1970) 5 Cal.App.3d 173, 180.)

Because the language of section 4663 does not limit the types of “other factors” that may be considered as a non-industrial cause of permanent disability, then the “other factors” may include disability that was apportionable prior to SB 899, i.e., the natural progression of a non-industrial condition or disease, a preexisting disability, or a post-injury disabling event. (See former §§4663, 4750, 4750.5.) In addition, the “other factors” now may include pathology, asymptomatic prior conditions, and retroactive prophylactic work preclusions, provided there is substantial medical evidence establishing that these other factors have caused permanent disability.

In this case, the issue is whether an apportionment of permanent disability can be made based on the preexisting arthritis in applicant’s knees. Under pre-SB 899 apportionment law, there would have been a question of whether this would have constituted an impermissible apportionment to pathology or causative factors. (E.g., *Pullman Kellogg v. Workers’ Comp. Appeals Bd. (Normand)*, *supra*, 26 Cal.3d at pp. 454-455, 456 [at fn. 4]; *King v. Workers’ Comp. Appeals Bd.*, *supra*, 231 Cal.App.3d 1640, 1647 [56 Cal.Comp.Cases 408]; *Duthie v. Workers’ Comp. Appeals Bd.*, *supra*, 86 Cal.App.3d at p. 728.) Under SB 899, however, apportionment now can be based on non-industrial pathology, if it can be demonstrated by substantial medical evidence that the non-industrial pathology has caused permanent disability.

Accordingly, section 4663(a) and (c) – as well as section 4664(a) – give renewed viability to cases such as *Baker v. Industrial Acc. Com.* (1966) 243 Cal.App.2d 380 [31 Cal.Comp.Cases 228]. In *Baker*, the injured employee’s lung conditions, which had resulted in permanent total disability before apportionment, were caused both by industrial factors (asthma due to allergic reactions to wheat and rye flour at work) and non-industrial factors (including emphysema due to a 40-year history of smoking at least one pack of cigarettes a day). The Court of Appeal held that if an employee “suffers from a disability which derives from both industrial and non-industrial causes,” then “[t]he employer is liable only for that part of the overall disability which is reasonably attributable to industrial causation.” (*Baker v. Industrial Acc. Com.*, *supra*, 243 Cal.App.2d at p. 390.) Thus, the Court approved a finding that the employee was entitled to only a 55% permanent disability award, after apportionment of 45% of the disability to the non-industrial causes.

Some 14 years later, the Supreme Court expressly disapproved of *Baker* because its apportionment to causation did not comport with subsequently developed legal principles of apportionment under former section 4663. (See *Pullman Kellogg v. Workers’ Comp. Appeals Bd. (Normand)*, *supra*, 26 Cal.3d at p. 456 [at fn. 4].) The Supreme Court implicitly suggested that, had *Baker* been decided under former 4663 using these principles, apportionment would not have been proper because it is the disability resulting from, rather than a cause of, a

disease which is the proper subject of apportionment, and because there was no evidence in *Baker* that the employee's smoking would have caused any disability had he not been exposed to substances at work. (*Pullman Kellogg v. Workers' Comp. Appeals Bd. (Normand)*, *supra*, 26 Cal.3d at pp. 454-455 & 456 [at fn. 5].)

However, old section 4663 was repealed by SB 899, and new section 4663 allows apportionment to causation, giving *Baker* and similar cases new life. Applicant asserts that because SB 899 did not amend section 4751, relating to benefits payable by the Subsequent Injuries Benefits Trust Fund ("SIF"), this reflects a legislative intent that pathology is not one of the "other factors" upon which apportionment to non-industrial causes can be based. In essence, applicant asserts that if apportionment based on pathology were allowed, this would cause a flood of SIF benefit claims to be filed under section 4751. This is because, in applicant's view, apportionment to pathology would decrease the percentage of disability for which the employer is responsible, while the overall level of disability would remain unchanged, leaving the SIF responsible for the difference. The WCAB disagreed.

Even Where A Medical Report "Addresses" The Issue Of Causation Of The Permanent Disability And Makes An "Apportionment Determination" By Finding The Approximate Relative Percentages Of Industrial And Non-Industrial Causation Under Section 4663(a), The Report May Not Be Relied Upon Unless It Also Constitutes Substantial Evidence. Section 4663 sets out various requirements for doctors' reports on the issue of apportionment, including that each report must "address" the issue of causation of the permanent disability and must make an "apportionment determination" by finding the approximate relative percentages of permanent disability directly caused by the industrial injury and that caused by other factors.

Nevertheless, the mere fact that a report "addresses" the issue of causation of the permanent disability and makes an "apportionment determination" by finding the approximate relative percentages of industrial and non-industrial causation does not necessarily render the report one upon which the WCAB may rely. This is because it is well established that any decision of the WCAB must be supported by substantial evidence. (Lab. Code, §5952(d); *Lamb v. Workmen's Comp. Appeals Bd.* (1974) 11 Cal.3d 274, 281 [39 Cal.Comp.Cases 310]; *Garza v. Workmen's Comp. Appeals Bd.* (1970) 3 Cal.3d 312, 317 [35 Cal.Comp.Cases 500]; *LeVesque v. Workmen's Comp. Appeals Bd.* (1970) 1 Cal.3d 627, 635 [35 Cal.Comp.Cases 16].)

In this regard, it has been long established that, in order to constitute substantial evidence, a medical opinion must be predicated on reasonable medical probability. (*McAllister v. Workmen's Comp. Appeals Bd.* (1968) 69 Cal.2d 408, 413, 416-417, 419 [33 Cal.Comp.Cases 660]; *Travelers Ins. Co. v. Industrial Acc. Com. (Odello)* (1949) 33 Cal.2d 685, 687-688 [14 Cal.Comp.Cases 54]; *Rosas v. Workers' Comp. Appeals Bd.* (1993) 16 Cal. App.4th 1692, 1700-1702, 1705 [58

Cal.Comp.Cases 313].) Also, a medical opinion is not substantial evidence if it is based on facts no longer germane, on inadequate medical histories or examinations, on incorrect legal theories, or on surmise, speculation, conjecture, or guess. (*Heggin v. Workmen's Comp. Appeals Bd.* (1971) 4 Cal.3d 162, 169 [36 Cal.Comp.Cases 93]; *Place v. Workmen's Comp. Appeals Bd.* (1970) 3 Cal.3d 372, 378-379 [35 Cal.Comp.Cases 525]; *Zemke v. Workmen's Comp. Appeals Bd., supra*, 68 Cal.2d at p. 798.) Further, a medical report is not substantial evidence unless it sets forth the reasoning behind the physician's opinion, not merely his or her conclusions. (*Granado v. Workers' Comp. Appeals Bd.* (1970) 69 Cal. 2d 399, 407 (a mere legal conclusion does not furnish a basis for a finding); *Zemke v. Workmen's Comp. Appeals Bd., supra*, 68 Cal.2d at pp. 799, 800-801 (an opinion that fails to disclose its underlying basis and gives a bare legal conclusion does not constitute substantial evidence); see also *People v. Bassett* (1968) 69 Cal.2d 122, 141, 144 (the chief value of an expert's testimony rests upon the material from which his or her opinion is fashioned and the reasoning by which he or she progresses from the material to the conclusion, and it does not lie in the mere expression of the conclusion; thus, the opinion of an expert is no better than the reasons upon which it is based).)

Moreover, in the context of apportionment determinations, the 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. (*Ashley v. Workers' Comp. Appeals Bd., supra*, 37 Cal.App.4th at pp. 326-327; *King v. Workers' Comp. Appeals Bd., supra*, 231 Cal.App.3d at pp. 1646-1647; *Ditler v. Workers' Comp. Appeals Bd., supra*, 131 Cal.App.3d at pp. 812-813.)

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 facts and on an adequate examination and history, and it must set forth reasoning in support of its conclusions.

For example, if a physician opines that approximately 50% of an employee's back disability is directly caused by the industrial injury, the physician must explain how and why the disability is causally related to the industrial injury (e.g., the industrial injury resulted in surgery which caused vulnerability that necessitates certain restrictions) and how and why the injury is responsible for approximately 50% of the disability.³ And, if a physician opines that 50% of an employee's back disability is caused by degenerative disc disease, the physician must explain the nature of the degenerative disc disease, how and why it is causing permanent

disability at the time of the evaluation, and how and why it is responsible for approximately 50% of the disability.

The WCAB applied these Principles To The Present Case as follows:

Here, the board concluded under section 4663 that 50% of applicant's permanent disability was caused by "other factors" consisting of preexisting degenerative arthritis in both knees, the WCJ relied upon the apportionment determination of defendant's QME, Dr. Ovadia. Dr. Ovadia opined that there is a "medically reasonable" basis for apportionment: (1) because of the "trivial nature" of applicant's October 28, 2002 left knee injury; (2) because of the almost immediate onset of right knee symptoms after that injury; and (3) because of the "obvious, significant degenerative arthritis in both knees" reflected in a pre-surgical MRI of applicant's left knee taken shortly after her October 28, 2002 injury and reflected in post-surgical x-rays. Dr. Ovadia also stated, "it is medically probable that she would have had fifty percent of her current level of knee disability at the time of today's evaluation even in the absence of her employment at Marshalls."

The WCJ was justified in concluding that Dr. Ovadia's opinion meets the standards of section 4663 and that it is substantial evidence. That is, it appears that Dr. Ovadia based his opinion on an adequate medical history, examination, and facts, and applicant's petition does not contend otherwise. Also, Dr. Ovadia's opinion is not speculative, and it sets forth the reasoning behind his conclusions. Further, he states his apportionment opinion in terms of reasonable medical probability. Moreover, he assesses the relative percentages of industrial and non-industrial causation based on the time of his evaluation of applicant. Finally, he makes his apportionment determination by finding the approximate percentage of permanent disability caused by "other factors," i.e., her preexisting degenerative arthritis in both knees. (Dr. Ovadia's finding that approximately 50% of applicant's permanent disability was caused by non-industrial factors necessarily implies a finding that 50% of her permanent disability was directly caused by the industrial injury.)

The WCAB recognize that Dr. Ovadia's March 15, 2004 report pre-dated the April 19, 2004 enactment of SB 899. Nevertheless, where a medical report is substantial evidence and meets all of the standards of section 4663, a WCJ or the Appeals Board may rely on it, even if it issued before SB 899's effective date.

Accordingly, The /WCAB will affirmed the WCJ's June 29, 2004 determination that applicant's bilateral knee injury entitles her to a 27% permanent disability award, because 50% of her permanent disability was caused by the preexisting non-industrial degenerative arthritis in both knees.

2. Apportionment to causations issues:

a. (Lighting Up) The issue of can you apportion to a case in which an industrial injury light up an underlying non disabling underlying condition was not covered by the *Escobedo* decision. In a footnote to *Escobedo* the WCAB wrote that they were aware of the principle that the employer takes the employee as it finds him or her, and that a person suffering from a preexisting disease or condition who is disabled by an industrial injury is entitled to compensation, even though the injury would not have adversely affected a normal person. (E.g., *Lamb v. Workmen’s Comp. Appeals Bd.* (1974) 11 Cal.3d 274, 282 [39 Cal.Comp.Cases 210]; *Zemke v. Workmen’s Compensation Appeals Bd.*, supra, 68 Cal.2d at pp. 796, 800; *Berry v. Workmen’s Comp. Appeals Bd.* (1968) 68 Cal.2d 786, 793 [33 Cal.Comp.Cases 352]; *Colonial Ins. Co. v. Industrial Acc. Com.* (Pedroza) 29 Cal.2d 79, 83-84 [11 Cal.Comp.Cases 266]; *Tanenbaum v. Industrial Acc. Com.* (1935) 4 Cal.2d 615, 617-618 [20 I.A.C. 390].) Accordingly, under pre-SB 899 law, to the extent that a subsequent industrial injury exacerbated, accelerated, aggravated, or “lit up” an applicant’s preexisting condition, the employer was liable for the resulting disability, without apportionment. (E.g., *Zemke v. Workmen’s Comp. Appeals Bd.*, supra, 68 Cal.2d at p. 796; *Berry v. Workmen’s Comp. Appeals Bd.*, supra, 68 Cal.2d at pp. 789-780; *Colonial Ins. Co. v. Industrial Acc. Com.* (Pedroza), supra, 29 Cal.2d at pp. 83-84; *Tanenbaum v. Industrial Acc. Com.*, supra, 4 Cal.2d at pp. 617-618.) In this case, however, there is no assertion that applicant’s preexisting arthritis was exacerbated or accelerated by her industrial injury. Accordingly, the WCAB did not and will not now address the continuing the validity of these principles in light of new sections 4663 and 4664(a).

b. Section 5500.5 was not changed by SB 899. In another footnote to *Escobedo* the WCAB wrote that the last paragraph of section 5500.5(a) also precludes the apportionment of permanent disability to any prior, uncompensated cumulative industrial trauma in a cumulative injury case. (*County of Los Angeles v. Workers’ Comp. Appeals Bd.* (Russell) (1987) 52 Cal.Comp.Cases 395 (writ den.); *The Burbank Studios v. Workers’ Comp. Appeals Bd.* (Hannifin) (1980) 45 Cal.Comp.Cases 670 (writ den.); *Hartford Accident and Indemnity Co. v. Workers’ Comp. Appeals Bd.* (Barrett) (1978) 43 Cal.Comp.Cases 858 (writ den.); see also *Flesher v. Workers’ Comp. Appeals Bd.* (1979) 23 Cal.3d 322, 324-327 [44 Cal.Comp.Cases 212] (although section 5500.5 limits the defendants who are liable for compensation, it does not limit the beginning date of the cumulative trauma for which the employee can plead and recover); *Rielli v. Workers’ Comp. Appeals Bd.* (1982) 134 Cal.App.3d 721, 725, fn. 3 [47 Cal.Comp.Cases 828] (same).) Section 5500.5(a) was not affected by SB 899. Although it still exists, it is not relevant to our present discussion.

c. Footnote to *Escobedo* states that Section 4663(c) refers to permanent disability “caused by the direct result of [the] injury,” while section 4664(a) refers

to permanent disability “directly caused by the injury.” We see no significant difference in the meaning of these phrases and we will treat them as being the same.

