



Apportionment

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“Apportionment: Recent Case law update focusing on themes, trends, and problem areas.” (© Raymond F. Correio, 2008)

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1. Valid/Legal Apportionment Determinations.

Warner v. W.C.A.B. (2007) 72 CCC 1734(4th DCA)

Case Summary: CT injury ending 2/18/94, to sinuses. There was a preliminary F&A which issued on 8/27/97, on the issue of AOE/COE. This later trial involved the nature and extent of disability and related issues of apportionment (i.e., causation of disability v. causation of injury). The AME's report and opinion were deemed to constitute substantial medical evidence on apportionment based on SB 899 and current case law. Permanent disability before apportionment was 100%. Valid legal apportionment was 99.5% (unspecified non-industrial factors).

Comments/Analysis: This case left applicant with 0.5% industrial PD. An astounding reduction of a 100% award. I assume the WCJ rounded it up to 1% PD. Perhaps there was a need for ongoing medical care and treatment in which case the reduced award had some value.

Khachikian v. W.C.A.B. (2007) 72 CCC 1715 (writ denied; 2nd DCA)

Case Summary: Sparse facts on this writ denied case. WCJ found injury AOE/COE on a CT injury ending on 2/28/00, to applicant's psyche but no injury to alleged internal system. Applicant was a teacher. AME determined that 20% of applicant's disability was related to a non-industrial factor consisting of a personality disorder. Permanent disability before apportionment was 41%. Final award of PD to applicant after apportionment was 33%.

Politz v. Zenith Environmental Pest Control, S.C.I.F. (2007) 72 CCC 1725
(writ denied; 2nd DCA)

Case Summary: Applicant suffered an 8/28/99, specific industrial back and neck injury and a CT ending 7/99, to the back and neck. This case while only a writ denied case with limited facts, illustrates the radical change based on apportionment to causation and the broad potential net for legal apportionment under LC 4663 to pre-existing asymptomatic degenerative conditions if there is supportive substantial medical evidence. Board found 33 1/3% valid non-industrial apportionment based on the natural progression of asymptomatic degenerative disc disease involving the applicant's cervical and lumbar spine. The other interesting side note is that applicant argued (to no avail) the apportionment determination violated L.C. sections 124 and 3202. Labor Code section 124(a) provides that "[i]n administering and enforcing this division and Division 4 (commencing with section 3200), the division shall protect the interests of injured workers who are entitled to the timely provision of compensation." Labor Code Section 3202 is the familiar liberal construction section but it's application has been undercut by SB 899's changes to LC Section 3202.5 mandating that all parties shall meet their evidentiary burden of proof on all issues by a preponderance of the evidence. In essence, LC 3202 never operates as a substitute for proof but still may prove helpful in certain situations where a statute is truly ambiguous or the evidence in a case is extremely close and subject to variable interpretations by the trier of fact.

Meszaros v. WCAB (2006) (writ denied; 1st DCA)

Case Summary: Applicant suffered a November 13, 2002, admitted low back injury. She had been working for defendant for several years as a nurse's assistant. The AME indicated 42% permanent partial disability before apportionment. The AME opined that applicant's pre-existing condition caused 50% of her current disability. The WCJ awarded applicant 21% after apportionment.

Applicant's pre-existing condition consisted of multi-level degenerative disc disease which had developed over many years. The condition was asymptomatic and not labor disabling before the current industrial injury of November 13, 2002. The AME also opined that the mechanism of the current industrial injury was minor and would not have caused the same degree of disability absent the pre-existing condition. The WCAB found the AME's opinion constituted substantial medical evidence and satisfied the standards articulated by the en banc decision in *Escobedo*.

Comments/Analysis: This case illustrates a significant issue for both physicians and attorneys in terms of substantial medical evidence. The AME characterized the specific industrial injury as very “minor” in nature and therefore in terms of the cause of the applicant’s resultant disability could not be a significant cause when compared to her pre-existing degenerative disc disease. Conversely, if the current industrial injury is significant or severe in nature compared to the pre-existing condition or factor, it could serve to undermine any significant apportionment under LC 4663. Depending on the particular facts of the case it might prove to be a fruitful area of inquiry in a doctor’s deposition.

Clarkson v. Verizon of California, Inc., (2007) 72 CCC xi; November, 2007, Cal.Wrk.Comp. P.D. LEXIS 100 (Noteworthy Panel Decision).

Case Summary: CT injury 7/14/03-7/14/04 to spine/back. AME’s apportionment determination of 20% non-industrial constituted substantial medical evidence even though the AME’s report did not expressly discuss the deleterious effects of applicant’s work history in causing the back injury. However, the report did have a history of applicant’s job duties and the length of his employment. Pre-existing factors related to degenerative arthritic changes to applicant’s lumbar spine confirmed by review of x-rays and an MRI. Apportionment determination in large part was based upon the AME’s review of the diagnostic x-rays and MRI.

Comments/Analysis: This is another case that demonstrates the significance of objective diagnostic studies in determining valid apportionment. While other aspects of a medical report may be lacking or not fully discussed, if a physician reviews and discusses relevant diagnostic testing, there is a high likelihood the report will constitute substantial medical evidence.

Pena v. Alvarado Hospital(2008) 73 CCC Sept.2008 xvi; 2008 Cal.Wrk.Comp.P.D. LEXIS 345 (Noteworthy Panel Decision)

Case Summary: Applicant suffered a slip and fall injury on September 8, 2006, resulting in admitted injuries to her lumbar and thoracic spine. Applicant’s primary treating physician in his permanent and stationary report, determined applicant’s lumbar PD using the range of motion method (“ROM”) as indicated in the AMA Guides 5th Edition. The PTP also found a ratable sleep disorder. He found no basis for legal apportionment. In

contrast, the reporting panel QME determined applicant's lumbar impairment using the diagnosis related estimate ("DRE") method. He found no ratable sleep disorder. However, contrary to applicant's PTP, he did find a basis for 50% legal apportionment under Labor Code Section 4663.

This case sets forth a detailed and informative discussion of when it is appropriate to use the DRE method versus the ROM method in determining impairment. The Board upheld the WCJ's determination that the panel QME's use of the DRE method was appropriate and correct.

With respect to apportionment under Labor Code section 4663, the WCJ and Board relying on the *Escobedo* and *Gatten* cases, found the panel QME's estimate of 50% apportionment was premised on reasonable medical probability since it was based upon diagnostic MRI studies which confirmed a long history of pre-existing degenerative changes in the form of degenerative spondylolisthesis at the L4-5 level. Applicant's petition for reconsideration was denied.

Paredes v. WCAB (2007) 72 CCC 690 (writ denied, 6th DCA).

Case Summary: Applicant was employed as a tractor driver. He suffered two specific injuries and one CT injury. Involved body parts included applicant's left shoulder, neck, left lower extremity, low back, and bilateral upper extremities. The reporting physician was an AME in orthopedics. In his report of March 10, 2005, he diagnosed cervical spondylosis, post-op lumbar diskectomy, and mild peripheral nerve neuropathy in the upper extremities bilaterally. With respect to the extent of permanent disability, the AME's initial report indicated the applicant's neck and back required a preclusion from semi-sedentary work. As to the upper extremities, there was a preclusion from forceful strength activities and fine manipulation with either upper extremity.

The AME apportioned 20% to the specific injury of May 20, 2000, and 70% to the specific injury of March 10, 2001. He also apportioned 10% to non-industrial factors of attritional changes of aging including a degenerative cervical disc.

The AME was deposed. He changed his opinion and indicated applicant was 100% permanently totally disabled and unable to compete in the open labor market. There were significant excerpts quoted from the AME's deposition testimony related to the apportionment issue. The AME candidly acknowledged he was confused as to whether or not the word "impairment" was synonymous with "disability" given the AMA guidelines. With respect to Labor Code Section 4663; the AME indicated there was pre-existing pathology. In assessing pathology the AME reviewed x-rays and MRI's taken of the applicant shortly after his first industrial injury. These diagnostic studies indicated

mild stenosis present in the applicant's cervical spine. The AME testified he believed the underlying cervical pathology would have caused some reduction in the applicant's ability to perform work activity in the general open labor market. The case proceeded to trial. There was testimony from a rehabilitation expert. The WCJ issued instructions that the applicant was only able to work in a sheltered workshop situation and was not able to compete in the open labor market. The rater issued a rating of 100% permanent total disability on these instructions. The WCJ found applicant 100% permanently totally disabled without apportionment. He deferred a number of issues including allocation of liability between SCIF and CIGA as well as the calculation of permanent disability related to the ongoing disagreement on what formula to utilize.

Both co-defendants filed for reconsideration arguing the WCJ should have followed the AME's opinion and apportioned 10% to non-industrial factors. The WCAB granted reconsideration and amended the WCJ's Award on the apportionment issue finding 10% legal apportionment under Labor Code 4663 attributable to non-industrial pathology. There was also a focused discussion of the requirements mandated by the *Escobido* decision. The WCAB noted that apportionment under SB 899 may be based on non-industrial pathology, "...if it is demonstrated by substantial medical evidence that the non-industrial pathology caused permanent disability." The Board also indicated it was unnecessary "to prove that the non-industrial pathology caused disability prior to the industrial injury, or that the pathology alone would have caused a particular amount of PD, absent the industrial injury." The WCAB also pointed out that the WCJ did not adhere to the requirements of *Escobido* and was influenced by the fact the AME did not use the magical phrase or term "reasonable medical probability." With respect to the issue of approximation of a particular percentage of non-industrial disability, the fact a doctor approximates or estimates the percentage of permanent disability caused by non-industrial factors does not make the opinion inherently speculative, since an approximate percentage is exactly what is required under Labor Code section 4663. The WCAB also noted that the Legislature specifically called for an approximation which inherently recognizes the difficulty of determining precisely the relative weight of the various causes of an employee's disability. The Board held that the AME's opinion satisfied the requirements of SB 899 and *Escobido* for purposes of establishing 10% of applicant's disability was attributable to non-industrial causes. Applicant filed a petition for writ of review raising numerous arguments in an effort to convince the Court of Appeal to reverse the WCAB and provide applicant with an unapportioned 100% Award.

Comments/Analysis: While this is "only" a writ denied case is significant for a number of reasons. First, there is the issue of the pre-existing asymptomatic pathology in the form of "mild cervical stenosis and spondylosis." The diagnosis of this underlying pathology was based on diagnostic studies consisting of x-rays and MRI's taken shortly after the first specific injury of 5/20/00. The WCAB emphasized that based on SB 899 and the en

banc decision in *Escobido*, this could provide the basis for legal apportionment even if the non-industrial pathology did not cause disability before the industrial injury or “that the pathology alone would have caused a particular amount of PD, absent the industrial injury.” Second, the WCAB stressed that an “approximation” of the percentage of non-industrial factors causing disability is consistent with L.C. 4663’s mandate and does not result in a physician’s opinion being characterized as “speculative.” The AME’s deposition testimony provided an adequate discussion and explanation as to the “how and why” the applicant’s cervical degenerative condition was one of the causes of present permanent disability.