3. The cases on apportioning causation: The outcome of the cases since Escobedo turn on the facts of each case and is the medical report on apportionment substantial evidence and how well written the medical reports discuss apportionment. In this regard, it has been established that, in order to constitute substantial evidence, a medical opinion must be predicated on reasonable medical probability. Also, a medical opinion is not substantial evidence if it is based on facts no longer germane, on inadequate medical histories or examinations, on incorrect legal theories, or on surmise, speculation, conjecture, or guess. Further, a medical report is not substantial evidence unless it sets forth the reasoning behind the physician’s opinion, not merely his or her conclusions. A mere legal conclusion does not furnish a basis for a finding. An opinion that fails to disclose its underlying basis and gives a bare legal conclusion does not constitute substantial evidence. In *People v. Bassett* (1968) 69 Cal.2d 122, 141, 144 It was held that the chief value of an expert’s testimony rests upon the material from which his or her opinion is fashioned and the reasoning by which he or she progresses from the material to the conclusion, and it does not lie in the mere expression of the conclusion; thus, the opinion of an expert is no better than the reasons upon which it is based. Moreover, in the context of apportionment determinations, the 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. history, and it must set forth reasoning in support of its conclusions.

a. *Sherman v. Los Angeles Unified School district (BPD)*(33 CWR 300): The matter was referred to an AME on the issue of whether applicant’s rheumatoid arthritis was caused or aggravated by her work injury. The history shows the applicant was healthy in terms of her musculoskeletal system until her injury of 4-3-98. She had no problems with the shoulder, neck, or back before her injury of 4-3-98. She had a second injury in August or September 1998. The AME concluded that although the trauma did not cause the rheumatoid arthritis, it lit up this disorder in her, allowing it to emerge to be diagnosed, and then need for treatment of the rheumatoid process was recognized. At his deposition the AME indicated the physical traumas at work of 4-3-98 and 8-98 or 9-98 “lit up” the rheumatoid arthritis in the applicant. The WCJ found applicant sustained injury in the form of rheumatoid arthritis to various body parts and psyche resulting in permanent disability of 98% with no basis for apportionment. Defendants filed a petition for reconsideration. The board concluded that the central issue is whether the WCJ erred in not apportioning permanent disability to applicant’s rheumatoid arthritis, pursuant to LC 4663. The board panel concluded that they were not persuaded that the new law of apportionment under LC 4663 destroyed the principle that a compensable injury may result from the “lighting up” of an

underlying disease. Under such circumstances, it is necessary for the appeals Board to consider what disability was caused directly by the injury and by other factors. In this case the appeals Board that WCJ was correct that the AME medical opinion justifies the finding that applicant's injury was proximately caused by her employment. That is, the AME opined that although applicant's trauma did not cause the rheumatoid arthritis, it lit up the disease, allowing it to emerge and be diagnosed. Therefore the WCJ correctly found that the rheumatoid arthritis was proximately caused by the employment trauma. Proximate cause having been determined the next step the board stated was to analyze the issue of permanent disability and apportionment. In this case the issue is what permanent disability was caused by the rheumatoid arthritis injury and what percentage of the disability, if any, was caused by other factors. The board turned to the facts of this case and concluded the report of the AME report established it was medically reasonably probable that, although not scientifically certain, that the permanent disability attributable to applicants rheumatoid arthritis is not subject to apportionment under LC 4663 because the AME concluded that the industrial injury lit up the disease and the applicant had no illness recognizable as rheumatoid arthritis and no disability in her joints before the employment trauma and the that the work restrictions offered by him were caused by the rheumatoid arthritis, and that apportionment is entirely industrial. The Board denied reconsideration.

b. Ford v. Payless shoes (BPD 33 CWCR 250) Applicant injured her back while working for Payless shoes. No evidence was introduced to apportionment to non industrial causes. Defendants filed a petition for reconsideration on several issues including SB 899 passed and the matter should be referred back for trial to develop the record on the new apportionment law. The board indicated that nothing in the record indicated a basis for apportionment to any other factors. No medical evaluator indicated a basis for apportionment and so the board held it was not necessary to further develop the record. The board concluded the WCJ was correct in finding no basis for apportionment because the applicant has the burden of establishing the percentage of disability directly caused by the accident and the defendant has the burden of establishing the disability was caused by other factors.

c. Dorman v. Louisiana Pacific corporation (BPD)XN 0131182 and 83): Applicant sustained an admitted industrial injury to the low back on 2-7-2002. Applicant had low back surgery as a result of this injury. The applicant was examined by Dr. Cox who concluded that the applicant was precluded from heavy lifting, repeated bending and stooping. He apportioned 25% to the two nonindustrial motor vehicle accidents on 2-22-2000 and 7-17-2001. He apportioned 25% to preexisting scoliosis. He apportioned 50% to the industrial injury. The history in the medical report showed that the applicant was employed as a laborer before the 2-7 2002 injury. He worked 8 hours per day, forty hours per week. His job duties were to wrap units of lumber, drive a forklift, pull wood off a chain, place units of wood and run machinery. He did occasionally

climbing. He intermittently twisted, squatted, bent and lifted objects up to 100 pounds. He was employed for four years. He has been doing this type of work for seven to eight years. At the hearing the applicant testified to the above facts and the fact he had no difficulty performing his job duties and did not have any work restrictions. The applicant admitted to a back injury in 1995 in the army and the two vehicle accidents above. The WCJ following trial found the applicant's testimony credible and found the medical report of Dr. Cox unpersuasive and not substantial evidence on apportionment. The WCJ awarded the applicant PD without apportionment. The defendant filed a petition for reconsideration that was denied. The WCAB ruled the opinion of Dr. Cox was not substantial evidence on apportionment. The board noted that there was no evidence that the two minor car accidents or the Scoliosis caused disability prior to the industrial injury of 2-7. The applicant performed arduous labor without limitation or difficulty three years before the 2-7 injury. Dr. Fox did not explain how the 2 vehicle accidents and the scoliosis were now causing disability. The board concluded that under the circumstances of this case and particularly in light of the applicant's work history and ability to perform heavy labor the board ruled his conclusions on apportionment were not substantial evidence. The WCJ's ruling on apportionment was affirmed.

D. Sheldon Moskowitz v. Hewlett Packard (BPD) Applicant employed from 1-84-12-20-01 for Hewlett Packard Sustained injury to her low back and knees. The applicant was awarded 60% PD with no apportionment. Defendant filed a petition for reconsideration. This history shows the applicant treated for low back pain in 1992, and 1999. He also treated in 1981 for upper and mid back pain. An MRI done on 1-2-02 confirmed disc herniation. X-rays showed mid lumbar spondylosis. Applicant underwent back surgery. The defense QME wrote on apportionment based on the new law that he apportioned 75% to the industrial injury and 25% to degenerative arthritis. The applicant's QME found all the disability industrial with no basis for apportionment. The QME concluded the x-ray changes noted by the defense QME as degenerative changes were in fact x-ray changes caused by 18 years of repetitive trauma of heavy labor at work. The x-ray changes and the disc on injury were all caused by 18 years of heavy work. The WCJ found based on the applicant's credible testimony and the applicant's QME report which was well reasoned and persuasive that the applicant was entitled to an award without apportionment. The WCJ concluded that the applicant met his burden of proof on causation of permanent disability and defendant failed to meet their burden of proof as to causation of other factors. The WCJ stated unlike the applicant's QME the defense QME provided no analysis to support his conclusory opinion that 25% of the disability should be apportioned to underlying degenerative arthritis. The defense QME does not explain or consider the applicant's 18-year arduous employment exposure and activities as a cause of the condition and permanent disability. The WCAB denied reconsideration adopting the WCJ opinion on apportionment.

e. *Mello v. WCAB* (70 CCC 1525 W/D): The parties went to an AME. The AME found the applicant limited to light work and apportioned 50% of the disability to pre-existing scoliosis and 50% to the industrial injury. The AME concluded that 50% of applicant's disability should be apportioned to her underlying scoliosis and chronically weakened back. As a result of the underlying scoliosis the doctor indicated that the applicant always been vulnerable to any injury that would have caused her significant muscular strain on her weakened back. The doctor indicated that the history showed that she was significantly with systems during her pregnancy to warrant a consultation with a neurosurgeon and her previous scoliosis surgeon along with her epidurals. The records concluded that she continued to experience low back pain and disability during her pregnancy. In his deposition the AME stated that the applicant was developing degenerative changes immediately adjacent to the site of her surgery for the scoliosis. He further testified he would have apportioned 100% to the industrial injury under the old law. He stated that with reasonable medical certainty applicant would be function as she was before her injury had she not sustained the industrial injury. The WCJ concluded that in applying post-SB 899 apportionment laws which putt the focus on the etiology of the disability rather than the industrial injury, the AME properly apportioned and the WCJ issued an award with apportionment as set forth by the AME. The WCAB denied reconsideration citing Escobedo and the writ was denied.

f. *Berry v. WCAB* (70 CCC 1334 W/D): Applicant injured her right knee on 9-24-02 resulting in surgery for a torn lateral meniscus. X-rays showed the applicant suffered from degenerative arthritis. Both sides obtained QME exams. The WCJ after reviewing the treating physicians report and the reports of both QME found a valid basis for apportionment. The WCJ in his report on reconsideration indicated that the defense QME was an orthopedic surgeon specializing in bone and joint surgery. The defense QME opinion was more specific as to what portion of applicant's surgery was required as a result of the industrial injury and what portion was required as a result of the underlying arthritis. The Dr. was also more specific as to portions of her PD resulted from each condition. The defense QME concluded that the changes shown on x-ray could not have developed within a month of the industrial injury. The physician concluded if the applicant had a tear of the meniscus she would have been able to return to work within tow or three weeks of undergoing surgery. The physician stated that the industrial injury may have exacerbated her arthritic condition even absent the industrial injury the arthritis ultimately would have become symptomatic. The Doctor indicated that applicant's disability was caused by the surgery and that the surgery consisted of shaving of the articular surface of applicants lateral femoral condyle and tibial plateau which was caused by the arthritis and repair of the simple tea which was caused by the industrial injury. He apportioned the disability 50 % to the injury and 50% to the arthritis. The WCJ found that the applicants QME report was not consistent with the current

law on apportionment (SB 899). The WCJ stated that the basis for his apportionment was not the defense QME's opinion that absent the industrial injury he would have developed disability but rather his opinion that a portion of the surgery related to the tear and a portion to the arthritis. The treating physician did not report on apportionment. The WCJ issued an award finding apportionment in accordance with the defense QME. A petition for reconsideration was denied and the writ was denied.

3. A medial report must be based on reasonable medical probability. It cannot be based on surmise speculation or guess. It need not be absolutely scientifically correct. The law requires that the physician's report be based upon reasonable medical probability and not on speculation, guess or surmise (*Zemke v. WCAB, supra*). If the physician cannot state the conclusion with reasonable medical probability, then there is no legal apportionment. The physician's report and testimony, when considered as a whole, must demonstrate, based upon reasonable medical probability, that there is a legal basis for apportionment (*Gay v. WCAB, 44 CCC 817*). A medical report to be substantial evidence must be based on reasonable medical probability, but need not be scientifically certain. (*Mcallister v. WCAB 33 CCC660*)

H. Calculation of PD under SB 899 and the Fuentes case: Nabors v. Piedmont Lumber and Mill Company and SCIF (70 CCC 856) and the Gallo case.

1. Nabors: The WCJ found that Danny Nabors ("applicant") sustained an admitted industrial injury to his back and lower extremities which caused 31% permanent disability after apportionment.

In his petition for reconsideration, applicant contends, he should receive an award of 80% permanent disability for this injury, equivalent to \$118,795, less the amount of \$42,476 for a prior 49% permanent disability award.⁴ In support of his contention, applicant argues that the Supreme Court's decision in *Fuentes v. Worker's Comp. Appeals Bd.* (1976) 16 Cal.3d 1 [41 Cal.Comp.Cases 42] ("*Fuentes*") is no longer controlling as it was based on the interpretation and application of former Labor Code section 4750, which was repealed on April 19, 2004, in Senate Bill ("SB") 899.

Based on our review of the relevant law, the WCAB held that when the Workers' Compensation Appeals Board ("WCAB") awards permanent disability after apportionment, the amount of indemnity due applicant is calculated by determining the overall percentage of permanent disability and then subtracting the percentage of permanent disability caused by other factors under section 4663(c) or previously awarded under section 4664(b); the remainder is applicant's final percentage of permanent disability for which indemnity is calculated pursuant to sections 4453 and 4658.

Applicant argues that *Fuentes* is no longer controlling as it was based on the interpretation and application of former section 4750, which was repealed on April 19,

2004, in SB 899.

Former section 4750 provided:

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.”

In *Fuentes*, the Supreme Court considered three methods for applying apportionment under former section 4750 and arriving at a percentage of permanent disability and its monetary value:

“Under formula A, adopted by the Board in petitioner’s case, there is subtracted from the total disability that portion which is nonindustrial, the remainder being the amount of compensable disability. Thus in the matter before us 24.25 percent, representing nonindustrial origin, is deducted from the 58 percent total disability with a net compensable disability of 33.75 percent. Under the schedule established by section 4658, subdivision (a), this entitled petitioner to 143.25 weekly benefits which may be converted in terms of dollars to an award of \$10,027.50.

“Formula B contemplates, first determination of the number of statutory weekly benefits authorized under section 4658 for a 58 percent disability, namely, 297. This figure is then multiplied by the percentage of industrially related disability (58.33). The product is 173.25 weeks, which results in a total monetary award of \$12,127.50.

“Petitioner urges adoption of formula C, under which the 58 percent permanent disability is converted into its monetary equivalent of \$20,790. From this figure is subtracted the dollar value (\$6,422.50) of the 24.25 percent of the noncompensable, nonindustrial disability. The result is an award of \$14,367.50, or the equivalent of 205.25 weekly benefits.” (*Fuentes v. Workers’ Comp. Appeals Bd.*, *supra*, 16 Cal.3d at pp. 5-6 [41 Cal.Comp.Cases at p. 44].)

The Supreme Court held that formula A was the correct formula required by the plain language of former section 4750, which precluded the employee from receiving “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” and limited the employer’s liability for permanent disability to “that portion due to the later injury as though no prior disability or impairment had existed.”

The Supreme Court observed that its interpretation of the plain language of former section 4750 was supported by the Legislature’s intent in enacting former section 4750 to encourage employers to hire disabled workers. In this regard, the Court noted the Legislature’s recognition that employers might refrain from hiring the disabled if, upon subsequent injury, an employer would become liable for compensating the employee for an aggregate disability that included a previous disability. (*Fuentes v. Workers’ Comp. Appeals Bd.*, *supra*, 16 Cal.3d at pp. 6-7 [41 Cal.Comp.Cases at p. 44] citing *Heggin v. Workers’ Comp. Appeals Bd.* (1971) 4 Cal.3d 162, 173 [36 Cal.Comp.Cases 93]; *State Comp. Ins. Fund v. Industrial Acc. Com. (Hutchinson)* (1963) 59 Cal.2d 45, 49 [28 Cal.Comp.Cases 20].)

Former section 4750 was repealed on April 19, 2004, along with former section 4663. They were replaced by new sections 4663 and 4664.

New section 4663 provides in relevant part:

(a) Apportionment of permanent disability shall be based on causation.

(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.

Section 4664 provides in relevant part:

(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.

The plain terms of sections 4663(c) and 4664(a) mandate that the percentage of non-industrial or previously awarded permanent disability be subtracted from the overall percentage of permanent disability in the same manner as formula A adopted by the Supreme Court in *Fuentes*. That is, section 4663(c) requires apportionment of the “percentage of the permanent disability” caused by factors other than the industrial injury at issue. (Emphasis added.) Similarly, section 4664(a) provides that the employer shall only be liable for the “percentage of permanent disability” directly caused by the new industrial injury. (Emphasis added.)

Moreover, bearing in mind the public policy behind the enactment of new sections 4663 and 4664, we conclude that only formula A results in an award of permanent disability that complies with the provisions of those sections. Applicant has suffered a compensable permanent disability of 31%. Under formula B, however, he would receive an award that, under the rates provided for in section 4658, is equivalent to the amount of indemnity given for a disability of approximately 40.75%. Application of formula C results in a recovery that is approximately the same as that authorized by section 4658 for a rating in excess of 69.75%.

The fact that *Fuentes* was an analysis of apportionment under section 4750, which was repealed on April 19, 2004, does not change the Legislative intent underlying apportionment statutes of encouraging employers to hire disabled workers. We must assume that the Legislature was aware of the existing case law and intended to maintain a consistent body of rules when it enacted sections 4663 and 4664. (*Fuentes v. Workers’ Comp. Appeals Bd.*, *supra*, 16 Cal.3d at p. 7 [41 Cal.Comp.Cases at p. 45]; *Estate of Simpson* (1954) 43 Cal.2d 594, 600; *American Friends of Service Committee v. Proconier* (1973) 33 Cal.App.3d 252.) It should not be presumed that the Legislature meant to overthrow long-established principles in law unless such intention is made clear. (*Fuentes v. Workers’ Comp. Appeals Bd.*, *supra*, 16 Cal.3d at p. 7 [41 Cal.Comp.Cases at p. 45] citing *Theodor v. Superior Court* (1972) 8 Cal.3d 77.) Therefore, we conclude that part of the legislative intent in enacting new sections 4663 and 4664 was, as in enacting former section 4750, to encourage employers to hire disabled workers.

Therefore, we conclude that formula A, as adopted by *Fuentes*, is still the correct formula. When the WCAB awards permanent disability after apportionment, the amount of indemnity due applicant is calculated by determining the overall percentage of permanent disability and then subtracting the percentage of permanent disability caused by other factors under section 4663(c) or previously awarded under section 4664(b); the remainder is applicant’s final percentage of permanent disability for which indemnity is calculated pursuant to sections 4453 and 4658.

DISSENTING OPINION OF CHAIRMAN RABINE He believes that the express language of section 4663 as amended by SB 899 requires that application of formula B discussed in *Fuentes v. Worker’s Comp. Appeals Bd.* (1976) 16 Cal.3d 1 [41 Cal.Comp.Cases 42] (“*Fuentes*”).

DISSENTING OPINION OF COMMISSIONER CAPLANE She believes that the express language of sections 4663 and 4664 as amended by SB 899 requires application of formula C discussed in *Fuentes v. Worker's Comp. Appeals Bd.* (1976) 16 Cal.3d 1 [41 Cal.Comp.Cases 42] ("*Fuentes*").

2. E & J Gallo Winery v. WCAB and Dykes (Court of Appeal)

In this opinion the court determines the appropriate method of apportioning liability between two workers' compensation injuries as based on the apportionment laws changed by enacting Senate Bill No. 899. The court concluded that where an employee sustains multiple disabling injuries while working for the same self-insured employer, the employee is entitled to compensation for the total disability above any percentage of permanent disability previously awarded. In this narrow context, the court say no reason to treat an employee who has been injured twice differently from a similarly situated employee who is injured once with the same level of disability. The courts conclusion benefits employers by ensuring there can be no double recovery for the same disability; it benefits the employee by providing equitable compensation under the exponentially progressive nature of the workers' compensation system. This approach best meets the legislative goal of bringing stability to what had become an unworkable statutory scheme.

David Dykes injured his back while working as a winery worker for E & J Gallo Winery (Gallo) in September 1996. As a result of the injury, a workers' compensation administrative law judge (WCJ) approved a stipulated agreement on March 26, 1999, to provide Dykes with future medical care and a 20.5 percent permanent disability award worth \$11,680 in compensation. Dykes returned to work with Gallo with a lighter duty and a medical restriction of lifting up to 50 pounds. By January 2002, his condition improved and his work restrictions were lifted.

On October 28, 2002, Dykes again injured his back while working for Gallo. Following a November 2004 workers' compensation hearing, a WCJ determined that Dykes was temporarily totally disabled between November 12, 2002 through March 25, 2004, when he became 73 percent permanently disabled. Adjusting for Dykes's age and occupation, a 73 percent disability award translated to a weekly \$230 payment over 453.50 weeks for a total sum of \$104,305. From the award, the WCJ subtracted the \$11,680 in compensation previously paid to settle Dykes's 1996 back injury, as well as 12 percent in attorney fees. The WCJ also awarded Dykes future medical treatment as reasonably necessary to cure or relieve the injury. Gallo was permissibly self-insured for purposes of workers' compensation at the time of both injuries. Gallo timely petitioned the Workers' Compensation Appeals Board (WCAB) for reconsideration, contending that the Labor Code mandated subtracting the percentage, not dollar amount, of the prior award from Dyke's disability award. The WCJ advised the WCAB in a report and recommendation by repeating her original analysis without addressing the calculation issue. On January 5, 2005, WCAB Commissioners Frank M. Brass, William K. O'Brien, and Janice Jamison Murray summarily denied reconsideration by adopting and incorporating the reasoning from the WCJ's report

Establishing new apportionment provisions for specific injuries, Sen. Bill 899 repealed sections 4663, 4750, and 4750.5 and enacted new sections 4663 and 4664. Sections 4663 and 4750 applied to antecedent injuries, while section 4750.5 applied to subsequent injuries. (*Fresno Unified School Dist. v. Workers' Comp. Appeals Bd.* (2000) 84 Cal.App.4th 1295, 1305.) Under the earlier section 4663, the aggravation of a preexisting disease or compensable injury was "allowed only for the proportion of the disability due to the aggravation of such prior disease

which is reasonably attributed to the injury.” Former section 4750 prevented an industrially injured employee suffering from a previous permanent disability or physical impairment from receiving a workers’ compensation award greater than he or she would otherwise receive for the later injury alone and limited the employer’s liability to only “that portion due to the later injury as though no prior disability or impairment had existed.”

Now, apportionment is “based on causation” and 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.” “The plain reading of ‘causation’ in this context is causation of the permanent disability.” (Escobedo v. Marshalls (2005) 70 Cal.Comp.Cases 604, 611 [en banc], review den. Nov. 16, 2005, S137275.) Examining physicians therefore must “make an apportionment determination by finding what approximate percentage of the permanent disability was caused by the direct result of injury arising out of and occurring in the course of employment and what approximate percentage of the permanent disability was caused by other factors both before and subsequent to the industrial injury, including prior industrial injuries.” The Legislature also added a new conclusive presumption affecting the burden of proof that a prior permanent disability exists whenever an employee has received a prior permanent disability award. In short, Sen. Bill 899 provides for apportionment based on either nonindustrial factors sufficiently described by the medical evidence or as previously awarded to the employee under a prior workers’ compensation claim

After a rocky transition period, it is now well-settled that, consistent with the Legislature’s intent, “the apportionment provisions of Sen. Bill 899 must be applied to all cases ... not yet final at the time of the legislative enactment on April 19, 2004, regardless of the earlier dates of injury and any interim decisions.” (Marsh v. Workers’ Comp. Appeals Bd., supra, 130 Cal.App.4th at p. 910; see also Rio Linda Union School Dist. v. Workers’ Comp. Appeals Bd. (2005) 131 Cal.App.4th 517, 531 review den. Oct. 12, 2005, S137089; Kleemann v. Workers’ Comp. Appeals Bd. (2005) 127 Cal.App.4th 274, 285-289, review den. May 11, 2005, S132853.)

Applying Sen. Bill 899’s new apportionment provisions to Dykes’ workers’ compensation claim, the WCAB found apportionment was not warranted on any nonindustrial grounds, but that his prior 1996 disability award must be taken into account (§ 4664, subd. (b)). The parties agree apportionment of the prior award is appropriate but disagree how to calculate the current award.

In petitioning us for review, Gallo contends that instead of subtracting the dollar amount of the 1999 award from the dollar amount of Dykes’s current level of disability, as the WCAB did here, the WCAB should have reduced Dykes’s current 73 percent level of permanent disability by the 20.5 percent level of permanent disability from the 1999 stipulated award. Gallo believes the “clear, unambiguous, and plain wording” of sections 4663 and 4664 requires that the “percentage of permanent disability previously awarded must be deducted to arrive at the percentage of permanent disability directly caused by the new injury.”

In *Fuentes v. Workers’ Comp. Appeals Bd.* (1976) 16 Cal.3d 1, 3, the Supreme Court established under the former apportionment provisions “the appropriate method of determining the extent of an employer’s liability for an employee’s industrial injury resulting in permanent disability in those cases in which a portion of the over-all disability is attributable to a preexisting injury.” *Fuentes* addressed a 1972 amendment to the permanent disability schedule under section 4658 changing the method of computing the number of weeks an employee was entitled to workers’ compensation indemnity payments. Before April 1, 1972, each percentage point of an industrially related permanent disability entitled the injured worker to four weeks of compensation at the employee’s applicable indemnity rate. (*Fuentes v. Workers’ Comp. Appeals Bd.*, supra, 16 Cal.3d at p. 4.) After the 1972 amendment, however, “the number of weekly benefits increases exponentially in proportion to the percentage of the disability.” The Supreme Court explained that the new exponentially progressive workers’ compensation system created a

difficulty in apportioning out the nonindustrial portion of a disability and gave rise to three potential methods of computing the number of weekly benefits, which the Supreme Court named formulas A, B, and C.