Sallay v. Macy’s West (2007) 72 CCC July 2007, p. xv (Noteworthy Panel Decision)

Case Summary: Following trial the WCJ found permanent disability without apportionment. Defendant filed for reconsideration. The WCAB granted reconsideration and reversed the WCJ’s finding of 50% valid apportionment related to applicant’s left knee disability based on preexisting degenerative changes. The QME relied on a complete medical history as well as diagnostic x-rays and MRI studies of applicant’s knees. The QME also set forth the basis for his opinion in the context of demonstrating familiarity with the concepts of apportionment under SB 899. The WCAB cited both the *Escobedo* and *E.L. Yeager (Gatten)* cases. Moreover at the trial level, the WCJ had improperly relied on applicant’s testimony to rebut the opinion of the QME on apportionment.

Kos v. Kimes-Morris Construction (2007) 72 CCC xvi; 2007 Cal.Wrk. Comp. P.D. LEXIS 147 (Noteworthy Panel Decision)

Case Summary: Case involved a 3/18/02, specific injury to the spine. Valid/legal apportionment of 90% (degenerative disc disease) pursuant to LC 4663 of applicant's 100% total permanent disability award with the remaining 10% deemed industrial. This case involves the purported conflict between the California FEHA prohibition against age discrimination in employment (see Gov. Code sections 12940(a) and 11135) and apportionment under LC 4663. The Board construed LC 4663's mandate of apportionment to causation to permit apportionment to age related degenerative conditions on the basis section 4663 is more specific and must prevail over the more general age discrimination statutes.

Comments/Analysis: Evolving case law or legislation will determine whether age related conditions that are determined to be other "factors" under LC 4663 constitute age discrimination per se and discrimination "solely" based on age.

Allen v. WCAB(Doyle-Ellis) (2008)(12/12/08); 6th DCA, not certified for publication).

Case Summary: Based on the medical evidence as opposed to the stipulations of the parties, applicant suffered a specific back injury on May 19, 2003. As a consequence, applicant had a surgical fusion.

The parties used an AME who issued a report and was deposed. Following the first trial, the WCJ relied on the AME report and also applied the 1997 PDRS. The WCJ found 40% permanent partial disability before 20% nonindustrial apportionment attributable to preexisting pathology in the form of a moderate disc collapse at L2-3 with related arthritis and stenosis. Defendant filed for reconsideration on the sole issue that the 2005 PDRS should have been used for determining disability since there was no pre-1/1/05 medical report indicating the existence of permanent disability. The WCAB granted reconsideration and then remanded the case on the limited issue of which PDRS should be applied

At the second trial, applicant's attorney changed tactics. He presented the testimony of a vocational rehabilitation expert on the loss of future earnings capacity ("FEC"). The vocational rehabilitation expert testified applicant's future loss of earning capacity was 100% based on her complete loss of "ability to work in the future." Following the second trial, the WCJ once again found 20% of applicant's permanent partial disability was attributable to nonindustrial factors of pre-existing pathology. However, in applying the 2005 PDRS, the WCJ found applicant had permanent disability of 30% before apportionment.

With respect to three critical issues the WCJ ruled that: 1) the AME's apportionment determination constituted substantial medical evidence and was not speculative, 2) the apportionment determination did not constitute age-based discrimination under Government Code section 11135 and, 3) the testimony of applicant's vocational rehabilitation expert did not rebut or overcome the 2005 PDRS as applied to rating applicant's disability.

Defendant and applicant both filed for reconsideration. The WCAB denied petitions, adopting and incorporating the WCJ's opinion. Applicant filed a writ with the Court of Appeal. The Court of Appeal in a nine page decision addressed the following issues:

1. The AME's report and deposition testimony constituted substantial medical evidence and was not speculative.

The Court quoted significant portions of the AME's report and deposition testimony with respect to his opinion finding valid/legal 20% nonindustrial apportionment under Labor Code section 4663. The Court stated:

Considering his written report and deposition testimony, Dr. Haider's medical opinion that 20 percent of Allen's disability was caused by nonindustrial factors was based on considerably more than mere speculation. Dr. Haider found objective medical evidence of underlying pathology, particularly arthritis and stenosis. Dr. Haider formed his opinion by reviewing both the 2002 x-rays, taken before Allen's industrial injury, as well as more recent x-rays which showed "a compression fracture of L4 which was there before." Allen believes the Dr. Haider's opinion was based on speculation because he admitted there was no mechanism for predicting when or if Allen's preexisting pathology would have been labor disabling had she not sustained the industrial injury. Allen provides no authority for the proposition that an underlying pathology must be labor disabling before it may constitute a valid basis for apportionment. To the contrary, Allen fails to acknowledge that since the enactment of Senate Bill No. 899 in 2004, apportionment of workers'

compensation awards *must* be based on causation, not disability (Section 4663, subd. (a); *Marsh v. WCAB* (2005) 130 Cal.App.4th 906, 912.) An employer is now only "liable for the percentage of permanent disability directly caused by the injury arising out of and occurring in the course of employment." (Section 4664, subd.(a).) The Legislature enacted these provisions to "eliminate the bar against apportionment based on pathology and asymptomatic causes..." (*Brodie v. WCAB* (2007) 40 Cal.4th 1313, 1327.) Allen's contention that Dr. Haider was unable to precisely assess prior disability before the industrial injury was irrelevant as to his assessment of causation.

2. Alleged age-based discrimination.

Applicant argued that the AME's opinion of 20 % nonindustrial apportionment adopted by the WCJ and WCAB constituted a violation of Government Code Section 11135, since it was an age-based classification. The Court of Appeal rejected this argument stating:

We need not determine the relationship between the Government Code provision and the workers' compensation laws here because we are not persuaded the WCAB's apportionment was based on Allen's age rather than her individual medical health. [T]he Legislature intended that apportionment of causation under section 4663 may be based on age related degenerative conditions." (*Kos v WCAB* (2008) 73 Cal Comp. Cases 529, 536 [writ den.].) Although Dr. Haider mentioned Allen was 60 years old and that it was a "factor" in her preexisting pathology, he explained that arthritis was common among individuals her age and added that "in this case I think it was more advanced than usual." As the WCJ found, "While the doctor did say age was a factor in the pathology, he meant that people develop arthritis as they age. His apportionment was to [Allen's] specific medical conditions, not simply to her being sixty years old."

3. The LeBoeuf Issue

Applicant argued the WCAB should have relied on her vocational rehabilitation expert's opinion that she suffered a 100% inability to generate future earnings as opposed to 30% permanent partial disability under the 2005 PDRS. Applicant's argument rested solely and exclusively on *Leboeuf*. The Court in rejecting applicant's argument, indicated it was not persuaded *LeBoeuf* applies after the enactment of SB 899 and even if it did apply, the vocational rehabilitation expert's opinion was inadequate or insufficient to rebut or override the 2005 PDRS. The Court also found applicant essentially waived the *Leboeuf* issue given the nature of the remand order.

Allen does not set forth any language in *LeBoeuf* that mandates the WCAB override the PDRS in favor of a vocational rehabilitation expert, let alone consider whether it applies after the adoption of Senate Bill No. 899. Senate Bill No. 899 repealed the requirement that the WCAB consider an injured employee's diminished ability "to compete in the open labor market" and replaced it with the obligation to consider "an employee's diminished future earning capacity", which is now statutorily defined as a schedule developed by the Division of Worker's compensation representing "a numeric formula based on empirical data and findings that aggregate the average percentage of long-term loss of income resulting from each type of injury for similarly situated employees." (Section 4660, subs.(a) & (b) (2).).

Regardless, even assuming *LeBoeuf* permits the WCAB to adopt a vocational rehabilitation expert's opinion of an employee's future earnings capacity in lieu of the PDRS, the WCAB in adopting the WCJ's reasoning, was unconvinced Ferra adequately assessed Allen's potential earnings capacity. As the WCJ explained, Ferra only considered the job of bookkeeper as relevant to Allen. The WCJ concluded Ferra's opinion was therefore "not good and sufficient on its face." Ferra's failure to consider additional jobs left the WCJ skeptical that Allen was precluded from any future earnings.

Case Comment: Prior to the writ proceedings, this case was a Noteworthy Panel Decision.

Wallace v. WCAB (2007) 72 CCC 561 (writ denied).

Case Summary: Applicant suffered an admitted 02/06/03, left knee injury. Multiple causes of disability including pathology of pre-existing asymptomatic non-disabling arthritis. WCAB rejected the AME's opinion on apportionment to pathology as being speculative. Instead, the Board relied upon the treating physician who operated on applicant's left knee. During the course of the surgery, the treating physician discovered applicant had significant pre-existing arthritis. Treating physician opined that 50% of applicant's 41% PD was non-industrial with applicant receiving a 20 ½% PD award.

Andrews v. Freezer Queen Foods, Inc., (2007) (January 2008, CCC p.xiii, Noteworthy Panel Decision)

Case Summary: Applicant suffered two specific knee injuries on November 15, 2000, August 16, 2001, and also cumulative trauma ending on November 5, 2002. The AME pursuant to Labor Code section 4663, found valid non-industrial apportionment related to the factor of applicant's obesity. The AME opined that it was overwhelmingly medically probable applicant's obesity was a factor in causing her knee condition and resultant disability. The WCAB found the AME's opinion persuasive because it was based on accepted diagnostic tools as well as the doctor's medical expertise. More importantly, the AME provided an adequate basis and reasoning for his determination of non-industrial apportionment based on the standards articulated in Escobedo and Gatten.

Stocks v. The Urban Group dba The Gables of Ojai (2007) 2007 Cal.Wrk. Comp.P.D. LEXIS 233 (73 CCC February 2008 p.xxv, (noteworthy panel decision).

Case Summary: Applicant suffered a specific admitted injury on September 12, 2000, to the right knee and right hip. There was consequential knee replacement surgery. Applicant's disability was subject to apportionment based on pre-existing non-industrial multi-departmental knee joint degeneration. The defense QME determined the current level of disability and then parceled out causative sources.

"Although applicant's degenerative joint disease was no longer present after (sic) industrial injury due to knee replacement, according to the qualified medical evaluator pre-existing joint disease contributed to applicant's need for knee replacement which itself caused applicant pain and limitation."

Permanent disability before valid legal apportionment was 76%. Valid legal apportionment of 33% resulting in a final permanent disability award of 51%.

Comments/Analysis: In a recent lengthy panel decision the Board seems to have rejected what it characterized as the "Steinkamp theory". In Malcolm v. Kelly Staff Leasing (2008) 36 CWCR 176 ;(MON 323982; 323983; 6/2/08; order denying reconsideration), applicant fell on her knee which impacted her right hip. Prior to the industrial injury she suffered from severe pre-existing non-industrial multifocal osteonecrosis. She had resultant right hip replacement surgery. Following trial she was awarded 15% PD after apportionment of 25% based on an AME report finding non-industrial 4663

apportionment to the pre-existing right hip degenerative condition. Applicant argued the hip replacement surgery removed the pre-existing degenerative condition resulting in no basis to apply 4663 apportionment. The Board rejected this argument stating:

In finding, apportionment based on Dr. Berman's opinion, we decline to follow *City of Concord v. WCAB (Steinkamp)* (2006) 71 Cal.Comp.Cases 1203(writ denied) and *Klein(sic) v. Episcopal Homes Foundation* (2006) 34 CWCR 228 [2006 Cal.Wrk.Comp.P.D.Lexis 30], wherein no apportionment was found on the theory that knee replacement surgery had removed the pre-existing degenerative disease.