Under formula A, which Gallo contends the WCAB should have applied here and which was ultimately adopted by the Supreme Court in *Fuentes*, the percentage of the nonindustrial permanent disability is subtracted from the percentage of the employee's overall level of total disability to determine the compensable level of permanent disability. The resulting percentage is then converted to a dollar amount under the compensation schedules set forth under section 4658. In the present case, this formula subtracts 20.5 percent of permanent disability attributable to Dykes's 1999 settled award from his current 73 percent permanent disability, resulting in a net 52.5 percent permanent disability. For Dykes, a 52.5 percent permanent disability warrants 286.25 weeks of benefits at \$170 per week, for a total award of \$48,662.50. (Formula A: 73 percent total disability – 20.5 percent prior disability = 52.5 percent apportioned disability = 286.25 weeks x \$170 per week = \$48,662.50 award.)

Formula B, rejected by *Fuentes*, examines the overall disability and then determines the number of weeks it should be paid. This formula first looks to the number of weeks in which benefits are statutorily authorized under section 4658 for the total level of current disability and multiplies that number of weeks by the percentage of the injury that was industrially related. Here, Dykes's 73 percent level of overall disability warrants 453.50 weeks of disability payments per the workers' compensation tables. About 72 percent of Dykes's present 73 percent permanent disability was caused by the recent injury while working for Gallo. ((73 percent – 20.5 percent) / 73 percent = 72 percent.) Formula B multiplies 453.50 weeks times 72 percent, resulting in approximately 326.25 weeks of \$170 payments amounting to \$55,462.50 in aggregate payments. (Formula B: 73 percent total disability = 453.50 weeks x 72 percent relative disability = 326.25 weeks x \$170 per week = \$55,462.50 award.)

Formula C, also rejected by *Fuentes*, is the method the WCAB applied in determining Dykes's award. This formula first determines the monetary value of the injured employee's overall permanent disability and subtracts the monetary value of the percentage of permanent disability from the noncompensable disability. Adopting the WCJ's reasoning, the WCAB here calculated that Dykes's current disability of 73 percent warranted 453.50 weeks of \$230⁵ weekly payments for an aggregate benefit of \$104,305, and then subtracted the value of his 20.5 percent disability established under the 1999 settlement, \$11,680, resulting in a \$92,625 current award. (Formula C: \$104,305 value of total 73 percent disability – \$11,680 value of prior 20.5 percent disability = \$92,625 award.)

Dykes believes the WCJ appropriately applied formula C to his award under the Supreme Court's reasoning in *Fuentes*. In that case, the Supreme Court adopted formula A, and rejected formulas B and C, as "required by the express and unequivocal language of section 4750" (*Fuentes v. Workers' Comp. Appeals Bd.*, *supra*, 16 Cal.3d at p. 6.) Dykes argues that by repealing section 4750, the Legislature must have intended to compensate injured workers in an amount more closely related to the full extent of their disability without considering the former overriding policy of encouraging employers to hire an employee with a pre-existing disability. Repealed by Sen. Bill 899, section 4750 previously provided:

"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.”
Examining the legislative intent of section 4750, the Supreme Court concluded:

“[T]he purpose of that statute is to encourage employers to hire physically handicapped persons. The Legislature recognized that employers might refrain from engaging the services of the handicapped if, upon subsequent injury, an employer was required to compensate the employee for an aggregate disability which included a previous injury. [Citations.] In enacting section 4750, the Legislature has expressed a clear intent that the liability of one who employs a previously disabled worker shall, in the event of a subsequent injury, be limited to that percentage of the over-all disability resulting from the later harm considered alone and as if it were the original injury.” (Fuentes v. Workers’ Comp. Appeals Bd., supra, 16 Cal.3d at p. 6.)

In Fuentes, the Supreme Court dismissed consideration of formulas B and C because they resulted in awards too closely aligned with the amount of compensation the employee would receive without apportioning the award. “This arithmetic leads to the inevitable conclusion that neither method B nor C can be reconciled with the mandate of section 4750 that the compensation for a subsequent injury be computed ‘as though no prior disability or impairment had existed.’” (Fuentes v. Workers’ Comp. Appeals Bd., supra, 16 Cal.3d at p. 6.)

Nabors v. Piedmont Lumber & Mill Company . After Gallo petitioned this court for review, the WCAB examined the appropriate method of calculating apportionment under Sen. Bill 899 in an en banc decision, Nabors v. Piedmont Lumber & Mill Company (2005) 70 Cal.Comp.Cases 856, review granted October 7, 2005, A110792. Four of six WCAB commissioners—including three from the panel who denied Dykes’s petition for reconsideration—looked to new sections 4663, subdivision (c) and 4664, subdivision (a), which both provide for apportionment as a “percentage” of permanent disability. Carrying over the same Supreme Court public policy considerations set forth in Fuentes, despite section 4750’s repeal, the majority concluded that formula A provided the most appropriate method of apportionment. Finding no evidence that the Legislature intended to change the formula endorsed by the Supreme Court in Fuentes, the WCAB majority reasoned that “part of the legislative intent in enacting new sections 4663 and 4664 was, as in enacting former section 4750, to encourage employers to hire disabled workers.” (Nabors v. Piedmont Lumber & Mill Company, Cal.Comp.Cases at p. 862.)

Separately dissenting from the majority, however, then-Chairman Merle Rabine believes that the express language of Sen. Bill 899 requires the application of formula B while Commissioner Ronnie Caplane believes the same express language requires the application of formula C. Chairman Rabine suggests section 4663, subdivision (a)’s limitation on an employer’s liability to the “percentage of permanent disability directly caused by the industrial injury” is best carried out through formula B’s ratio of the industrial injury to the overall disability, rather than formula A’s subtraction of the nonindustrial or previously awarded disability from the overall percentage of permanent disability. (Nabors v. Piedmont Lumber & Mill Company, supra, 70 Cal.Comp.Cases at pp. 862-864, dis. opn. of Commissioner Rabine.) He also points to the lack of any empirical evidence that formula A, over formulas B or C, has had any effect on the stated public policy of encouraging employers to hire the disabled over the nearly 30 years since Fuentes. Meanwhile, Commissioner Caplane argues for adoption of formula C because the Legislature must have intended a change by amending the statutes. She also finds it is “manifestly unfair” under the progressive workers’ compensation system to compensate an employee with apportioned multiple industrial injuries less than if the employee

had suffered a single industrial injury resulting in the same level of permanent disability^{IV}.

Fuentes is not controlling after Sen. Bill 899. The court was unconvinced by the Nabors majority that the reasons for adopting formula A are as compelling today as in 1976 when the Supreme Court addressed the issue in Fuentes. Fuentes repeatedly states its holding was required by the express and unequivocal language of section 4750. In fact, the Supreme Court went so far as to suggest that the repeal of section 4750 would create the opportunity to apply another apportionment formula.

A year after deciding Fuentes, the Supreme Court confirmed in *Wilkinson v. Workers' Comp. Appeals Bd.* (1977) 19 Cal.3d 491, 500 that its adoption of formula A rested exclusively on section 4750:

“Fuentes ... interpreted section 4750 in such a way that the worker who incurs a single injury will usually receive greater benefits than one who incurred successive injuries resulting in the same total disability. Our opinion in Fuentes, however, did not rest upon any broad proposition that awards based upon a combined disability rating are inequitable, but upon the narrower proposition that such awards contravene the language and policy of section 4750.”

The Legislature has now repealed section 4750 and its replacement, section 4664, is notably distinct:

| Former § 4750 | New § 4664 |
|---|--|
| <p>“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.</p> <p>“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.”</p> | <p>“(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.</p> <p>“(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....”</p> |

While both former section 4750 and new section 4664 address the broad issue of apportioning liability between multiple injuries, they invoke significantly different approaches of achieving that same goal. Former section 4750 limited the employer’s liability for the “injury when considered by itself and not in conjunction with or in relation to the previous disability or impairment” and only “for that portion due to the later injury as though no prior disability or impairment had existed.” The Supreme Court’s holding in Fuentes expressly rested on this language in section 4750 that the level of permanent disability caused by a subsequent injury was to be determined without reference to or consideration of the employee’s prior condition. Sen. Bill 899 reversed that policy. Now, a prior award is conclusively presumed to exist as a means of establishing the level of permanent disability directly caused by the subsequent injury. Evaluating physicians must also make similar apportionment percentage determinations. The WCAB may no longer apportion liability without considering a prior or other noncompensable disability.

The court was not persuaded by the Nabors majority that the public policy of encouraging employers to hire the disabled dictates retaining Fuentes's formula A in calculating apportionment between multiple injuries. Under Sen. Bill 899, apportionment of liability remains a central tenet to the workers' compensation system. Because apportionment is now based on causation and prior permanent disability awards are presumed to exist at the time of any subsequent injury, employers still have an incentive to hire the disabled under Sen. Bill 899. As Chairman Rabine noted in his Nabors dissent, there is no evidence in the record that any apportionment formula promotes hiring the disabled better than another. Further, the reliance on apportionment alone as a means of encouraging employers to hire the disabled is not as necessary today as when the Legislature first enacted section 4750. During the 30 years since Fuentes, disability discrimination has been expressly outlawed by other statutory schemes. (See, e.g., Americans with Disabilities Act of 1990 (42 U.S.C. § 12101 et seq.); California Fair Employment and Housing Act (Gov. Code, § 12900 et seq.); Prudence Kay Poppink Act (Stats. 2000, ch. 1049).) Moreover, employers can now avoid costly job displacement benefits of \$4,000 to \$10,000 by retaining workers who sustain work-related disabilities. (§ 4658.5.)

“When the Legislature deletes an express provision of a statute, it is presumed that it intended to effect a substantial change in the law.” (Lockheed Martin Corp. v. Workers' Comp. Appeals Bd. (2002) 96 Cal.App.4th 1237, 1246.) Even the WCAB has recently noted: “There is no doubt that, in repealing former section 4750 and in enacting new section 4664, the Legislature intended to change the law relating to apportionment of permanent disability.” (Sanchez v. County of Los Angeles (Oct. 26, 2005, MON 0307506) 70 Cal.Comp.Cases ___, ___ [p. 10] [en banc]; Strong v. City & County of San Francisco (Oct. 26, 2005, SF0 0479038) 70 Cal.Comp.Cases ___, ___ [p. 11] [en banc]; see also Escobedo v. Marshalls, supra, 70 Cal.Comp.Cases at p. 616.) Although the WCAB believes the Legislature did not intend a change in policy, we conclude the Legislature contemplated a variation in determining apportionment by repealing section 4750 and replacing it with different language in section 4664 for apportioning liability among multiple injuries.

Applicable apportionment formula

Having found that neither the statutory language nor legislative intent necessarily requires the continued application of formula A, we must now determine the meaning of the new apportionment provision that “[t]he 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.” We limit our analysis to the present facts where the injured employee received a prior disability award while working for the same self-insured employer.

It is well established that we first look to the statutory language as the best evidence of the Legislature's intent. (Burden v. Snowden (1992) 2 Cal.4th 556, 562.) The plain language of section 4664, subdivision (a), underscores its simplicity: An employer is liable for the direct consequences of a work-related injury, nothing more and nothing less. To determine the employer's liability, noncompensable disability is either based on medical evidence (§ 4663, subd. (c)) or conclusively presumed from a previous award (§ 4664, subd. (b)). Moreover, the “accumulation” of permanent disability awards to any one region of the body may not exceed 100 percent over the employee's life except under certain enumerated circumstances. (§ 4664, subd. (c).) As a result, section 4664 contemplates accumulating multiple disability awards rather than subtracting percentage levels of disability.

In Fuentes, the Supreme Court considered three options offered by the parties as potential formulaic approaches to apportioning liability. Since the Supreme Court decided Fuentes, however, the workers' compensation system has become even more progressive. Now, in addition to permanent disability tables providing for exponentially progressive higher number of weeks of payments, the maximum weekly benefit payments also increase at specific levels of permanent disability.

Under the current expanded, exponentially progressive nature of the workers' compensation tables, we can therefore extract at least five possible interpretations of calculating apportionment among multiple injuries—reaching final awards as varied as \$48,662.50, \$55,462.50, \$65,837.50, \$75,037.50, and \$92,625—all taking into account the same underlying facts that Dykes became 73 percent permanently disabled after having previously received a 20.5 percent disability award. By not recognizing the injured employee's total disability and artificially shifting compensation down on the permanent disability tables, all of the other formulas shortchange an employee by treating him or her as though no prior injury or disability existed, which is now no longer permitted under Sen. Bill 899. The other formulas also preclude an employee who previously received a disability award from ever being deemed 100 percent totally disabled. Moreover, any other algebraic formulation of apportioning liability between multiple injuries creates a windfall to the employer and places an unreasonable burden on the injured employee who must compete in the open labor market with a permanent disability. This is especially applicable where the employee worked for the same self-insured employer at the time of both injuries; Gallo cannot reasonably argue that it is not liable to the full extent of Dykes's 73 percent disability, whether the result of one or multiple industrial injuries. Dykes's employment with Gallo directly caused him to become 73 percent disabled, and section 4750 no longer directs the WCAB to consider the new injury "by itself and not in conjunction with or in relation to the previous disability or impairment" and "as though no prior disability or impairment had existed."

Under the Nabors majority, the WCAB would award Dykes an apportioned award of \$48,662.50 without a life pension to supplement his prior \$11,680 award for a total of \$60,342.50 in compensation. Yet if Dykes had sustained a single injury in 2002 causing the same total level of disability, he would have received an award of \$104,305 plus a \$50.25 per week life pension. We do not believe the Legislature intended such a discrepancy between single and multiple injured employees when it prescribed that the "employer shall only be liable for the percentage of permanent disability directly caused by the injury" (§ 4664, subd. (a).) As Commissioner Caplane explained, "Although the workers' compensation system is not designed to make injured workers whole, it should compensate workers fairly and equitably within its strictures." (Nabors v. Piedmont Lumber & Mill Company, supra, 70 Cal.Comp.Cases at p. 865 (dis. opn. of Commissioner Caplane).)

Gallo believes the application of any formula other than formula A, which compensates an employee at the lowest possible level, overcompensates employees and creates a disincentive to hire disabled workers. We disagree. Before the Legislature adopted Sen. Bill 899, apportionment was based on disability and never on pathology or causation. (Franklin v. Workers' Comp. Appeals Bd. (1978) 79 Cal.App.3d 224, superseded by Sen. Bill 899 as stated in Kleemann v. Workers' Comp. Appeals Bd., supra, 127 Cal.App.4th at pp. 284-285, fn. 26.) An employee could therefore become rehabilitated over time, preventing any apportionment of the award. Here, the WCJ noted that Dykes testified uncontrovertibly that after the 1996 injury, but before the 2002 injury, "His condition got better in January 2002 and his restrictions were lifted." In issuing Dykes's award, the WCJ cited nothing in the medical record indicating Dykes was, in fact, disabled at the time of the subsequent injury. Apportionment under the prior workers' compensation scheme therefore would not have been supported by substantial evidence and Dykes would have received a full \$104,305 award, plus a life pension, in addition to \$11,680 from the 1996 injury. Conclusively presuming the prior disability awarded in 1999 existed at the time of a subsequent injury, Sen. Bill 899 now protects employers from paying employees more than once for the same disability.

Dykes was conclusively presumed under section 4664, subdivision (b), to be 20.5 percent permanently disabled per his 1999 disability settlement at the time of his subsequent industrial injury in 2002. His 2002 injury directly caused him to become 73 percent permanently disabled. Taking his prior level of disability into account, as required by section 4664, subdivision (a), the “percentage of permanent disability directly caused by the injury arising out of and occurring in the course of employment” is the additional percentage of disability that takes him from 20.5 percent to 73 percent disabled. Dykes is therefore entitled to the difference between a 20.5 percent disability and a 73 percent disability on the permanent disability table applicable for the subsequent injury. By adopting the WCJ’s findings, the WCAB correctly determined that Dykes’s subsequent injury caused him to sustain 73 percent permanent disability, payable at \$230 per week for a total of \$104,350, less credit for the prior 20.5 percent disability award in the amount of \$11,680. While the WCAB did not expressly award a life pension, we conclude the pension was imposed as a matter of law under section 4659 because Dykes’s subsequent injury directly caused him to become 73 percent

The WCAB’s Order Denying Reconsideration is affirmed. Costs are awarded to David Dykes, but his request for attorney fees under section 5801 is denied as there was a reasonable basis for the petition.

I. Labor Code section 4664 and the prior award of PD and the 100% limitation.

1. Sanchez v. County of Los Angeles (2005) 70 Cal.Comp.Cases 1440 (Appeals Board en banc)

A. Introduction:

The WCAB granted reconsideration to further study the issue of apportionment under Labor Code section 4664, in situations where an employee suffers an industrial injury causing permanent disability, and where there has been a prior industrial injury resulting in an award of permanent disability relating to the same region of the body.

Based on the boards review of the relevant statutes and case law, the held:

- (1) Where an employee suffers an industrial injury causing permanent disability, and where there is a prior award of permanent disability relating to the same region of the body, section 4664 requires the apportionment of overlapping permanent disabilities;
- (2) The defendant has the burden of proving the existence of any prior permanent disability award(s) relating to the same region of the body;
- (3) When the defendant has established the existence of any prior permanent disability award(s) relating to the same body region, the permanent disability underlying any such award(s) is conclusively presumed to still exist, i.e., the applicant is not permitted to show medical rehabilitation from the disabling effects of the earlier industrial injury or injuries;

- (4) When the defendant has established the existence of any prior permanent disability award(s) relating to the same region of the body, the percentage of permanent disability from the prior award(s) will be subtracted from the current overall percentage of permanent disability, unless the applicant *disproves* overlap, i.e., the applicant demonstrates that the prior permanent disability and the current permanent disability affect different abilities to compete and earn, either in whole or in part;
- (5) The issue of whether the prior permanent disability for the same region of the body overlaps the current disability is determined using substantially the same principles that were applied prior to the enactment of section 4664; and
- (6) The sum of the permanent disability awards for any one body region cannot exceed 100%, even where the permanent disability caused by the applicant's new injury does not overlap the permanent disability underlying the prior award(s), unless the employee's new industrial injury causes disability that is conclusively presumed to be total under section 4662.

B. Facts: Virginia Sanchez sustained an industrial injury to her left foot on December 18, 2002, while employed as a deputy sheriff by the County of Los Angeles (defendant). At trial, the parties stipulated that her left foot injury resulted in permanent disability of 7%. This stipulation apparently was based on the February 18, 2004 report of Jon Greenfield, M.D., the agreed medical evaluator (AME) in orthopedics. Dr. Greenfield stated that applicant's left foot injury caused subjective disability of intermittent slight left foot pain, becoming moderate with cold weather and rain. Dr. Greenfield imposed no work restrictions based on the left foot injury.

Previously, applicant had received a stipulated 22% permanent disability award for an October 10, 1997 bilateral knee injury, which she also sustained while employed as a deputy sheriff by defendant. When the parties stipulated to this award, they further stipulated that the 22% permanent disability rating was "based upon the applicant's loss of 35% pre-injury capacity for kneeling, squatting, climbing, heavy lifting, pushing and pulling as determined by Alexander Angerman, M.D., in his AME report dated 11/7/01." They also stipulated to the following rating formula: "14.5-15%-490I-21-22."

On October 7, 2004, the workers' compensation administrative law judge (WCJ) issued a decision determining that applicant's December 18, 2002 left foot injury resulted in 7% permanent disability, without apportionment.

Thereafter, defendant filed a timely petition for reconsideration. Defendant contended, in substance, that apportionment is required and that no new permanent disability should have been awarded because: (1) the factors of disability resulting from applicant's left foot injury are completely overlapped by the factors of disability from her prior bilateral knee injury, for which she received a 22% permanent disability award; and

(2) section 4664(b), as enacted by SB 899, provides that “[i]f 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.”

Applicant filed an answer to the petition for reconsideration. The WCJ issued a Report and Recommendation on Petition for Reconsideration (Report), recommending that the petition be denied because there is no overlap between applicant’s current left foot disability, which is based solely on subjective complaints, and her prior bilateral knee disability, which was based solely on work restrictions.

C. Discussion:

Prior Law (LC 4750)

Former section 4750 was interpreted to encourage employers to hire people with disabilities; the Legislature recognized that employers might refrain from hiring the disabled if, upon a subsequent injury, the employer would become obligated to compensate the employee for the pre-existing disability. Under former section 4750, when an employee who had pre-existing permanent disability sustained an industrial injury that also resulted in permanent disability, the employer or its insurer was not liable for the combined disability, but only for that portion attributable to the subsequent industrial injury, considered alone.

In applying former section 4750, when the permanent disability resulting from a new injury included factors of disability that were the same as ones that already existed as the result of a prior injury or condition, the disabilities were said to “overlap.” If all of the factors of permanent disability attributable to the subsequent industrial injury already existed as a result of the prior injury or condition, then there was “total” overlap, and the employee was not entitled to any additional permanent disability indemnity; if, however, the subsequent industrial injury caused some new factors of permanent disability that were not pre-existing, then there was “partial” overlap, and the employee was entitled to permanent disability indemnity to the extent the subsequent industrial injury further restricted his or her earning capacity or ability to compete. It is not the part of the body involved in the subsequent industrial injury that was important; rather, it was the nature of the disability resulting from the new injury in relation to the pre-existing disability that was determinative. Thus, the fact that the pre-existing disability and the new disability involved two different anatomical parts of the body, while relevant, did not in itself preclude apportionment using the rules of overlap. The mechanics of rating overlap generally provided that each separate factor of permanent disability for both the new industrial injury and the pre-existing condition be set forth, so it could be determined what elements, if any, of one disability were included in the other. If however, successive injuries produced separate and independent disabilities – i.e., if the disabilities did not fully or partially overlap because they did not affect the *same* abilities to compete and earn – then each was rated separately.

The Determination Of Overlapping Disabilities After SB 899

1. Where An Employee Suffers An Industrial Injury Causing Permanent Disability, And Where There Is A Prior Award Of Permanent Disability Relating To The Same

Region Of The Body, Section 4664 Requires The Apportionment Of Overlapping Permanent Disabilities

The WCAB Held that new section 4664 still requires the apportionment of overlapping permanent disabilities where an employee suffers an industrial injury causing permanent disability, and where there is a prior award of permanent disability relating to the same region of the body.

There is nothing in new section 4664 that evinces a clear expression of legislative intent to abandon the longstanding policy of encouraging employers to hire workers with disabilities by assuring that such employers are not made liable for pre-existing disabilities if those workers subsequently sustain an industrial injury. To the contrary, the express language of new section 4664 suggests the Legislature intended this policy to have continuing force and effect. Specifically, section 4664(a) states, “[t]he 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.” Thus, the board

new industrial injury to the extent that this permanent disability is overlapped by prior permanent disability involving the same region of the body. In this way, the employer in a subsequent injury case is held liable only for the permanent disability directly caused by that injury. On the other hand, the employee is entitled to be compensated for any *new* permanent disability directly caused by the new industrial injury.

The WCAB concluded that the principles of overlap remain alive under new section 4664, They now went on to address how these overlap principles are to be applied to apportionment determinations under new section 4664 in situations where an employee suffers an industrial injury causing permanent disability relating to one region of the body, and where there has been a prior industrial injury resulting in an award of permanent disability relating to the same region of the body.

2. The Defendant Has The Burden Of Proving The Existence Of Any Prior Permanent Disability Award(s) Relating To The Same Region Of The Body.

Section 4664(b) applies only “[i]f the applicant has received a prior award of permanent disability.” Thus, the provisions of section 4664(b) are not triggered unless a prior award of permanent disability exists.

The WCAB concluded it is defendant’s burden to prove that applicant had a prior permanent disability award relating to the same region of the body. Placing this burden on defendant is consistent with the statutory provisions that the party holding the affirmative of an issue has the burden of proof by a preponderance of the evidence. Placing this burden on defendant is also consistent with the longstanding principle that, because it is the defendant that benefits from a finding of apportionment, it bears the burden of demonstrating that apportionment is appropriate. Under section 4664, it is still the defendant that benefits from a finding of apportionment. Although – as discussed below – section 4664 has effected some shift in the parties’ respective burdens on apportionment in the context of a prior permanent disability award, we discern no legislative intent to completely overthrow this long-established principle. Thus, it is defendant’s burden to show that applicant *had* a prior permanent disability award, rather than applicant’s burden to show he or she did *not* have one.

The preferred procedure for establishing the existence of a prior permanent disability award is for the defendant to offer in evidence a copy of

the award, or to request that the WCAB take judicial notice of a prior award. If, for some reason, a copy of the prior permanent disability award cannot be produced, then the existence of any prior permanent disability award may be shown by secondary evidence – *if the secondary evidence is sufficiently reliable and sufficiently establishes the substance of the lost or destroyed award.* This opinion does not address what type(s) of secondary evidence might be used to establish the existence of a prior permanent disability award, but the board observed that the WCAB may draw reasonable inferences from any secondary evidence presented, if it is sufficiently reliable. ///

3. When The Defendant Has Established The Existence Of Any Prior Permanent Disability Award(s) Relating To The Same Body Region, The Permanent Disability Underlying Any Such Award(s) Is Conclusively Presumed To Still Exist, i.e., The Applicant Is Not Permitted To Show Medical Rehabilitation From The Disabling Effects Of The Earlier Industrial Injury Or Injuries

Once a defendant establishes the existence of a prior award of permanent disability relating to the same region of the body, section 4664(b) provides, “it shall be conclusively presumed that the prior permanent disability exists at the time of any subsequent industrial injury.”