The results in *Steinkamp* and *Klein(sic)* are contradicted by the Supreme Court's statement in *Brodie* that the new approach to apportionment is to look at the current disability and parcel out its causative sources. In fact, the "*Steinkamp* theory" is less than ironclad because hip replacement surgery does not necessarily make the pre-existing osteonecrosis disease disappear in every case, and it begs the question of what is causing the disability now, where the need for surgery was caused by pre-existing degenerative disease in the first place.

NOTE: It appears the correct spelling for the *Klein* case cite hereinabove is: *Kien v. Episcopal Homes Foundation* (2006 Cal. Wrk. Comp. P.D. LEXIS 30; noteworthy Panel Decision).

Hernandez v. WCAB (2007) 72 CCC 756 (writ denied, 3rd DCA)

Case Summary: The AME in orthopedics determined or found 71% overall PD, but then indicated 30% apportionment under Labor Code section 4663. The pre-existing "factors" in this case included spondylolisthesis which was not disabling before the industrial injury. The AME's opinion on apportionment was based on a review of applicant's medical history.

Mills v. WCAB (Sunrise Builders) (2008) 73 CCC 812; 36 CWCR 138
(writ denied; 5th DCA)

Case Summary: Applicant was employed as a drywaller for 43 years before starting work for defendant in 2002. His job duties were arduous based on the fact he worked as a combined drywall finisher and hangar. Prior to his date of hire, he had a documented medical history of pulmonary problems consisting of end stage obstructive pulmonary disease.

Applicant fell from a scaffold on October 7, 2002, suffering admitted orthopedic injuries to his left foot, right ankle, both knees, hips, back, right shoulder, and ribs. He also alleged his orthopedic injury aggravated his underlying preexisting respiratory condition. Defendant denied this aspect of the claim. The parties selected an AME in orthopedics. During the course of his deposition, the AME opined applicant was 100% permanently totally disabled with his nonindustrial pulmonary condition being responsible for 60% of the combined total disability.

Applicant's QME on the other hand, determined his orthopedic injury did not contribute to the pathology of his lung disease, but that his pulmonary condition "deteriorated" much more rapidly due to the orthopedic injury. The defense QME concluded applicant's orthopedic injury did not "cause, exacerbate or aggravate" applicant's preexisting pulmonary disease which was responsible for 100% of his disability.

The case went to trial in 2007. The WCJ relied on the AME's opinion and found 40% of applicant's disability attributable to the industrial orthopedic injury, and 60% related to the nonindustrial preexisting pulmonary condition. Moreover, the WCJ determined applicant suffered no pulmonary or respiratory injury during the course of his employment with the defendant.

PROCEEDINGS BEFORE THE WCAB.

Applicant filed for reconsideration contending the AME's opinion did not constitute substantial evidence and applicant's QME's report was more persuasive. The WCAB granted reconsideration issuing a separate decision adding additional reasoning to the WCJ's report and recommendation on reconsideration. The Board indicated that "...apportionment between industrial and nonindustrial factors depends upon the language used by the medical evaluators in addressing the issue of disability."

The Board also reviewed the AME's deposition and found applicant had actually suffered two separate injuries. One injury was an industrial orthopedic injury causing 40% permanent disability. Applicant also suffered a nonindustrial injury causing 60%

permanent disability. As a consequence, applicant was entitled to a 40% award. Alternatively, if the WCAB had considered that the two injuries overlapped as opposed to being separate and distinct injuries, the Board would have subtracted the percentages of overlapping disabilities with applicant receiving a permanent disability award of approximately 10%.

COURT OF APPEAL

Although applicant's injury occurred in 2002, prior to the enactment of SB 899, the matter was not submitted for decision until 2007, which resulted in the retroactive application of SB 899 and more specifically, Labor Code Section 4663. *Marsh v. WCAB*(2005) 130 Cal.App.4th 906(Marsh), citing *City of Fresno School District v. WCAB(Humphrey)* 84 Cal.App.4th 1295. The Court of Appeal discussed at length applicant's argument related to the *Humphrey* case. Applicant argued SB 899 did not negate the *Humphrey* decision which applicant argued allowed apportionment to a subsequent nonindustrial injury overlapping with an industrial injury.

The Court explained in detail that *Humphrey* was not only factually distinguishable, but also *Humphrey* focused on former Labor Code Section 4750.5 which was repealed by SB 899. Moreover, *Humphrey* actually involved a subsequent nonindustrial injury, not as in this case, a preexisting nonindustrial injury.

The Court then quoted a portion of the WCJ's report and recommendation on reconsideration as follows:

[T]he Humphrey case is factually distinct in that the applicant in that case suffered a nonindustrial heart attack after the industrial orthopedic injury occurred. In this case, voluminous, contemporaneous medical records clearly establish that applicant had end stage chronic obstructive pulmonary disease before the industrial orthopedic injury occurred. Based on this significant factual distinction alone, applicant's contention that Humphrey applies to this case, must be rejected. (original emphasis)

Applicant also argued that since he was able to work before the admitted orthopedic industrial injury he did not suffer from any prior disability and therefore the combined level of permanent disabilities sustained from both the industrial admitted injury and nonindustrial pulmonary condition should be entirely or largely attributable to his employment.

The Court indicated that in enacting SB 899, the Legislature specifically intended the "elimination of such liability on the part of the employer for "lighting up" a nondisabling preexisting disability, condition, or physical impairment...." The Court also stated

applicant was attempting to apportion *disability* rather than causation of disability in direct contradiction to Labor Code Section 4663, subdivision (a).

The Court also rejected applicant's contention that the AME's opinion did not constitute substantial medical evidence. The AME issued three medical reports as well as being cross-examined. The AME reports were characterized as thorough, comprehensive, well reasoned, and persuasive. There was no basis or good reason to reject the opinion of an AME mutually selected by the parties because of his expertise and neutrality, citing *Powers v. WCAB*(1986) 179 Cal.App.3rd 775.

Schaffer v. WCAB (2006) 71 CCC 684 (writ denied, 4th DCA).

Case Summary: Applicant suffered a cumulative trauma injury ending August 12, 1992. She alleged orthopedic injuries as well as a compensable consequence psychiatric injury. Applicant had a variety of injuries including a severe overuse syndrome, bilateral carpal tunnel syndrome, myofascial pain syndrome, bilateral shoulder impingement syndrome, tennis elbow, and degenerative disc disease of the cervical spine. In addition she had a number of non-industrial medical and psychiatric conditions including asthma, osteoporosis, discoid lupus, obesity, insulin-dependent diabetes, hypertension, insomnia, fibromyalgia, hypothyroidism, peptic ulcer disease, gastroesophageal reflux disease, migraines, depression, anxiety, cervical disc bulging, bilateral hip pain, bilateral knee pain, and low back pain. A number of these non-industrial medical and psychiatric conditions predated her industrial injuries. Applicant was also diagnosed with a pain disorder.

The combination of applicant's orthopedic and disputed psychiatric conditions rendered her totally permanently disabled. In 2004, the WCJ found applicant's psychiatric injury was non-industrial. At the same time, the WCJ found her orthopedic injuries resulted in unapportioned permanent disability of 60%. Applicant filed for reconsideration which was granted. Pursuant to Labor Code section 5701, the WCAB appointed a psychiatrist to evaluate the applicant. He concluded that 25% of applicant's psychiatric disability was due to industrial causes and 75% was non-industrial.

With respect to applicant's orthopedic permanent disability, the WCAB found the defense QME's report constituted substantial medical evidence of a 60% orthopedic PPD without apportionment. The WCAB also affirmed the psychiatric opinion of 25% industrial and 75% non-industrial permanent disability. Combining the orthopedic and a psychiatric disability on the multiple disability table resulted in an overall permanent disability rating of 71 ¾%. Applicant filed for reconsideration which was denied and then subsequently filed a writ with the Court of Appeal. One of the issues raised by applicant was that the

WCAB had improperly disregarded a joint stipulation that SB 899 was not applicable to this case. The Court of Appeal determined the WCAB had properly disregarded the parties' stipulation since it conflicted with controlling case authorities. The Court of Appeal also agreed with the WCAB that the reports of the defense QME in orthopedics and the court appointed psychiatrist constituted substantial medical evidence in support of the 71 ¾% permanent disability award.

Comments/Analysis: There is no explanation as to the reason the WCAB after granting reconsideration, appointed a "regular physician"(a psychiatrist) under LC 5701. This was already after the WCJ had found no psychiatric injury AOE/COE. The other interesting issue is the WCAB's refusal to recognize the joint stipulation by the parties that SB 899 would not apply to the case since the stipulation was contrary to controlling case law and related statutes.

Sherron v. American Cas. Co., of Reading Pennsylvania (2008) 36 CWCR 201 (Order Denying Reconsideration).

Case Summary: The WCJ found applicant to be 100% permanently totally disabled before apportionment based on his inability to compete in the open labor market and lack of feasibility to benefit from rehabilitation. Applicant, a hod carrier, suffered a specific knee injury on June 30, 2003. He also alleged a compensable consequence psychiatric injury. Following trial, the WCJ determined applicant did not suffer a psychiatric injury based on the fact he had not worked for the required six months pursuant to Labor Code section 3208.3(b), and there was no "sudden and extraordinary" event exception.

With respect to the apportionment issue, the WCJ found 26% of applicant's permanent total disability attributable to non-industrial factors, specifically applicant's pre-existing learning disability. This pre-existing nonindustrial condition was confirmed by at least one of the qualified rehabilitation representatives and a QME in psychiatry.

As an aside, the WCJ applied the 1997 PDRS, since there was a permanent and stationary report in existence with work restrictions prior to January 1, 2005, even though applicant had a period of temporary total disability after January 1, 2005, related to a knee surgery. Applicant was determined to be permanent and stationary initially on June 2, 2004.

COMMENT: It is interesting to note that although the applicant was 100% permanently total disabled related to his knee injury, the 100% finding was based on orthopedic factors combined with his inability to compete in the open labor market and lack of feasibility to participate in vocational rehabilitation. The 26% apportionment was based

on Labor Code section 4663 attributable solely to a non-orthopedic factor of a pre-existing nonindustrial learning disability.

2. Failure of Proof (Defense).

Kinley v. Orange County Department of Education (2007) 72 CCC xv; 2007 Cal.Wrk.Comp. P.D. LEXIS 109 (Noteworthy Panel Decision).

Case Summary: Specific injuries of 8/11/98, and 9/5/00, as well as a CT from 7/90-10/20/00. All three injuries related to the back. WCAB held the AME's apportionment determination did not meet the standards mandated by the Escobedo en banc decision. The AME focused on the condition of applicant's back at the time of the industrial injury (apparently the CT), and failed to state "how and why" the degenerative changes were the cause of, or contributing to 12½% of applicant's present disability of 100%.

San Mateo County Transit District v. WCAB (Reddy) (2008) 73 CCC 438 (writ denied)

Case Summary: Applicant suffered a 4/5/04 specific injury to the neck and left minor upper extremity. Applicant was awarded 33% permanent disability without apportionment based on the report of an AME. Defendant under the theory (guise) of "newly discovered evidence" attempted to get the WCJ and the Board to reopen discovery related to the WCAB case files for applicant's three prior work injuries, two of which occurred while the applicant was working for this same employer. Before the case was submitted the WCJ requested the actual physical case files under the theory they were public records and discovery would not have to be reopened. However, the WCJ's review of the computer records related to applicant's prior cases indicated that none of the cases resulted in actual Awards and therefore no 4664 conclusive presumption of permanent disability. More importantly during the course of litigation, defendant failed to take applicant's deposition. As a consequence, defendant failed to exercise due diligence in investigating the prior claims before discovery closed. Defendant failed to prove that any of applicant's current PD was attributable to his three prior workers' compensation injuries.

Comments/Analysis: It would seem the three prior claims/injuries involved some or all of the same body parts as the current injury. Even without the benefit of a deposition, since two of the injuries involved the same employer, it would seem there was some way for a diligent defense attorney or adjuster to obtain the medicals or other records related to the prior injuries.

Seabright Ins. Co. v. WCAB (Fitzpatrick) (2008) 36 CWCR 32 (3rd DCA; not certified for publication).

Case Summary: Applicant, a 59 year old teacher suffered a specific injury on 12/5/01, to her upper and lower back, hips, and knees. With respect to the apportionment issue, applicant's QME issued two reports. In his first report he indicated that with respect to applicant's back condition, she was limited to between semi-sedentary and sedentary work with some additional restrictions without apportionment.

Applicant's QME then issued a supplemental report in which he reviewed defense medical reports and also the Escobedo decision. He changed his opinion and apportioned 10% of applicant's permanent back disability as being caused by pre-existing asymptomatic osteopenia diagnostically confirmed by bone density studies. There were also other reports from a treating physician and defendant's QME that indicated 50% and 35% apportionment caused by applicant's pre-existing condition.

After multiple hearings and decisions the WCJ issued a final award of 68% permanent partial disability after apportionment of 10% related to applicant's pre-existing osteopenia based on applicant's QME report. Applicant filed a petition for reconsideration raising several issues including that any apportionment to applicant's osteopenia was invalid as not being supported by substantial medical evidence. Applicant also argued the apportionment determination by the WCJ assigned fault to the injured worker and apportioned to risk factors of age and gender related conditions that were discriminatory and violated both California and federal law. The WCAB denied reconsideration. Applicant filed a writ with the Court of Appeal.

The Court of Appeal reversed the WCAB's apportionment determination indicating there was insufficient reasoning and explanation from applicant's QME as to the reason or reasons for the change in his apportionment determination reflected in his supplemental report. In his supplemental report, the QME merely stated he had reviewed the Escobedo decision and he felt it required apportionment and then simply "threw out the 10% figure without analysis." The Court of Appeal characterized this as an unexplained and unsupported conclusion which did not constitute substantial medical evidence. As to applicant's arguments of age and gender discrimination, the Court of Appeal held that on remand the WCAB might determine that apportionment was unwarranted so there was no need to address these issues. However, they did note that on the present record, applicant had failed to support her argument or allegation that osteopenia is age and gender related discrimination with sufficient supporting authority. The WCAB's decision was vacated and remanded for further proceedings.

Comments/Analysis: The CWCR's editor's note reflects this was the second opinion from the Third DCA dealing with alleged age and gender discrimination. The first was

Vaira v. WCAB (2007) 72 CCC 1586, 35 CWCR 307, where the Court was careful to point out the distinction between apportionment to age related conditions contributing or causing PD versus apportionment to age or gender alone.

The more provocative issue is one of possible reverse discrimination since the PDRS is structured to award higher PD ratings and greater benefits to older workers.

Asher v. Pactiv Corp. (2008) (Noteworthy Panel Decision)

Case Summary: Applicant received an award of 33% permanent disability without apportionment related to a November 21, 2002, low back injury. The AME opined there was legal/valid apportionment based on Labor Code section 4663 attributable to applicant's pre-existing degenerative disc disease. However, the AME's opinion on apportionment was rejected as conclusory and therefore not consistent with the standards articulated in Escobedo related to substantial medical evidence. There was no "how and why" analysis and a failure to "quantify" how applicant's degenerative disc disease contributed ("caused") a percentage of permanent disability. More importantly, there was no discussion or analysis by the AME to distinguish applicant's pre-existing degenerative disc disease as being solely or directly related to the aging process itself as opposed to being a factor that is age variable. If apportionment to a pre-existing degenerative disc disease condition is based solely or exclusively on age, it may constitute a form of discrimination prohibited by Government Code section 11135(a).

Coca Cola Bottling Co., v. WCAB(Saucedo)(2006) 71 CCC 279(writ denied; 2nd DCA).

Case Summary: Applicant was employed as a forklift operator. He suffered a specific admitted injury on June 11, 2001, to his back and left leg. He also alleged a cumulative trauma injury to his back, left leg, and carpal tunnel during the period 1976 to June 11, 2001. Applicant's first treating physician took x-rays of his lumbar spine and diagnosed him with lumbosacral syndrome with degenerative disc disease and left radiculopathy. Applicant changed treating physicians. The second treating physician ordered an MRI which indicated the applicant had a scoliotic curve in his spine. He diagnosed applicant with spondylosis of the lumbar spine and attributed his back problems to obesity. Applicant weighed approximately 300 pounds. The second treating physician recommended applicant undergo a weight loss program. After the specific injury of June 11, 2001, applicant continued to work full time as a fork lift operator with no lost time from work.

The parties used an AME in orthopedics. He issued an initial report dated November 17, 2003. The AME noted applicant's obesity. He found applicant had suffered a CT injury in addition to the specific injury. Both injuries became P&S on different dates. Significant work restrictions were imposed by the AME. With respect to apportionment of disability between the two injuries, the AME determined the CT injury was responsible for 100% of the disability to applicant's wrists. The specific injury was responsible for 100% of the disability to applicant's low back and left ankle. The AME issued a supplemental report and was deposed. With respect to the issue of apportionment, he testified the MRI findings related to applicant's spine could be due to the "evolutionary" process, but it would be speculative to consider these changes contributed to applicant's back problems.

The first trial on all issues including PD and apportionment occurred in October of 2004. Applicant testified that he continued to work without any lost time but worked with significant pain. The WCJ awarded applicant 83% PPD without apportionment. Defendant petitioned for reconsideration raising the issues of overlap and duplication. In response, the WCJ vacated her award and the case was set for another trial with the rater crossed examined on alleged overlap/duplication issues. In May of 2005, the WCJ issued her second F&A, once again awarding applicant 83% permanent disability without apportionment. Defendant filed a second petition for reconsideration alleging the AME's reports and deposition testimony did not constitute substantial medical evidence since he failed to address apportionment under Labor Code sections 4663 and 4664 as interpreted in the *Escobedo* decision.

In her report on reconsideration, the WCJ recommended that reconsideration be denied. She indicated the AME adequately addressed apportionment under both Labor Code sections 4663 and 4664. Based on both the AME's opinion and applicant's credible trial testimony, the WCJ found no legal basis for apportionment to applicant's non-industrial degenerative disc disease. The Board adopted and incorporated the WCJ's report without further comment on the issues.

Comments/Analysis: The lesson in this case involves the intersection of advocacy and burden of proof. The first issue relates to what objective evidence there was to support 83% PD. The available facts do not discuss any significant diagnostic test findings as to any of the involved body parts or any surgical history. In terms of potential apportionment, the lumbar MRI showed degenerative disc disease and scoliosis. Second, the best opportunity for defendant to establish valid legal apportionment under LC 4663 was at the deposition of the AME. Either the MRI findings were minimal with respect to applicant's lumbar degenerative disc disease or applicant's attorney was successful in getting the AME to testify that any attempt to apportion to the underlying degenerative disc pathology would be speculative. There was no mention or reference to the *Gatten* case, so perhaps this case was decided prior to the Court of Appeal's decision in *Gatten*.

Grossmont Hospital v. WCAB(Powell) (2007) 71 CCC 85 (writ denied).

Case Summary: Applicant suffered a specific injury on January 31, 1998, related to her back, bowel, bladder, and psyche. She was employed as a registered nurse. Applicant's treating physician found her permanent and stationary as of September 14, 2001, limiting her to semi-sedentary work. He issued a supplemental report on January 27, 2003, after reviewing the findings of applicant's vocational rehabilitation counselor who opined applicant was not vocationally feasible due to her disability. As a consequence, applicant's treating physician declared her 100% permanently totally disabled.

Defendant's QME determined applicant to be permanent stationary on January 5, 2000, limiting her to heavy work and from constant prolonged sitting or prolonged standing such that she would be unable to be in a weight-bearing position for greater than four hours during the course of an eight hour workday. He also issued a supplemental report disputing applicant was 100% permanently totally disabled.

Following trial, the WCJ issued a findings and award on June 16, 2005, finding applicant to be 100% permanently totally disabled with no apportionment. Defendant filed a petition for reconsideration of raising a number of issues including apportionment. In his report on reconsideration the WCJ indicated he had reviewed the en banc decision from the board in *Escobedo*. He also indicated defendant had the burden of establishing the approximate percentage of permanent disability that was not caused by the industrial injury. Based on his review of the defense QME report, the WCJ concluded defendant had not met its burden on apportionment.

He characterized the QME's determination of apportionment as not constituting substantial evidence since it was conclusory and contradictory. The defense QME premised his apportionment determination on the fact applicant had symptomatic arthritic disease related to her back prior to the specific injury to January 31, 1998. The defense QME indicated 50% of applicant's current impairment was related to her industrial injury and 50% related to factors outside of the industrial injury. The WCJ commented on the fact the defense QME offered no basis or reasoning for the percentages he assigned other than the fact applicant had pre-existing arthritis which was in part due to the natural aging process.

The WCJ also pointed out that portions of the defense QME's report were inconsistent. The significant inconsistency related to the fact the defense QME indicated the *predominant* cause of applicant's current level of disability or impairment was related to non-industrial factors not related to the industrial injury to his back. The judge did not understand that if non-industrial causes were predominant then why did the defense QME

reach an apportionment determination of 50% industrial and 50% non-industrial. As a consequence he concluded the defense QME's determination that 50% of the applicant's disability allegedly attributable to degenerative arthritis was not convincing. The WCAB denied reconsideration and adopted and incorporated the WCJ's report.

Comments/Analysis: The Court of Appeal in denying defendants writ made several interesting observations. Since both medical reports contained apportionment determinations they met the threshold requirements of LC 4663 and *Escobedo*. The Court indicated both reports did not constitute substantial medical evidence because the respective apportionment determinations were conclusory. However, it does not matter that applicant's report is conclusory and therefore does not constitute substantial medical evidence because it is defendant that has the burden of proving legal apportionment. Since the defense QME's report did not meet the substantial evidence test, defendant was unable to meet its burden of proof.

Sierra Bible Church v WCAB (Clink)(2007) 72 CCC 21 (writ denied, 5th DCA)

Case Summary: Applicant suffered a specific back injury on June 17, 2002, while working as a custodian. She was examined by an AME in orthopedics. The AME issued an initial report dated September 23, 2004, in which he determined applicant's permanent partial disability was solely attributable to the specific injury of June 17, 2002, without apportionment. The AME issued a second report on January 19, 2005, essentially affirming his previous report of no apportionment. The AME was deposed on March 24 2005, and completely reversed his prior opinions, indicating non-industrial apportionment of 75% allegedly attributable to applicant's underlying degenerative disc disease.