Because section 4664(b) mandates “it shall be *conclusively* presumed that the prior permanent disability exists” (emphasis added), we conclude that, in the context of apportionment under section 4664(b), the Legislature intended to abrogate the line of cases that had allowed an injured employee to show he or she had medically rehabilitated from the effects of an earlier injury at the time of a subsequent injury.

Accordingly, an applicant cannot offer any medical or testimonial evidence to contradict the conclusively presumed “prior permanent disability,” i.e., he or she cannot attempt to demonstrate medical rehabilitation.

4. When The Defendant Has Established The Existence Of Any Prior Permanent Disability Award(s) Relating To The Same Region Of The Body, The Percentage Of Permanent Disability From The Prior Award(s) Will Be Subtracted From The Current Overall Percentage Of Permanent Disability, Unless The Applicant Disproves Overlap, i.e., The Applicant Demonstrates That The Prior Permanent Disability And The Current Permanent Disability Affect Different Abilities To Compete And Earn, Either In Whole Or In Part

Section 4664(b)’s first sentence creates a “conclusive” presumption that the prior permanent disability exists at the time of any subsequent industrial injury. The second sentence, however, states that this “conclusive” presumption is a “presumption affecting the burden of proof” – which is a rebuttable presumption. Hence, an inherent tension in section 4664(b) exists.

The Evidence Code establishes that there are only two types of presumptions: conclusive presumptions and rebuttable presumptions.

The Evidence Code also establishes that a presumption affecting the burden of proof is a rebuttable presumption.

Where the law establishes a conclusive presumption, no evidence can be offered to dispute it. It need not have a logical basis, and no evidence may be received to contradict it. A conclusive presumption requires the trier of fact to find the existence of the presumed fact from the existence of the basic fact. An adverse party is not permitted to introduce evidence to contradict or rebut the existence of the presumed fact. Indeed, conclusive presumptions are not truly rules of evidence, but are substantive rules of law, which exist to further particular public policies and purposes.

A presumption affecting the burden of proof is a rebuttable presumption. By law, “[t]he effect of a presumption affecting the burden of proof is to impose upon the party against whom it operates the burden of proof as to the nonexistence of the presumed fact.” Like a conclusive presumption, a presumption affecting the burden of proof “implement[s] some public policy other than to facilitate the determination of the particular action in which the presumption is applied.” But, of course, a presumption affecting the burden of proof is rebuttable. (Evid. Code, §§601, 606.) The party against whom the presumption applies must produce evidence to *disprove* the presumed fact.

Of course, it is a basic principle of construction that meaning must be given to every word or phrase of a statute, if possible, so as not to cause any word or phrase to be mere surplusage. Moreover, statutory phrases are not to be read in isolation; rather, they must be harmonized, both internally and with the entire statutory scheme of which they are a part, to the extent possible. Therefore, it is the boards duty to harmonize both the first and second sentences of section 4664(b), if possible, so as to give effect to them both and so as *not* to render either sentence meaningless.

In light of these principles, we conclude that, once a defendant has established the existence of a prior award of permanent disability relating to the same region of the body, then the percentage of permanent disability found under the prior award will be subtracted from the current overall percentage of disability, *unless* the applicant *disproves* overlap by establishing that the prior permanent disability does not overlap the current permanent disability, either in whole or in part.

This interpretation of section 4664(b) harmonizes its first sentence, which provides that “it shall be conclusively presumed that the prior permanent disability exists at the time of any subsequent industrial injury,” with its second sentence, which provides that “[t]his presumption is a presumption affecting the burden of proof.” That is, consistent with the first sentence, the prior permanent disability still will be conclusively presumed to “exist,” and the applicant cannot show that he or she has medically rehabilitated from it. Nevertheless, consistent with the second sentence, the applicant will have the opportunity to disprove or negate apportionment, in whole or in part, by showing that his or her most recent injury caused some *new* permanent disability that did *not* previously “exist,” i.e., that the new injury has produced separate and independent permanent disability that does not overlap the pre-existing permanent disability because the new disability affects *different* abilities to compete and earn. If, however, the applicant fails to disprove overlap, then the applicant cannot avoid the application of the conclusive presumption that the prior permanent disability still “exists” and, therefore, the prior percentage permanent disability rating will be deducted from the current overall

percentage permanent disability rating where the disabilities are in the same region as described in section 4664(c).

Further, the phrase “prior permanent disability” in section 4664(b) does *not* mean the *factors of disability* upon which the prior permanent disability award was based. To so interpret section 4664(b) would mean that, before the conclusive presumption could attach, the defendant would have both the burden of proving the existence of a prior permanent disability award *and* the burden of proving the nature of the permanent disability upon which that award was based. As noted earlier, the trigger for the conclusive presumption is the existence of a prior award of permanent disability, not the factors of permanent disability underlying such an award.

Additionally, if a defendant were required to establish the prior factors of permanent disability as well as the existence of the prior permanent disability award, this effectively would cause the *second* sentence of section 4664(b) to be read out of the statute, in violation of the principles of construction discussed above. Once more, the second sentence of section 4664(b) provides, in essence, that the conclusive presumption that the prior permanent disability exists “is a presumption affecting the burden of proof.” As discussed above, a “presumption affecting the burden of proof” requires the party *against* whom the presumption operates to establish the *nonexistence* of the presumed fact. Reading the first and second sentences of section 4664(b) together, as the board concluded, the conclusive presumption of the existence of prior permanent disability in the first sentence of section 4664(b) operates *in favor* of defendant. Therefore, any interpretation of the second sentence must require applicant to *disprove* something, while at the same time not nullifying whatever has been conclusively established.

Both of these aspects of section 4664(b) are fulfilled by requiring the applicant to *disprove* the existence of overlap by establishing the nature of the permanent disability upon which the prior permanent disability award was based, rather than by requiring the defendant to *prove* the existence of overlap by establishing the nature of that permanent disability. This is because, once the character of the permanent disability underlying the prior permanent disability award is established, the determination of apportionment is essentially a mechanical process – not a burden of proof issue – i.e., as will be discussed below, it is determined using substantially the same overlap principles that have been historically applied in the cases discussed in Section II-A, above. Thus, if a defendant had to prove not only the existence of a prior permanent disability award, but also the character of the permanent disability upon which the prior award was predicated, there would be nothing left for the applicant to *disprove*, in contravention to the second sentence of section 4664(b).

Moreover, as discussed above, a conclusive presumption is a substantive rule of law adopted to further some particular public policy or purpose. (*Estate of Cornelious, supra*, 35 Cal.3d at p. 464; *Kusior v. Silver, supra*, 54 Cal.2d at p. 619; *Federal Deposit Ins. Corp. v. Superior Court, supra*, 54 Cal.App.4th at p. 346.) Similarly, a presumption affecting the burden of proof is intended to “implement some public policy other than to facilitate the determination of the particular action in which the presumption is applied.” (Evid. Code, §605.) It appears that the public policies behind the twofold conclusive and rebuttable presumptions of section 4664(b) are that apportionment of pre-existing disability will occur (i.e., the

pre-existing disability will be deducted), unless some showing is made (other than medical rehabilitation) why apportionment should not occur. To interpret section 4664(b) to mean that, once a prior permanent disability award has been established, the prior permanent disability percentage will be deducted

unless applicant shows that the present and pre-existing disabilities do *not* overlap, in whole or in part, is consistent with these policies.

If an applicant introduces evidence to show that his or her present and pre-existing disabilities do *not* overlap, the defendant is entitled to introduce rebuttal evidence to show why overlap should be found.

5. Under Section 4664, The Issue Of Whether The Prior Permanent Disability For The Same Region Of The Body Overlaps The Current Disability Is Determined Using Substantially The Same Principles That Were Applied Prior To The Enactment Of SB 899

If the defendant meets its burden of proving the existence of a prior permanent disability award relating to the same region of the body, and if the applicant meets his or her burden of establishing the character of the permanent disability that was the basis of the prior award (from which he or she cannot assert medical rehabilitation), then apportionment shall be determined substantially in accordance with the same overlap principles that were historically applied in cases decided before the enactment of SB 899. (See Section II-A, *supra*.)

We state that apportionment shall be determined “substantially” in accordance with historical overlap principles because we recognize that, in future cases, the differences between how permanent disability is determined under the April 1997 Schedule for Rating Permanent Disabilities and how it is determined under the January 2005 Schedule for Rating Permanent Disabilities may present novel overlap questions. None of these questions are presented here, however, and we will not speculate on them.

6. The Sum Of The Permanent Disability Awards For Any One Body Region Cannot Exceed 100%, Even Where The Permanent Disability Caused By The Applicant’s New Injury Does Not Overlap The Permanent Disability Underlying The Prior Award(s), Unless The Employee’s New Industrial Injury Causes Disability That Is Conclusively Presumed To Be Total Under Section 4662

the employee’s disability is conclusively presumed to be total under section 4662. Thus, absent conclusively presumed total disability, the sum of the permanent disability awards for one body region cannot exceed 100%, even where the permanent disability caused by the applicant’s current injury does not overlap the permanent disability underlying his or her prior permanent disability award(s).

Section 46

D. Application Of These Principles To The Present Case

The WCJ correctly determined that applicant's December 18, 2002 left foot injury caused 7% permanent disability, with no apportionment.

The parties stipulated applicant's December 18, 2002 left foot injury caused 7% permanent disability. The record establishes that this stipulation was based on the February 18, 2004 report of Dr. Greenfield, the AME, who found that applicant's left foot injury caused subjective disability of intermittent slight left foot pain, becoming moderate with cold weather and rain. Dr. Greenfield neither imposed any work restrictions nor found any ratable objective factors of disability based on the left foot injury.

To claim apportionment under section 4664(b), defendant had the burden of proving the existence of any prior permanent disability award(s). Defendant satisfied this burden by presenting a copy of the May 6, 2002 stipulated Findings and Award, which established that applicant's October 10, 1997 bilateral knee injury caused 22% permanent disability.

Under section 4664(b), applicant was not entitled to assert that she had medically rehabilitated from her bilateral knee disability. She was, however, entitled to disprove apportionment by demonstrating that her conclusively existing bilateral knee disability does not overlap the permanent disability caused by her December 18, 2002 left foot injury, either in whole or in part.

On this record, applicant succeeded in carrying her burden of proof. The May 6, 2002 stipulated Findings and Award shows that applicant's bilateral knee disability consisted of a 35% loss of her pre-injury capacity for kneeling, squatting, climbing, heavy lifting, pushing and pulling. Thus, applicant's pre-existing knee disability resulted solely in a diminished capacity to perform specified work activities. This partial loss of work capacity with respect to applicant's knees does not overlap her current disability of intermittent slight left foot pain – becoming moderate with cold weather and rain – because the prior and current disabilities affect her abilities to compete and earn in separate and independent ways. Therefore, applicant has demonstrated that there is no overlap between her prior permanent disability, which conclusively still exists, and her current permanent disability.

Finally, although both applicant's current and prior injuries involved the same region of the body, i.e., the lower extremities under section 4664(c)(1)(F), the sum of her current 7% permanent disability award and her prior 22% permanent disability award does not exceed 100%. Therefore, the additional award of 7% permanent disability does not violate section 4664(c)(1), which provides that “[t]he 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.” The board emphasized, however, that for purposes of section 4664(c)(1), applicant now has a total of 29% permanent disability (i.e., 22% plus 7%) for the lower extremities region.

Accordingly, The board affirmed the WCJ's October 7, 2004 decision finding that applicant's December 18, 2002 left foot injury resulted in 7% permanent disability, without apportionment.

**2. Strong v. City & County of San Francisco (2005) 70 Cal.Comp.Cases 1460
(Appeals Board en banc):**

A. introduction:

The Board granted reconsideration to further study the issue of apportionment under Labor Code section 4664, as enacted by Senate Bill 899 (SB 899), in situations where an employee suffers an industrial injury causing permanent disability to one region of the body, and where there has been a prior industrial injury resulting in an award of permanent disability involving and/or including different regions of the body

Based on our review of the relevant statutes and case law, The WCAB held:

- (7) Where an employee suffers an industrial injury causing permanent disability to one region of the body, and where there is a prior award of permanent disability involving and/or including any other region(s) of the body, section 4664 requires the apportionment of overlapping permanent disabilities;
- (8) The defendant has the burden of proving the existence of any prior permanent disability award(s) involving and/or including any other region(s) of the body;
- (9) When the defendant has established the existence of any prior permanent disability award(s) involving and/or including any other region(s) of the body, the permanent disability underlying any such award(s) is conclusively presumed to still exist, i.e., the applicant is not permitted to show medical rehabilitation from the disabling effects of the earlier industrial injury or injuries;
- (10) When the defendant has established the existence of any prior permanent disability award(s) involving and/or including any other region(s) of the body, the percentage of permanent disability from the prior award(s) will be subtracted from the percentage of permanent disability for the body region of the most recent injury, unless the applicant *disproves* overlap, i.e., the applicant demonstrates that the prior permanent disability and the current permanent disability affect different abilities to compete and earn, either in whole or in part; and
- (11) The issue of whether the prior permanent disability for a different region of the body overlaps the current disability is determined using substantially the same principles that were applied prior to the enactment of section 4664.