Following trial, the WCJ found 75% of the applicant's disability was attributable to the pre-existing degenerative disc disease based on AME's deposition. Applicant was awarded 25% permanent partial disability with a dollar value of \$16,277.50 and future medical care and treatment. Applicant filed a petition for reconsideration. The primary contention/argument on reconsideration was that the WCJ's apportionment determination was invalid and inconsistent with the *Escobido* decision. The WCJ in his report on reconsideration recommended the WCAB deny reconsideration and that his apportionment determination of 75% to non-industrial causation should be affirmed. The WCAB granted reconsideration and reversed the WCJ.

Defendant filed a writ. The Court of Appeal quoted large portions from the cross-examination/deposition testimony of the AME. While the AME in general terms

identified the specific type of degenerative disc disease process he failed to indicate the applicant personally suffered from any underlying pathology as opposed to the general population. The AME opined that every individual after the age of 20 begins to suffer from a particular type of degenerative disc disease and there may be no symptoms. The Court of Appeal was careful to distinguish the facts in the present case from those in the *Gatten* case. In *Gatten*, the injured worker had pathology but with related symptoms and treatment. In *Gatten* there was also a definitive diagnostic MRI taken before the industrial injury that showed degenerative changes had already begun. In the instant case, there was apparently no MRI diagnostic study that demonstrated the nature and severity of any changes attributable to applicant's degenerative disc disease process.

In essence the AME's opinion was speculative and did not constitute substantial medical evidence to establish apportionment under Labor Code section 4663. The WCAB awarded applicant 77% permanent partial disability without apportionment.

Comments/Analysis: The WCAB and the Court of Appeal were both perplexed by the fact that the AME issued two separate medical reports finding significant permanent disability without apportionment, and then reversed himself completely during his deposition and found 75% non-industrial apportionment. A careful reading of the excerpts of the AME's deposition confirm that the percentage figure was not supported by any detailed discussion as to "how and why" a progressive degenerative disc disease purportedly common to anyone over the age of 20, was causing actual disability personally to this injured worker.

Fry's Electronics v. WCAB(Moghadam) (2007) 72 CCC 131(writ denied, 6th DCA).

Case Summary: The WCJ relying on a range of the medical evidence awarded applicant 80% permanent partial disability without apportionment. Defendant filed a petition for reconsideration claiming the WCJ should have apportioned 25% of the applicant's permanent disability to his pre-existing back injury with related surgery and pathology based on the Defense QME report. Applicant had a prior 1969, back injury which resulted in surgery in the form of disc fusion.

On reconsideration, defendant alleged that both Labor Code sections 4663 and 4664 were applicable. The WCJ indicated that section 4664 was not at issue since there was no prior award of disability. Therefore the discussion on apportionment focused exclusively on Labor Code Section 4663 and whether defendant had met its burden of proof under the standards articulated in the *Escobedo* en banc decision. There was an extensive excerpt from the WCJ's report on reconsideration. The WCJ indicated the defense

QME failed to adequately explain or discuss “how and why” the applicant’s prior back injury and related surgery with resultant pathology was the cause of any of his current disability. The WCJ indicated it was not sufficient to show there is pathology without an explanation of how and why the pathology caused either a pre-existing actual work restriction or eventual permanent disability. Applicant testified he had completely rehabilitated himself from his prior 1969, back injury and related surgery and had no work limitations for approximately 20 years before his industrial injury. Moreover, the defense QME did not provide the reasoning behind his choice of 25% as the specific figure for apportionment. The WCJ concluded the defense QME’s report was not supported by sufficient reasoning. The WCJ also opined she felt that if an industrial injury lights up a quiescent condition which would not have caused disability absent the intervening industrial injury then apportionment is not warranted. The WCJ was also careful to point out that in previous decisions on other cases she had found legal apportionment based on pathology when the *Escobedo* requirements had been satisfied.

Kaiser Foundation Hospitals v. W.C.A.B.(Tremoureaux)(2006) 71 CCC 538
(writ denied; 6th DCA)

Case Summary: One of the injuries in this case involved an old cumulative trauma ending June 1, 1989, to applicant’s wrist. With respect to the old injury, applicant received a stipulated award on November 6, 1996, of 18 ¾% permanent disability. There were also two new dates of injury including a July 24, 1998, specific and a CT ending October 30, 2000. Both of the new injuries involved applicant's upper extremities.

A trial was held on March 30, 2005, with the primary issues being permanent disability and apportionment. At trial applicant asserted she was 100% permanently totally disabled based on the reports of her treating physician. She also argued she was entitled to a finding or determination of 100% permanent total disability pursuant to the conclusive presumption set forth in Labor Code section 4662. Applicant also argued defendant was not entitled to subtract on a percentage basis, her old award of 18 ¾% permanent disability and was only entitled to take credit for the total permanent disability payments made under the prior award.

The defense QME agreed applicant was 100% permanently totally disabled. However, defendant argued applicant was only entitled to an 81 ¼% percent permanent disability award after apportionment and subtraction of her prior 18 ¾% permanent disability award.

The WCJ issued a joint findings and award on June 21, 2005, awarding applicant 81 ¼% permanent disability after apportionment and subtraction of the 1996, stipulated award of

18 ¾% permanent disability pursuant to Labor Code Section 4664(b). Applicant filed for reconsideration. She argued that she was entitled to the conclusive presumption of permanent total disability pursuant to Labor Code Section 4662 since she suffered the loss of use of both hands. Applicant also argued the WCJ committed error in apportioning any of her current total permanent disability award to the prior stipulated award under Labor Code Section 4664.

In his report on reconsideration, the WCJ recommend reconsideration be granted and that applicant should be awarded 100% permanent total disability and agreed with applicant's contention the conclusive presumption of permanent total disability under Labor Code Section 4662(b) applied. The judge also indicated the subtraction method of apportionment pursuant to Labor Code Section 4664 (b) was inappropriate.

The WCAB granted reconsideration. In the Board's opinion and decision after reconsideration, the panel amended the WCJ's decision finding applicant was 100% permanently totally disabled pursuant to the conclusive presumption of labor code section 4662(b). That presumption of total permanent disability was based on medical evidence indicating applicant had lost the use of both hands. While the Board made reference to the case of *Nabors v. Piedmont Lumber and Mill Company* (2005) 70 CCC 856, the panel also indicated *Nabors* did not apply to the facts of this case. *Nabors* involved a straight subtraction method of apportionment.

Here, we conclude that, although section 4664(b) applies and, therefore, it is conclusively presumed that applicant's 18.75% permanent partial wrist disability existed at the time of the subsequent injuries at issue herein, the conclusive presumption of permanent total disability pursuant to section 4662(b) also applies and precludes apportionment of any kind, including apportionment to a prior award under section 4664(b).

The WCAB concluded that evidence of the applicant's prior award could not be used to rebut the Labor Code Section 4662(b) conclusive presumption of permanent total disability.

Moreover, our conclusion that the evidence of prior disability under section 4664(b) cannot rebut the conclusive presumption of permanent total disability pursuant to section 4662(b) is supported by the plain language of section 4664(c)(1), which precludes the "accumulation of all permanent disability awards issued with respect to any one region of the body" from exceeding 100% over the

injured employees lifetime “*unless the employee's injury or illness is conclusively presumed to be total*” (Italics added by WCAB.) pursuant to section 4662. Properly, therefore, as applicant’s permanent disability for the loss of use of both hands is conclusively presumed to be total pursuant to section 4662(b), her lifetime accumulation of awards for her upper extremity “region of the body” under section 4664(c)(1), may exceed 100%.

Gibson v. Mendocino Solid Waste Management Authority (2007) 72 CCC xiii; 2007 Cal.Wrk.Comp. P.D. LEXIS 104; 36 CWCR 39(Noteworthy Panel Decision).

Case Summary: Applicant suffered a cumulative trauma injury to the neck. Defendant argued there was a valid legal basis for apportionment based on “normal” degenerative changes. A report from a panel QME opined that 75% of applicant’s 37% permanent disability was industrial and 25% was attributable to the “normal” degenerative changes. The panel QME’s apportionment determination did not constitute substantial medical evidence due to failure to explain the basis for his percentage determination. There was no “how and why” discussion by the doctor as to the reason applicant’s degenerative changes were the cause of 25% of his current disability.

The unrepresented employee alleged a cervical injury of uncertain date. It appears from the facts the employer sent the worker to a treating physician who issued a report on May 29, 2003. The treating physician found the employee had the onset of right shoulder and right arm complaints in approximately April of 2002. The treating physician also determined there was no specific injury and concluded applicant suffered a cumulative trauma injury ending on February 7, 2003.

The employer then initiated the unrepresented panel QME process with the employee. The unrepresented panel QME found the worker permanent and stationary in early 2005, with work restrictions. In terms of apportionment and injury dates, the unrepresented panel QME indicated that 50% of applicant’s disability was attributable to a specific injury, 25% was attributable to a CT injury, and 25% to “normal degenerative aging”.

Defendant then obtained a private rating of the panel QME report which rated 32% after application of 25% apportionment due to the “degenerative aging process.” Based on this private rating, defendant and the unrepresented employee, entered into a Request for Stipulated Award of 32%. The requested Stipulated Award was filed with the WCAB. The presiding judge reviewed the case and sent the unrepresented panel QME report to

the DEU for a rating. The DEU rating reflected 45% permanent disability without apportionment. The presiding judge also noticed the date of injury might be in error and set the case for a hearing on adequacy before another judge.

At the conclusion of the adequacy hearing, there was a defense motion to obtain a supplemental report from the panel QME on the issue of apportionment. The WCJ denied the motion. A findings and award issued on July 16, 2007. Applicant received 37% permanent disability without apportionment. The judge also disapproved the proposed Stipulations with Request for Award that had been previously submitted.

Defendant filed for reconsideration alleging there was no evidence to support a cumulative trauma injury. Defendant also argued a supplemental report from the panel QME should have been obtained. Third, the permanent disability award was subject to apportionment.

The WCJ prepared a report on reconsideration which discussed in detail the procedural requirements for unrepresented workers in non-litigated and litigated cases. With respect to the non-litigated process, the unrepresented panel QME report is supposed to be sent to the DEU for a summary rating. If there is an apportionment issue in the unrepresented panel QME report, the case is referred to a WCJ for a determination as to whether or not the claimed apportionment is legal. Only after the DEU summary rating is prepared and served on the parties do other options come into play. The parties have the option of settling the case based on the summary rating. If there is no settlement based on the summary rating, either of the parties, can file an application for adjudication and the case then becomes litigated.

In this particular case defendant failed to follow the required procedures for unrepresented workers in the non-litigated track. First, while the case was still in the non-litigated posture they ordered a private rating and formulated a settlement. By doing so they essentially “gambled” as to whether or not the proposed settlement would be approved. Once the proposed settlement was submitted for approval, the evidentiary record remained closed unless the assigned WCJ finds good cause to develop the record. In this case there was no excuse or justification for defendant’s failure to follow the proper procedures in processing a settlement related to an unrepresented worker in the non- litigated track.

With respect to the apportionment issue, the WCJ stated that in his opinion no experienced workers compensation professional would conclude that the unrepresented panel QME’s apportionment determination was valid/legal. This was because the panel QME did not explain his reasoning at all. The QME’s apportionment determination was a mere conclusion without supportive reasoning. If the defendant actually wanted a determination as to whether or not apportionment was legal they should have filed an

application and then obtained a report constituting substantial medical evidence on apportionment. If defendant had filed an application for adjudication they would have had the opportunity to cross-examine the panel QME and also may have obtained a supplemental report. In this case defendant did neither.

There was also an issue related to the date of injury. The WCJ relied on the initial treater's opinion which was more persuasive than the panel QME on the date of injury issue and also that applicant suffered a CT injury as opposed to a specific injury. The WCAB adopted and incorporated the WCJ's report on reconsideration as their own.

Yellowhair v. Hair Masters (2008) 2008 73 CCC xiii (September); 2008 Cal. Wrk. Comp. P.D. LEXIS 356 (Noteworthy Panel Decision).

Case Summary: Applicant suffered a 9/14/2004, injury to her head and neck. The WCJ originally awarded applicant 24% permanent partial disability before apportionment based on Labor Code section 4663 of 25% industrial and 75% to a subsequent nonindustrial motor vehicle accident. On reconsideration, the WCAB reversed the WCJ's permanent disability finding of 24% reducing it to 16% before apportionment, since there was no substantial evidence that applicant sustained a shoulder injury that accounted for 8% of the original 24% permanent disability awarded by the WCJ.

On the apportionment issue, the WCAB also reversed the WCJ's Labor Code section 4663 apportionment determination, on the basis the reporting QME provided no analysis or basis for his apportionment determination under the standards set forth in Escobedo v. Marshalls (2005) 70 CCC 604 (en banc). As a consequence, the WCAB awarded applicant 16% permanent disability without apportionment.

Asher v. Pactiv Corporation (2008) 73 CCC xxiv (October); 2008 Cal. Wrk. Comp. P.D. LEXIS 423 (Noteworthy Panel Decision).

Case Summary: Applicant suffered a 11/21/02 specific back injury. Following trial, applicant received an unapportioned award of 33% PPD. The parties used an AME in orthopedics. Defendant filed for reconsideration arguing that there was a valid basis for legal apportionment under Labor Code 4663 based on the AME's opinion that applicant had underlying degenerative disc disease.

On reconsideration, the WCAB affirmed the WCJ's determination that there was no legal basis for apportionment. The AME's opinion did not constitute substantial medical evidence for a variety of reasons. First, the AME failed to discuss "how or why" the

applicant's degenerative disc disease was a cause of applicant's current disability. Second, the AME's opinion lacked sufficient justification for the quantification i.e., the percentage of the degenerative disc diseases contribution to PPD. Third, apportionment on grounds of preexisting degenerative disc disease relates directly to aging itself, rather than to some other factor that might be age variable in its impact. As a consequence, in this case it was deemed to be a form of discrimination prohibited by Government Code section 11135(a).

Prado v. Joint Industry Board (2008) 73 CCC xxv (October); 2008 Cal.Wrk.Comp. P.D. LEXIS 438 (Noteworthy Panel Decision).

Case Summary: WCJ awarded applicant 81% PPD after finding legal apportionment of 5%. Applicant filed for reconsideration. The WCAB rescinded the WCJ's apportionment determination and awarded applicant 85 ½% PPD without apportionment. The WCAB found that the WCJ had improperly relied upon "non-existent range of the evidence" to find apportionment. Moreover, defendant failed to prove overlap of any prior disability as required by *Kopping*.

3. Range of The Medical Evidence.

O’Nesky v. W.C.A.B. (2007) 72 CCC 1555 (writ denied).

Case Summary: Industrial 7/8/96, right knee injury. Applicant also suffered a subsequent 2003, non-industrial incident/injury involving a horse falling on his right leg. WCJ relied on the applicant’s QME to determine overall PPD but then used the range of the evidence standard in determining the percentage of apportionment. Part of the WCJ’s apportionment determination was based on applicant’s lack of credibility in describing his right leg injury and resultant disability from the 2003, horse incident when compared to the actual treatment records. Prior to apportionment, applicant had 55% PD. Application of 50% non-industrial apportionment reduced his award to 27 ½%.

Comments/Analysis: Two things are significant in this case. First, we have a non-industrial injury that is 7 years “subsequent” to the industrial injury as the basis for apportionment. Second, the WCJ’s used the range of the medical evidence on the percentage of apportionment attributable to the 2003, subsequent horse injury. Although the respective apportionment percentages are not specified in the case summary, it can be assumed that applicant’s QME probably had little if any apportionment attributable to the 2003 injury, while the defense QME’s apportionment percentage figure no doubt exceeded the 50% used by the WCJ.

Kooy v Lawry’s Restaurant (2007, Panel Decision MON 0218864; MON 0218866)

Case Summary: Applicant received an award of 71.25% PD after apportionment. Defendant filed for Reconsideration alleging among a number of issues that the WCJ erroneously determined the extent of apportionment based on the “range of evidence.” There were two AME reports. One report was in psychiatry and the other in rheumatology. The AME in psychiatry opined that 10-40% of applicant’s overall PD was caused by non-industrial factors. The AME in rheumatology indicated non-industrial apportionment in the range of 10-20%. The Board denied reconsideration noting that the WCJ did not actually apply the range of the evidence standard since there were only separate reports from AME’s in different fields. However, the Board stated:

Furthermore, we are not persuaded by defendant’s assertions, without supporting legal authority, that it is error to determine the extent of apportionment based on a “range of evidence.” Rather, as we previously

noted, “an apportionment determination may properly be made by a WCJ based on a range of evidence.”

4. Overlap Issues. (Burden of Proof)

E. & J. Gallo Winery v. WCAB (Rubio) (2008) 73 CCC 1206; 36 CWCR 197 (5th DCA, writ denied, not certified for publication)

Case Summary: Applicant suffered an April 22, 2004, injury to his left shoulder. There was some evidence he also had a prior 1999, injury to his upper spine with work restrictions related to his left upper extremity. With respect to the 2004, injury, an AME issued three reports. With respect to the prior 1999, injury, there was a QME report issued on May 10, 2000.

Following trial the WCJ issued a 15% permanent disability award without any apportionment to the prior 1999, injury. Defendant filed for reconsideration claiming applicant had received a prior 11% permanent disability award. Moreover, defendant contended applicant never revealed the prior 11% permanent disability award.

The WCJ submitted a report on reconsideration indicating there was no evidence in the record applicant had ever received an 11% prior disability award. Even if it were to be assumed applicant had a prior 11% award, defendant failed to prove that any prior disability attributable to the old 1999, injury overlapped with any current disability related to the 2004, left shoulder injury. The WCAB adopted and incorporated the WCJ's decision and denied defendant's petition for reconsideration indicating there was no legal basis for apportionment under either Labor Code Section 4664 or 4663.

Defendant filed a writ arguing applicant's award should have been reduced by the 11% prior award and had met its burden of proving that a prior industrial injury overlapped with the current injury. Moreover, defendant (contrary to *Kopping*) argued that applicant had the burden of proving he was entitled to an unapportioned award of permanent disability.

In discussing and analyzing defendant's contentions, the Court of Appeal citing *Kopping v. WCAB* 142 Cal.App.4th 1099, held defendant had the burden of proof on apportionment including any issues related to overlap. There was discussion by the Court related to the AME report in which the AME opined applicant had a prior prophylactic work restriction from the 1999, injury of no heavy lifting above shoulder level related to his left upper extremity based on the May 10, 2000, QME report. The AME opined there was valid 4664 apportionment and 11% should be subtracted from applicant's award.

The Court of Appeal's discussion referenced and emphasized the WCJ's report on reconsideration indicating that with respect to the 2004, shoulder injury; applicant had objective factors of disability including loss of range of motion to the left shoulder as well as surgery. There was also a 1% whole person impairment add-on for pain. With

respect to the QME evaluation and report dealing with the old 1999, injury, there was no loss of range of motion and no surgery. Therefore the applicant had new factors of disability related to the 2004, injury that were not in existence with respect to the 1999, injury and medical reporting from the QME. The Court of Appeal, WCJ, and WCAB concluded that the AME's report indicating 11% apportionment to the 1999, injury did not constitute substantial medical evidence because the AME did not explain in detail how the disability from the 1999, injury would overlap with the disability attributable to the new 2004 injury. The AME "merely stated his conclusions and has given no support for his conclusion." The Court of Appeal concluded defendant failed to meet its burden of proof related to apportionment due to overlapping injuries (disabilities).

Brault v. State of California, Department of Justice (2007 Cal.Wrk.Comp. P.D. LEXIS 134; (Noteworthy Panel Decision); 72 CCC xii; December 2007).

Case Summary: Based on scant facts, this is a difficult case to fully analyze. Applicant received an unspecified permanent disability award for a 1/6/95, injury under the 1997 PDRS. Applicant's PD for the current/new injury of 12/29/98, was calculated under the 2005 PDRS. The WCAB held defendant was not entitled to credit for the prior disability award per se due to the fact the rating methods under the two different PDRS's were irreconcilable. However, the Board did find 1% valid legal apportionment based on a medical determination that the old injury produced (caused?) disability "equivalent" to 1% when calculated under the 2005 PDRS.

Comments/Analysis: This is a very significant case dealing with a complex and provocative issue of "overlap" under the Kopping case. How does a defendant prove up overlap between the two different permanent disability rating schedules (PDRS)? Is a medical report required as it was in this case to "determine" what an old schedule disability would translate to under the 2005 PDRS. Ultimately, the Court of Appeal will have to resolve this issue.

Interim Technologies v. WCAB (Lashbrook) (2007) 72 CCC 1549 (writ denied).

Case Summary: Applicant suffered two CT injuries, one ending 12/5/96, the other 1/7/00, and one specific injury on 1/1/95, involving cervical spine and headaches. There were AME's in orthopedics and neurology. WCAB found there was no overlap between applicant's factors of disability for the cervical spine and headaches. As a consequence, there was no basis for valid/legal apportionment.

Balbirnie v. City of Long Beach (2007 Cal.Wrk.Comp.P.D. LEXIS 131; (Noteworthy Panel Decision) 72 CCC xii, December 2007).

Case Summary: Two cumulative traumas: 5/21/73-9/30/03 and 5/21/73-8/20/02, and two specific injuries: 8/5/99 and 8/19/03. Applicant received 74% permanent disability after apportionment under LC 4663 to unspecified non-industrial factors. However, under the standards articulated under Kopping v. WCAB (2006) 142 Cal.App.4th 1099; 71 CCC 1229, defendant failed to meet its burden of proof to establish valid/legal apportionment under LC 4664(b). Under LC 4664(b), defendant was claiming 10% and 6% permanent disability related to two prior stipulated awards and also a prior compromise and release that settled for \$12,500.00.

The 2 prior stipulated awards of 10% and 6% permanent disability did not set forth or contain any work restrictions. More importantly, the two prior stipulations were to different body parts than those alleged in the current cases. With respect to the C&R, there was no specificity as to the basis for the \$12,500.00 settlement in terms of ratings or work restrictions.

Comments/Analysis: Although the facts are sparse in this case it is still a good example of the rather difficult burden defendant's face in some cases under Kopping and LC 4664(b) in establishing a "prior award of permanent disability."