Facts:

Jack C. Strong sustained a series of industrial injuries while employed as a stationary

engineer by the City and County of San Francisco (defendant). For each injury, Peter A. von Rogov, M.D., treated him. Dr. von Rogov's reports were the only medical reports received in evidence in this matter.

Applicant initially sustained a November 27, 1995 injury to his left knee. On December 8, 1999, a stipulated award issued, which found that this left knee injury caused permanent disability of 34-½%. Based on the summary rating determination received in evidence at trial, the 34-½% stipulated permanent disability finding was based on a 20% standard rating, in accordance with Dr. von Rogov's August 13, 1998 permanent and stationary report. That report found that applicant "has a disability corresponding to Category C of the Guidelines for Work Capacity," i.e., a preclusion from heavy lifting. The report also found that applicant had objective and subjective disability.

Applicant had another industrial injury on February 12, 1999, to his left shoulder, left knee, left ankle, and right wrist. A stipulated award issued on March 28, 2003, finding that this injury caused permanent disability of 42%. Based on the summary rating determination admitted in evidence at trial, this 42% rating was based on a limitation to light work, after apportionment to applicant's prior preclusion from heavy lifting. Both the light work limitation and the apportionment to the prior no heavy lifting restriction were consistent with the June 6, 2001, February 28, 2001, December 13, 2001, and May 9, 2002 reports of Dr. von Rogov. Those reports also set forth various objective and subjective factors of disability, as well as some additional work restrictions.

The back injury in the case occurred on May 8, 2002. In various reports issued after applicant became permanent and stationary (i.e., reports dated November 3, 2002, November 30, 2002, February 17, 2003, and January 26, 2004), Dr. von Rogov states that applicant's present *overall* disability is a limitation to semi-sedentary work and that the *increase* in disability from a limitation to light work is a result of the May 8, 2002 back injury. Dr. von Rogov's reports also contain some partial descriptions of objective and subjective factors of disability for applicant's back.

On December 9, 2004, a trial occurred at which the various reports of Dr. von Rogov, the prior stipulated permanent disability awards, and the summary rating determinations discussed above were all admitted in evidence. The parties also stipulated that applicant's *overall* permanent disability is 70%, after adjustment for age and occupation. The parties raised the issue of the application of section 4664 and the issue of apportionment (overlap) for determination.

After receiving trial briefs from the parties, the WCJ issued rating instructions to the Disability Evaluation Unit (DEU), as follows:

"Please consider whether there is overlap between the following disabilities:

"Applicant has an overall disability of 70% after adjustment of for age and occupation based on a limitation to semi-sedentary work because of a back injury of 5/08/02 and previous injuries to the left shoulder, left knee, left ankle and right wrist.

"Prior to the 5/08/02 injury, applicant was limited to light work

for an injury to the left shoulder, left knee, left ankle and right wrist limiting the applicant to light work.”

On March 29, 2005, a disability evaluation specialist (rater) of the DEU issued a 10% recommended permanent disability rating opining: (1) that applicant’s pre-existing light work limitation rated 60%, after adjustment for his current occupation; and (2) that applicant’s May 8, 2002 caused 10% permanent disability, after apportionment (i.e., the stipulated 70% overall disability minus the 60% pre-existing disability).

On May 31, 2005, the WCJ issued a Findings and Award determining that applicant’s May 8, 2002 back injury caused 10% permanent disability.

Thereafter, applicant filed a timely petition for reconsideration. In substance, the applicant contends: (1) that, under section 4664(a), the employer is liable for the “percentage of permanent disability directly caused by the injury” and, here, applicant’s May 8, 2002 back injury has directly caused permanent disability of 70%; (2) that, because the 70% permanent disability caused by the May 8, 2002 injury is all in the region of the back, then under section 4664(c)(1) there cannot be any apportionment to pre-existing disability in other regions of the body; and (3) that, if apportionment is to apply, it is limited to subtracting the monetary equivalent of the pre-existing disability from the monetary equivalent of the current overall disability.

Defendant filed an answer to the petition for reconsideration. In essence, defendant asserts: (1) that the repeal of former section 4750 did not eliminate the principle of overlapping disability; and (2) that, under *Nabors v. Piedmont Lumber and Mill Co.* (2005) 70 Cal.Comp.Cases 856 (Appeals Board en banc), the amount of indemnity due is calculated by subtracting the permanent disability caused by other factors from the overall percentage of permanent disability.

Discussion:

A. The Determination Of Overlapping Disabilities Prior To SB 899

In order to evaluate whether new section 4664, requires the apportionment of overlapping disability when an employee suffers an industrial injury causing permanent disability to one region of the body, but there has been a prior industrial injury resulting in an award of permanent disability involving and/or including different regions of the body, we will first trace some of the pre-SB 899 history of apportionment based on pre-existing permanent disability.

The percentage of permanent disability caused by any injury shall be computed as to cover the permanent disability caused by that particular injury. The fact an employee has suffered previous disability or received compensation shall not preclude compensation for a later injury provided that an employee who is suffering physical impairment and shall sustain permanent injury thereafter shall not receive compensation for a 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 employee for the combined disability but only for that portion due to the later injury as though no prior disability or impairment had existed

Former Labor Code section 4750 was established to encourage employers to hire people with disabilities; the Legislature recognized that employers might refrain from hiring the disabled if, upon a subsequent injury, the employer would become obligated to compensate the employee for the pre-existing disability. Thus, under former section

4750, when an employee who had pre-existing permanent disability sustained an industrial injury that also resulted in permanent disability, the employer or its insurer was not liable for the combined disability, but only for that portion attributable to the subsequent industrial injury, considered alone

In applying former section 4750, when the permanent disability resulting from a new injury included factors of disability that were the same as ones that already existed as the result of a prior injury or condition, the disabilities were said to “overlap.” If all of the factors of permanent disability attributable to the subsequent industrial injury already existed as a result of the prior injury or condition, then there was “total” overlap, and the employee was not entitled to any additional permanent disability indemnity; if, however, the subsequent industrial injury caused some new factors of permanent disability that were not pre-existing, then there was “partial” overlap, and the employee was entitled to permanent disability indemnity to the extent the subsequent industrial injury further restricted his or her earning capacity or ability to compete.

It is not the part of the body involved in the subsequent industrial injury that is important; rather, it was the nature of the disability resulting from the new injury in relation to the pre-existing disability that was determinative. Thus, the fact that the pre-existing disability and the new disability involved two different anatomical parts of the body, while relevant, did not in itself preclude apportionment using the rules of overlap.

The mechanics of rating overlap generally provided that each separate factor of permanent disability for both the new industrial injury and the pre-existing condition be set forth, so it could be determined what elements, if any, of one disability were included in the other. The issue of apportionment would be resolved by determining the percentage of combined disability after the new injury, and then subtracting the percentage of disability due to the prior injury which overlapped – either partially or totally – the disability resulting from the new injury. If, however, successive injuries produced separate and independent disabilities – i.e., if the disabilities did not fully or partially overlap because they did not affect the *same* abilities to compete and earn – then each was rated separately.

B. The Determination Of Overlapping Disabilities After SB 899

1. Where An Employee Suffers An Industrial Injury Causing Permanent Disability To One Region Of The Body, And Where There Is A Prior Award Of Permanent Disability Involving And/Or Including Any Other Region(s) Of The Body, Section 4664 Requires The Apportionment Of Overlapping Permanent Disabilities

New section 4664 provides:

“(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.”

The board held that new section 4664 still requires the apportionment of overlapping permanent disabilities where an employee suffers an industrial injury causing permanent disability to one region of the body, and where there is a prior award of permanent disability involving and/or including other regions of the body.

There is nothing in new section 4664 that evinces a clear expression of legislative intent to abandon the longstanding policy of encouraging employers to hire workers with disabilities by assuring that such employers are not made liable for pre-existing disabilities if those workers subsequently sustain an industrial injury. To the contrary, the express language of new section 4664 suggests the Legislature intended this policy to have continuing force and effect. Specifically, section 4664(a) states, “[t]he 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.” The employer is liable only for “the permanent disability ... caused by the direct result of [the] injury” and it is not liable for “the permanent disability ... caused by other factors both before and subsequent to the industrial injury, including prior industrial injuries”).

The board conclude that, new section 4664, an employee is not entitled to be compensated for permanent disability resulting from a new industrial injury to the extent that this permanent disability is overlapped by prior permanent disability, even where the prior permanent disability involves and/or includes different regions of the body. In this way, the employer in a subsequent injury case is held liable only for the permanent disability directly caused by that injury. On the other hand, the employee is entitled to be compensated for any *new* permanent disability directly caused by the new industrial injury.

The board further noted that section 4664(b) states only that any prior permanent disability shall be conclusively presumed to “exist[.]” at the time of the subsequent injury. It does not require that the prior permanent disability be subtracted, but also it does not preclude subtraction. Thus, the language of section 4664(b) also supports our conclusion that a determination must be made regarding the *consequences* of the previously “exist[ing]” permanent disability – i.e., if the pre-existing permanent disability and the current permanent disability overlap, there will be subtraction to the extent of that overlap, but, otherwise, there will be no subtraction.

Having concluded that the principles of overlap remain alive under new section 4664, The board addressed how these overlapping principles are to be applied to apportionment determinations under new section 4664 in situations where an employee

suffers an industrial injury causing permanent disability relating to one region of the body, but where there has been a prior industrial injury resulting in an award of permanent disability involving and/or including a different region of the body.

2. The Defendant Has The Burden Of Proving The Existence Of Any Prior Permanent Disability Award(s) Involving And/Or Including Any Other Region(s) Of The Body

Section 4664(b) applies only “[i]f the applicant has received a prior award of permanent disability.” Thus, the provisions of section 4664(b) are not triggered unless a prior award of permanent disability exists.

The board concluded that it is defendant’s burden to prove that applicant had a prior permanent disability award relating to a different region of the body. Placing this burden on defendant is consistent with the statutory provisions that the party holding the affirmative of an issue has the burden of proof by a preponderance of the evidence. Placing this burden on defendant is also consistent with the longstanding principle that, because it is the defendant that benefits from a finding of apportionment, it bears the burden of demonstrating that apportionment is appropriate.

Under section 4664, it is still the defendant that benefits from a finding of apportionment. Although – as discussed below – section 4664 has effected some shift in the parties’ respective burdens on apportionment in the context of a prior permanent disability award, the WCAB discerned no legislative intent to completely overthrow this long-established principle. Thus, it is defendant’s burden to show that applicant *had* a prior permanent disability award, rather than applicant’s burden to show he or she did *not* have one.

The preferred procedure for establishing the existence of a prior permanent disability award is for the defendant to offer in evidence a copy of the award, or to request that the WCAB take judicial notice of a prior award. If, for some reason, a copy of the prior permanent disability award cannot be produced, then the existence of any prior permanent disability award may be shown by secondary evidence – *if the secondary evidence is sufficiently reliable and sufficiently establishes the substance of the lost or destroyed award*. This opinion does not address what type(s) of secondary evidence might be used to establish the existence of a prior permanent disability award, but we will observe that the WCAB may draw reasonable inferences from any secondary evidence presented, if it is sufficiently reliable. (

3. When The Defendant Has Established The Existence Of Any Prior Permanent Disability Award(s) Involving And/Or Including Any Other Region(s) Of The Body, The Permanent Disability Underlying Any Such Award(s) Is Conclusively Presumed To Still Exist, i.e., The Applicant Is Not Permitted To Show Medical Rehabilitation From The Disabling Effects Of The Earlier Industrial Injury Or Injuries

Once a defendant establishes the existence of a prior award of permanent disability relating to a different region of the body, section 4664(b) provides, “it shall be conclusively presumed that the prior permanent disability exists at the time of any subsequent industrial injury.”

Because section 4664(b) mandates “it shall be *conclusively* presumed that the prior permanent disability exists” The board concluded that, in the context of apportionment under section 4664(b), the Legislature intended to abrogate the line of cases that had allowed an injured employee to show he or she had medically rehabilitated from the effects of an earlier injury at the time of a subsequent injury. Accordingly, an applicant cannot offer any medical or testimonial evidence to contradict the conclusively presumed “prior permanent disability,” i.e., he or she cannot attempt to demonstrate medical rehabilitation.

4. When The Defendant Has Established The Existence Of Any Prior Permanent Disability Award(s) Involving And/Or Including Any Other Region(s) Of The Body, The Percentage Of Permanent Disability From The Prior Award(s) Will Be Subtracted From The Percentage Of Permanent Disability For The Body Region Of The Most Recent Injury, Unless The Applicant Disproves Overlap, i.e., The Applicant Demonstrates That The Prior Permanent Disability And The Current Permanent Disability Affect Different Abilities To Compete And Earn, Either In Whole Or In Part

Section 4664(b)'s first sentence creates a “conclusive” presumption that the prior permanent disability exists at the time of any subsequent industrial injury. The second sentence, however, states that this “conclusive” presumption is a “presumption affecting the burden of proof” – which is a rebuttable presumption. Hence, an inherent tension in section 4664(b) exists.