Hickey v. County of Sacramento Sheriff's Department (2007)(January, 2008, CCC p. xx. (Noteworthy Panel Decision)

Case Summary: Applicant suffered a cumulative, low back injury ending on March 14, 2005. He also had a prior 1994, back injury which was resolved by a stipulated award for 14% PD. Defendant could not prove up legal/valid apportionment based on 4664 since there was a failure to show overlap. There was no indication of what factors of disability formed the basis for the prior award of 14%.

Montague v. GAF Building Materials (2007) (January, 2008 CCC p.xxii, (Noteworthy Panel Decision)

Case Summary: This case involves apportionment issues under Labor Code sections 4663 and 4664. Applicant suffered bilateral knee injuries related to a specific injury of 8/1/02, and a cumulative trauma from August 2002 thru September 2003. He also had a prior stipulated award of 6¾% for an old 1988, ankle injury.

The Labor Code section 4663 issue related to applicant's pre-existing degenerative joint disease involving his bilateral knees. The Board found the QME's 4663 apportionment determination met the standards articulated in *Gatten*. The QME's opinion was based on a diagnostic MRI evidencing pre-existing arthrosis in applicant's bilateral knees. There was a detailed discussion of the interplay between applicant's work duties and the degenerative disease process of osteoarthritis. The QME stated his apportionment opinion was based on reasonable medical probability. However, the portion of the decision dealing with Labor Code 4663 does not specify the percentage of non-industrial apportionment attributable to applicant's pre-existing osteoarthritis.

Although defendant prevailed on the Labor Code section 4663 apportionment issue, they were not successful in proving apportionment under 4664(b) related to applicant's prior 1988 award of 6¾% for an ankle injury. In essence defendant failed to demonstrate or prove up any overlapping factors of disability stemming from the 1988, left ankle injury related to the current bilateral knee injuries. The old stipulated award did not provide factors of disability related to the 1988, ankle injury. Moreover, the QME did not provide any factors of disability to establish that overlap actually existed even though his opinion stated there was "complete overlap". Also, applicant's treating physician,

contrary to the defense QME found no overlap. In conclusion, defendant failed to meet their burden of proof under Labor Code section 4664 (b).

Portillo v. ATI Systems Int. (2007) 73 CCC 2/08; (Noteworthy Panel Decision), p.xxiii)

Case Summary: This is a case involving both Labor Code Section 4663 and 4664 apportionment principles.

With respect to applicant's current date of injury of January 3, 2006, body parts injured included the left ankle, left knee, and left wrist. Applicant suffered a prior injury on November 11, 1999, for which there was Award related to left knee, left ankle, foot, and low back. The AME in the case found valid Labor Code 4663 apportionment of 20% of the applicant's current left ankle injury caused by the prior injury of November 11, 1999, but indicated no apportionment from the prior 1999, injury related to applicant's left knee and left wrist. Therefore there was 20% valid Labor Code section 4663 apportionment only to applicant's left ankle.

The 4664 issue involved overlap and duplication. The WCJ ruled defendant was not entitled to credit pursuant to 4664 regarding any permanent disability award for the January 3, 2006, injury to the left ankle, left knee and wrist injuries based on the prior award related to the November 11, 1999, injury involving applicant's left knee, left ankle, left foot and low back. The reason the WCJ found no valid 4664 apportionment was based on the fact the prior 1999, injury and related body parts were rated under the 1997 PDRS. In contrast, the most recent injury of January 3, 2006, and involved body parts were rated under the 2005 PDRS. In conclusion, the AME chose to assign a specific percentage of disability caused by the prior injury and that percentage was subtracted from applicant's overall permanent disability pursuant to 4663.

Parker v. County of Los Angeles (2008) 2008 Cal.Wrk.Comp. P.D. LEXIS 255, 3/17/08 (Noteworthy Panel Decision).

Case Summary: Applicant, a deputy sheriff had an old award for an admitted back and neck injury that issued on 4/23/01, for 30% permanent disability. The stipulated award was based on an AME report and was rated under the 1997 PDRS. Applicant returned to work and suffered an additional specific injury as well as a cumulative trauma to his low back resulting in two separate surgeries. The case proceeded to trial with the primary issues nature and extent of disability and apportionment. With respect to the two new

injuries, they were rated under the 2005 PDRS based on the AMA guides. Defendant argued that under LC 4664 they were entitled to the conclusive presumption with the prior 30% award subtracted from applicant's present overall disability under the *Welcher* and *Brodie* cases. Applicant argued that defendant was not entitled to apportionment under 4664 since there was a failure to prove overlap.

The WCJ (whose opinion was adopted and incorporated by the Board) ruled that defendant had failed to meet the burden of proof as to overlap under LC 4664, but was entitled to 25% apportionment under LC 4663. There were two distinct reasons defendant failed to prove overlap under 4664. First, applicant's old 2001, award of 30% was related to both the back and neck. The two new injuries involved only the back and defendant could not segregate out on a percentage basis what portion of the old award was for the neck and what portion related to the back. Second, the old award was determined and rated under the 1997 PDRS and the 2 new injuries under the 2005 PDRS. The WCJ pointed out that the two rating schedules utilize different criteria in determining PD.

However, based on an AME report related to the two new injuries, the WCJ found a legal basis for 25% apportionment to "other factors" under LC 4663, specifically the prior 1999, injury that involved the applicant's back. Applicant was awarded 17% PD after apportionment of 25%.

Minvielle v. County of Contra Costa/Contra Costa Fire, legally uninsured (2008) 36 CWCR 199 (Opinion and Decision after Reconsideration) (Cuneo, Brass, Moresi) (Noteworthy Panel Decision, LEXIS)

Case Summary: Applicant a firefighter suffered a specific November 22, 2004, injury to his back. He also had a prior October 8, 1992, back injury with related spinal surgery while working for the same employer. The old 1992 injury resulted in a May 4, 1995, award of 27½ % permanent partial disability.

Primary issues at trial were the nature and extent of permanent disability and apportionment. The parties entered into joint detailed stipulations related to permanent disability calculations. The case was submitted on the record without testimony. The parties stipulated that with respect to the most recent injury of November 22, 2004, that under the AMA guides, permanent disability would be 31% before apportionment.

Following trial the WCJ issued an award of 4% permanent partial disability after applying apportionment pursuant to Labor Code section 4664(b). The WCJ also found that Labor Code section 4663 apportionment was inapplicable based on the AME report,

since applicant was able to demonstrate that he had rehabilitated himself completely from the after effects of the prior injury of October 8, 1992.

Applicant filed a petition for reconsideration raising several arguments. Applicant argued that the any apportionment pursuant to Labor Code section 4664(b) was not legal because defendant failed to prove overlap between the old injury and the new injury. Moreover, the WCJ had committed error by simply subtracting the percentage of permanent disability awarded in the old case from the percentage of permanent disability found in the new case. With respect to a secondary overlap issue, applicant contended that the permanent disability caused by the 1992 injury was rated under the 1950 PDRS as opposed to the permanent disability from the 2004 injury, which was rated under the AMA guides, 5th edition and the new PDRS.

In a lengthy 10 page decision, the WCAB rescinded the WCJ's decision since there was no proof of overlap between the permanent disability caused by the old 1992 injury, and any permanent disability caused by the new 2004 injury.

The permanent disability caused by the 1992 injury was calculated using the 1950 schedule and the permanent disability caused by the injury in this case was calculated using the AMA guides, and it is not appropriate to simply subtract one percentage from the other in order to apportion pursuant to section 4664 because different standards were used to calculate the permanent disability caused (sic) each injury. The case is returned to the trial level to determine if the two injuries can be rated under the same standard such that apportionment can be applied pursuant to section 4664."

The Board agreed with the WCJ's determination that the record did not support apportionment pursuant to section 4663 because the AME found applicant was completely rehabilitated from the earlier 1992 injury. It was undisputed applicant was essentially asymptomatic, worked without limitations, and did not seek medical treatment or care for over a decade.

BURDEN OF PROOF ISSUES

The WCAB citing *Kopping*, held that "defendant has the burden of proving overlap before apportionment under section 4664 will apply." (emphasis added). The Board elaborated on this point by stating:

Under *Kopping*, a defendant must prove *both* the existence of a prior award and overlap of the permanent disability caused by the two injuries in order to obtain section 4664 apportionment. Contrary to the view of the WCJ, overlap is not proven merely by showing that the second injury was

to the same body part because the issue of overlap requires a consideration of the factors of disability or work limitations resulting from the two injuries, not merely the body part injured.

OVERLAP PRINCIPLES WHEN DIFFERENT PERMANENT DISABILITY RATING SCHEDULES ARE USED.

Citing a line of cases beginning in 1938 up to 2007, the Board indicated that pursuant to the *Mercier* case, in certain situations, there can be valid overlap established even though the injuries are to different parts of the body. Moreover, current section 4664 does not change the law requiring the need to consider the same factors of disability in order to determine overlap.

In the instant case, unlike the facts in *Kopping*, the overlap issue has an added dimension or complication due to the fact the percentages of permanent disability caused by the two injuries were calculated using different standards. Applicant's 1995 award was rated under the 1950 PDRS. This rating schedule considered applicant's ability to compete in the open labor market and was based on a work restriction of no heavy lifting. In contrast, the permanent disability caused by the current 2004 injury, was rated using the AMA guides that considers WPI. Moreover, the AMA guides provide two distinct methods of calculating permanent disability; one is based on a diagnostic related estimate (DRE) and the other considers range of motion (ROM).

Because of these fundamentally different standards, you cannot just subtract the 27.5% permanent disability under the prior 1995 award from the 33% permanent disability caused by the current 2004 injury which was premised on the ROM standard in the AMA guides. When permanent disability is rated under different standards, overlap cannot be demonstrated or established under most circumstances.

The short answer is that section 4664 apportionment does *not* apply when the injuries are rated under different standards because overlap is not shown. In order to properly apportion pursuant to section 4664, the issue of overlap must be addressed by using the same standard to calculate the permanent disability caused by each of the injuries. This is an issue of proof based upon substantial medical evidence.

APPLYING THE PRINCIPLES TO THE FACTS OF THIS CASE

In this case the AME found no basis for apportionment under section 4663 since the applicant had demonstrated complete rehabilitation from the disability attributable to the prior 1992 injury.

The critical issue that remained was whether there was any basis for apportionment pursuant to section 4664. The AME addressed this issue in a series of supplemental reports. He indicated that under the DRE method there was 13% WPI. Using the ROM method, the WPI was 21%. He also recommended a 2% add on for pain for either method.

In a separate supplemental report, the AME addressed the thorny issue of whether he could retroactively estimate the disability attributable to applicant's 1992 spine injury under the AMA guides. This AME was also the AME in the 1992 case! He opined that at the time of his P&S exam of applicant in 1995, applicant would be in the lower end of a DRE Category III, resulting in a 10% WPI. Even though the AME attempted to provide an estimate as to an AMA assessment of PD for the old 1992 injury, he failed to use the same method that was used in determining PD for the current 2004 injury. The PD related to the 2004 injury, was based or calculated using the ROM resulting in 31% PD. The AME used the DRE method in retroactively determining an estimate of AMA guide PD related to the 1992 spine injury. As a consequence, the WCAB remanded the case back to the trial level "to determine if it is possible to rate the 1992 injury under the same standard (ROM) as the 2004 injury in order to assure that the issue of section 4664 apportionment is properly addressed."