Where the law establishes a conclusive presumption, no evidence can be offered to dispute it. It need not have a logical basis, and no evidence may be received to contradict it “A ‘conclusive presumption’ requires the trier of fact to find the existence of the presumed fact from the existence of the basic fact. An adverse party is not permitted to introduce evidence to contradict or rebut the existence of the presumed fact. Indeed, conclusive presumptions are not truly rules of evidence, but are substantive rules of law, which exist to further particular public policies and purposes. (

A presumption affecting the burden of proof is a rebuttable presumption. By law, [t]he effect of a presumption affecting the burden of proof is to impose upon the party against whom it operates the burden of proof as to the nonexistence of the presumed fact. Like a conclusive presumption, a presumption affecting the burden of proof “implement[s] some public policy other than to facilitate the determination of the particular action in which the presumption is applied.” But, of course, a presumption affecting the burden of proof is rebuttable. (Evid. Code, §§601, 606.) The party against whom the presumption applies must produce evidence to *disprove* the presumed fact.

The board concluded that, once a defendant has established the existence of a prior award of permanent disability relating to a different region of the body, then the percentage of permanent disability found under the prior award will be subtracted from the current overall percentage of disability, *unless* the applicant *disproves* overlap by establishing that the prior permanent disability does not overlap the current permanent disability, either in whole or in part.

This interpretation of section 4664(b) harmonizes its first sentence, which provides that “it shall be conclusively presumed that the prior permanent disability exists at the time of any subsequent industrial injury,” with its second sentence, which provides

that “[t]his presumption is a presumption affecting the burden of proof.” That is, consistent with the first sentence, the prior permanent disability still will be conclusively presumed to “exist,” and the applicant cannot show that he or she has medically rehabilitated from it. Nevertheless, consistent with the second sentence, the applicant will have the opportunity to disprove or negate apportionment, in whole or in part, by showing that his or her most recent injury caused some *new* permanent disability that did *not* previously “exist,” i.e., that the new injury has produced separate and independent permanent disability that does not overlap the pre-existing permanent disability because the new disability affects different abilities to compete and earn. If, however, the applicant fails to disprove overlap, then the applicant cannot avoid the application of the conclusive presumption that the prior permanent disability still “exists” and, therefore, the prior percentage permanent disability rating will be deducted from the current overall percentage permanent disability rating, even where the disabilities are in different regions as described in section 4664(c).

The phrase “prior permanent disability” in section 4664(b) does not mean the factors of disability upon which the prior permanent disability award was based. To so interpret section 4664(b) would mean that, before the conclusive presumption could attach, the defendant would have both the burden of proving the existence of a prior permanent disability award *and* the burden of proving the nature of the permanent disability upon which that award was based. As noted earlier, the trigger for the conclusive presumption is the existence of a prior award of permanent disability, not the factors of permanent disability underline such an award.

Additionally, if a defendant were required to establish the prior factors of permanent disability as well as the existence of the prior permanent disability award, this effectively would cause the *second* sentence of section 4664(b) to be read out of the statute, in violation of the principles of construction discussed above. Once more, the second sentence of section 4664(b) provides, in essence, that the conclusive presumption that the prior permanent disability exists “is a presumption affecting the burden of proof.”

Both of these aspects of section 4664(b) are fulfilled by requiring the applicant to *disprove* the existence of overlap by establishing the nature of the permanent disability upon which the prior permanent disability award was based, rather than by requiring the defendant to *prove* the existence of overlap by establishing the nature of that permanent disability. This is because, once the character of the permanent disability underlying the prior permanent disability award is established, the determination of apportionment is essentially a mechanical process – not a burden of proof issue it is determined using substantially the same overlap principles that have been historically applied in the cases discussed in Section II-A, above. Thus, if a defendant had to prove not only the existence of a prior permanent disability award, but also the character of the permanent disability upon which the prior award was predicated, there would be nothing left for the applicant to disprove, in contravention to the second sentence of section 4664(b).

We will not now address what documentary evidence and/or testimony might suffice to establish the nature of the prior permanent disability; however, we reiterate that the WCAB will have the power to draw reasonable inferences from the record before it.

5. Under Section 4664, The Issue Of Whether The Prior Permanent Disability For A Different Region Of The Body Overlaps The Current Disability Is Determined Using Substantially The Same Principles That Were Applied Prior To The Enactment Of SB 899

If the defendant meets its burden of proving the existence of a prior permanent disability award relating to a different region of the body, and if the applicant meets his or her burden of establishing the character of the permanent disability that was the basis of the prior award (from which he or she cannot assert medical rehabilitation), then apportionment shall be determined substantially in accordance with the same overlap principles that were historically applied in cases decided before the enactment of SB 899. (See Section II-A, *supra*.)

We state that apportionment shall be determined “substantially” in accordance with historical overlap principles because we recognize that, in future cases, the differences between how permanent disability is determined under the April 1997 Schedule for Rating Permanent Disabilities and how it is determined under the January 2005 Schedule for Rating Permanent Disabilities may present novel overlap questions. None of these questions are presented here, however, and we will not speculate on them.

D. Application Of These Principles To The Present Case

The WCJ correctly determined that applicant’s May 8, 2002 back injury caused 10% permanent disability, after apportionment.

At trial, the parties stipulated that applicant’s *overall* permanent disability is 70%, after adjustment for age and occupation. The parties then placed the questions of the application of section 4664 and of apportionment (overlap) in issue.

To claim apportionment under section 4664(b), defendant had the burden of proving the existence of any prior permanent disability award(s) including or involving different regions of the body. Defendant satisfied this burden by offering in evidence: (1) a December 8, 1999 stipulated award finding that applicant’s November 27, 1995 left knee injury caused 34-½% permanent disability; and (2) a March 28, 2003 stipulated award finding that applicant’s February 12, 1999 left shoulder, left knee, left ankle, and right wrist injury caused 42% permanent disability.

Under section 4664(b), applicant was not entitled to assert that he had medically rehabilitated from the permanent disability caused by his two prior injuries. However, he was entitled to disprove apportionment by demonstrating that his conclusively existing permanent disability, upon which the December 8, 1999 and March 28, 2003 awards were based, does not overlap the permanent disability caused by his May 8, 2002 back injury, either in whole or in part.

On this record, applicant succeeded in disproving total overlap, i.e., he established there is only partial overlap between his current disability and the disability upon which his prior permanent disability awards were based.

The evidence establishes: (1) that the stipulated 34-½% permanent disability rating for applicant's November 27, 1995 left knee injury was based on a preclusion from heavy lifting, in accordance with Dr. von Rogov's August 13, 1998 report; and (2) that the stipulated 42% permanent disability rating for applicant's February 12, 1999 left shoulder, left knee, left ankle, and right wrist injury was based on a limitation to light work, after apportionment to applicant's prior preclusion from heavy lifting, in accordance with Dr. von Rogov's June 6, 2001, February 28, 2001, December 13, 2001, and May 9, 2002 reports. Accordingly, applicant had pre-existing overall disability consisting of a limitation to light work, from which he cannot assert medical rehabilitation.

The evidence also establishes that the parties' stipulation that applicant's *overall* disability following his May 8, 2002 back injury is 70%, after adjustment for age and occupation, is based on an *overall* a limitation to semi-sedentary work, in accordance with Dr. von Rogov's November 3, 2002, November 30, 2002, February 17, 2003, and January 26, 2004 reports.

Finally, these four reports of Dr. von Rogov state that the *increase* in disability from a limitation to light work to a limitation to semi-sedentary work is a result of applicant's May 8, 2002 back injury.

The pre-existing light work limitation only partially overlaps the current semi-sedentary work limitation. Therefore, applicant is entitled to be compensated for the difference. This is what the WCJ did. Specifically, he found that applicant's May 8, 2002 back injury caused 10% permanent disability, after apportionment. He arrived at this 10% rating by deducting the pre-existing 60% disability (which was based on applicant's pre-existing light work limitation, as adjusted by the DEU for applicant's current age)⁶ from the stipulated 70% overall disability (which was based on applicant's current overall limitation to semi-sedentary work, as adjusted for his current age and occupation).

Accordingly, the WCJ followed the correct procedure. On this record, with the evidentiary basis for the prior permanent disability awards having been established, it would not have been appropriate for the WCJ to utilize a methodology of simply adding the percentages of permanent disability from the prior awards and then subtracting that total from the current overall percentage of permanent disability.

As a final point, The board stated they must briefly address applicant's contention that, if apportionment is to apply, it is limited to subtracting the monetary equivalent of the pre-existing disability from the monetary equivalent of the current overall disability. This issue has already been resolved adversely to applicant by our en banc decision in *Nabors v. Piedmont Lumber and Mill Co.* (2005) 70 Cal.Comp.Cases 856 (Appeals Board en banc). We will not re-visit *Nabors* here.

Accordingly, we affirm the WCJ's May 31, 2005 decision finding that applicant's May 8, 2002 back injury caused 10% permanent disability, after apportionment.

3. Overlap Defined: The Schedule for Rating Permanent Disabilities, April 1997, defines overlap as follows: "When factors of disability resulting from the current injury duplicate factors resulting from a different injury or condition, the disabilities are said to 'overlap'. Overlap occurs to the extent that the factors of disability resulting from the

current injury do not reduce an injured worker's ability to compete in the open labor market beyond the disability resulting from the pre-existing injury(ies) and/or conditions(s).... Overlapping disability(ies) resulting from the prior injury or condition must be factored out of the current disability so the rating reflects only the residual disability caused by the current injury. Overlap may be total, partial or absent....” Disabilities do not overlap unless both impair the injured worker's ability to perform work in the same manner. (*Mercier v. WCAB*, 41 CCC 205; *California Workers Compensation Practice*, 3d Edition., CEB §16.40).

3. Dragomir-Tremoureux v. Kaiser Foundation Hospitals. (BPD)(33 CWCRC 302): Applicant sustained an injury to her arms on 7-24-98 and a CT ending 10-30-2000 while working for Kaiser. In November 1996 she had previously received an award for 18 ¾ % to her wrist. The applicant was referred to an AME who applicant was 100% disabled as a result of all the industrial injuries, but concluded that the 18 ¾ % prior award of PD should be set off against the current 100% disability. The WCJ after trial awarded 81 ¼ percent after apportionment to the prior award based the Escobedo case (apportionment to causation and the case of Nabors. Applicant filed a petition for reconsideration which was granted by the Appeals Board. The panel quoted portions of Labor Code Sections 4662, 4663 and 4664. Labor code section 4662 provides that the loss of both hands or the loss of use of both hands is conclusively presumed to be total. Labor Code section 4664 (b) provides that if the applicant has received a prior award of PD, it is conclusively presumed that the prior award of PD existed at the time of the subsequent injury. Under Labor code section 4664 (c) the accumulation of all award issued for any one region of the body may not exceed 100% over the lifetime unless the employee's injury or illness is conclusively presumed to be total pursuant to Labor Code Section 4662. Labor Code section 4664 provides that upper extremities, including shoulders are a region of the body. Nothing in Labor Code section 4664 is intended to permit a single injury to exceed a 100%. In this case the Appeals Board concluded under Labor code Section 4664 (b) it was conclusively presumed that the 18 ¾ % PD still existed at the time of the injuries in this case. The board also concluded that the presumption of Labor Code Section 4662 applied and that that it was presumed applicant's disability was total. A conclusive presumption operates as a rule of substantive law and cannot be rebutted, and no evidence can be received to contradict it. The board concluded board that Labor Code section 4662 presumption precludes apportionment because that the plain language of Labor code Section 4664 (c) (1) provides that the total of all PD awards issued with respect to any one region of the body do not exceed 100 % over the employee's lifetime unless the employee's injury or illness is conclusively presumed to be total per Labor Code section 4662. Because applicants disability was presumed to be total pursuant to Labor Code Section 4662, her lifetime accumulation of upper extremity PD awards could exceed 100 percent PD.

J. Other Issues:

- a. How will this work when new awards are based on AMA percentages and old award are based on the rating manual (objectives, subjective and work restrictions) based on a new and different rating manual? Could it be that the only apportionment in these cases is to causation.
- b. Is a C & R an award of permanent disability for purposes of this section and if so how do you determine the percentage if not set forth in the agreement?
1. If the C & R has a stipulated rating agreed to by the parties it is more likely an award of PD.
 2. f no mention of rating at all unlikely it is an award of PD.
 3. If range of PD mentioned as basis of settlement it is still unlikely it is an award of PD.
 4. If not an award of PD, you may still get apportionment under direct causation portion of statute
- c. Apportionment and the Labor Code Section 3212.5 presumption: Brown v. City of Long Beach: (33 CWCR 215 BPD) A WCAB panel reversed a WCJ's apportionment under SB 899 holding that apportionment can not be made to preexisting disease if the statute has a nonattribution clause. A WCJ found that a City of long Beaches police officers had a 30 % heart disability apportioning 1/3 to smoking and family factors. The WCAB indicated that the legislature had not repealed or amended 3212.5 when it enacted SB 899 and the law in effect prior to SB 899 which precludes apportionment of a police officers heart disease that is presumed compensable. If the presumption statute conttains a nonattribution clause the WCAB may not apportion and PD covered by the presumption to preexisting disease. In the absence of a nonattribution clause, however apportionment to other factors made be made in accordance with the Escobedo case.