Martinez v. A.B.L. Trucking, Inc., Zenith Insurance Co. (2008) 2008 Cal. Wrk.Comp.P.D. LEXIS 248 (Noteworthy Panel Decision)

Case Summary: From a procedural perspective, defendant's petition for reconsideration was granted and the Findings & Award issued by the WCJ was rescinded.

Applicant a cement truck driver suffered a specific injury on April 26, 2006, to his low back, left shoulder, neck, and left leg. The WCJ issued a Findings and Award wherein applicant was awarded 12% permanent disability without apportionment under Labor Code sections 4663 or 4664. Applicant also suffered a previous injury on September 4,

2001, to his low back and left shoulder and received an Award of 37% permanent disability based on work restrictions under the 1997 PDRS.

Defendant filed a petition for reconsideration alleging that based on the report of the AME for the current injury, there was no increase in applicant's permanent disability above the 37% previously awarded for the prior injury of September 4, 2001.

The AME reporting on the current injury of April 26, 2006, reviewed the report(s) from the AME who examined the applicant related to the old injury of September 4, 2001. With respect to applicant's low back, the former AME had diagnosed low back grade I spondylolisthesis, along with a resolved left shoulder contusion. In terms of the AMA Guides, the AME used the DRE method for determining applicant's impairment as it related to the current injury. The AME indicated 7% WPI. (Chapter 15, Table 15 - 7, section III (A)). Alternatively, the AME also opined that if work restrictions were applicable to the current injury, that based on the confirmed presence of grade I spondylolisthesis, applicant would be precluded from heavy lifting and repetitive bending and stooping. The AME indicated there were no work restrictions for the left shoulder.

With respect to the old injury of September 4, 2001, it was determined by the prior AME, that applicant had work restrictions of no heavy work, and a 50% loss of pre-injury capacity related to his low back and left shoulder. These restrictions formed the basis for the old 37% award.

The AME reporting to the parties on the new injury of April 26, 2006, opined there was no increase in applicant's current disability above the 37% level related to the old injury of September 4, 2001. In fact, applicant's current physical findings and subjective complaints were less severe than they were when he was evaluated in conjunction with the old injury of September 4, 2001.

Based on this evidence the Board stated "... we are persuaded that defendant established overlap pursuant to section 4664 and that applicant does not have permanent disability as a result of the injury herein." As a consequence, the Board rescinded the WCJ's determination of 12% PD; finding applicant was not entitled to any permanent disability. Moreover, there were no funds against which to award attorney's fees.

Case Comment: This is one of the few cases where a defendant has been successful in "bridging" the two PDRS rating schedules. In this case it was a bridge linking work restrictions. Theoretically, the same approach could work linking WPI assessments. However, this "bridging" of the two rating schedules is contingent on a very persuasive medical report that meets the substantial medical evidence test as it relates to apportionment as articulated in the *Escobedo* and *Gatten* cases. Defendant would also have to prove overlap under *Kopping*.

Kulish v Crosetti Orchards, Cambridge Integrated (2008) 2008 Cal.Wrk.Comp. P.D. LEXIS 84 (Noteworthy Panel Decision)

Case Summary: Defense petition for reconsideration denied. This case involves a focused discussion of overlap in the context of Labor Code section 4664(b). Applicant suffered a specific low back injury on February 5, 1996, resulting in 80% permanent disability (ultimately reduced to 57% under section 4664(c)(1). He had a prior back injury in 1986. He received an award of 43% permanent disability related to this injury.

Defendant failed to obtain or introduce at trial any evidence related to what factors of disability were involved, or how the prior award of 43% was calculated. Given this failure of proof, the WCJ properly concluded there was no legal basis for apportionment under Labor Code section 4664(b).

Defendant unsuccessfully argued the Brodie decision overturned the decision in Kopping. However, the WCAB pointed out that contrary to defendant's argument/contention, the Brodie opinion actually cited with approval the Kopping decision not once but twice! The Brodie Court never stated that Kopping was overruled. More importantly, the Brodie opinion specifically referenced overlap. Consequently, overlap remains a viable component of the apportionment equation.

There was also an ancillary issue related to the applicability of section 4664(c)(1), which operates to limit the combined permanent disability from, or related to one region of the body, to 100% over an employee's lifetime. Based on the facts of this case, applicant had already received an award of 43% permanent disability for the back region, therefore the maximum allowable permanent disability for his current injury is limited to 57%. ($100\% - 43\% = 57\%$).

Case Comment: Even though defendant received the benefit of a reduction of applicant's PD from 80% to 57% based on the applicability of section 4664 (c)(1), they argued applicant should have only received an award of 37% ($80\% - 43\%$ (the prior award)).

Goodman v. Pine Ridge Elementary School District (2008) 73 CCC Sept. 2008 xv; 2008 Cal.Wrk.Comp.P.D. EXIS 333 (Noteworthy Panel Decision; Opinion and Order denying defense Petition for Reconsideration)

Case Summary: Following trial the WCJ issued a Findings and Award wherein applicant was awarded 42% permanent disability without apportionment related to a CT injury to her bilateral elbows. Defendant filed for reconsideration arguing the WCJ should have found apportionment based on overlapping disabilities. The parties used an AME in orthopedics. Applicant had a documented prior specific low back injury on March 11, 1998, which settled by Stipulated Award for 12% permanent disability. With respect to the current CT injury, to applicant's bilateral upper extremities, the rating followed by the WCJ was: 7 - 35% - 322G - 38 - 42.

The Board cited the Kopping case, that when Labor Code section 4664 apportionment is alleged or claimed, defendant has the burden of proving overlap between the current permanent disability and any previously awarded disability. Although the AME discussed both work restrictions and subjective factors of disability related to the prior low back injury, the actual prior Stipulated Award for 12% did not expressly indicate whether the prior Award was based on work restrictions or subjective factors of disability. Based on the particular facts of this case, there was no evidence that any factors of disability for the low back overlapped with the work restrictions for the upper extremities. Since defendant failed to prove overlap, the WCJ was correct in issuing a Findings and Award of 42% PD without apportionment.

Galvez v. Fontana Unified School Dist., PSI (2008) 73 CCC Sept. 2008, xv; 2008 Cal.Wrk.Comp. P.D. LEXIS 331 (Noteworthy Panel Decision).

Case Summary: Applicant while employed as a police officer, sustained a cumulative trauma injury to his cardiovascular system resulting in 63% permanent disability without apportionment. Defendant filed for reconsideration arguing there was a basis for legal apportionment related to a prior award of 29:2% PD which should be deducted from applicant's current permanent disability award of 63% under Labor Code section 4664(b). There was a joint stipulation at trial that applicant received a prior stipulated award of 29:2% permanent disability on November 25, 1996, related to a spine injury.

In her report on reconsideration, the WCJ stated one of the reasons she found no basis for legal apportionment under section 4664, was her view that section 4664 “does not permit apportionment between injuries involving separate regions of the body resulting from

separate dates of injury." The WCAB indicated the WCJ was wrong in conceptualizing or reading Labor Code section 4664 as prohibiting apportionment between injuries involving separate regions of the body and attributable to separate dates of injury. Specifically citing the *Strong* case (en banc), (which was approved in part and disapproved in part in *Kopping*), the WCAB stated:

[A]s was true before the repeal of former section 4750 and continuing with the enactment of 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." (*Strong*, supra, 70 Cal.Comp.Cases at pp. 1469-1470, (original emphasis).)

The WCAB held that "apportionment is permitted for prior permanent disability awards involving a different region of the body if it is adequately established in the record." (Meaning overlap is established or proven).

Although the prior 1996 award establishing 29:2% permanent disability related to applicant's back was admitted as a joint exhibit at trial, there was no specificity or proof establishing the basis or method of how the 29:2 permanent disability was derived i.e., such as work restrictions or subjective factors of disability. There was no evidence introduced as part of the record to establish any overlapping factors of disability which resulted in the prior 1996 award of 29:2% permanent disability.

The WCAB also characterized the deposition testimony of the AME in the current case as ambiguous, since he had not been presented with any medical reports or other documentation during the deposition to support defendant's contention that there was a specific work restriction that formed the basis for the prior award. As a consequence, the WCAB held that defendant failed to meet its burden of proof as to overlap under *Kopping*.

The Earthgrains Co., et al., v. WCAB (Hansen) (2008) 73 CCC 1000 (writ denied, 5th DCA)

Case Summary: Applicant worked as a route salesperson and supervisor. He filed a claim alleging a cumulative trauma injury for the entire period of his employment from 1988 to June 28, 2002. He alleged injuries to his knees, spine, and upper extremities. With respect to the CT injury, applicant was represented by counsel.

During the course of his employment with the same employer, applicant received three prior stipulated awards all related to orthopedic injuries. He represented himself with respect to all of the prior injuries and stipulated awards. Applicant received a stipulated award of 7.75% permanent disability on July 12, 1989, related to a specific injury of September 22, 1988, to his right knee. On May 1, 1993, he received a joint stipulated award related to specific injuries which occurred on December 14, 1990, and January 28, 1992, to his low back. With respect to the December 14, 1990 injury, he was awarded 10.75% permanent disability and 16.75% for the January 28, 1992 injury. In January of 2002, approximately five months before his last day of work, applicant had left total knee replacement surgery. The reason applicant retired in June of 2002, was because his treating physician indicated he needed a two level back fusion surgery. He had the back fusion surgery on July 18, 2002, which was within 30 days of his retirement date. Defendant paid for the surgery. In addition to the two-level spinal fusion surgery in July of 2002, applicant later had a right total knee replacement in March 2003.

Following trial, the WCJ found injury AOE/COE on a cumulative trauma basis related to applicant's bilateral knees and spine. He was awarded 49% permanent partial disability after subtracting/factoring in adjustment for the prior disability awards pursuant to Labor Code section 4664(b). The WCJ relied on applicant's QME report to determine PD, finding it more reliable and persuasive than the defense QME report. Neither applicant's QME, or the defense QME found any valid basis for Labor Code section 4663 apportionment.

Defendant filed a petition for reconsideration raising a number of issues including arguments of entitlement to additional apportionment under Labor Code section 4663, statute of limitations, temporary disability, and that the WCJ had erroneously determined applicant's permanent and stationary date.

With respect to the apportionment issue, the Court of Appeal affirmed the determinations of the WCJ and WCAB related to valid Labor Code section 4664 (b) apportionment and that there was no legal basis for apportionment under Labor Code section 4663.

Defendant argued entitlement to additional apportionment under section 4663 based on applicant's medical history which indicated a high school football injury along with a pre-existing degenerative spinal condition combined with applicant's age and weight. Defendant was forced to concede that both QME's determined there was no valid basis for legal apportionment under section 4663. The WCAB's decision was affirmed by the Court of Appeal except for the issue related to the correct determination of applicant's permanent and stationary date.

The Court of Appeal remanded the case back to the Board solely on the issue of determining applicant's P&S date. The Court noted there were a number of medical reports reflecting or indicating that applicant was permanent and stationary no later than March 2004, contrary to applicant's QME report, which indicated applicant was permanent and stationary in August of 2006. The court stressed that applicant's QME had simply stated in his report that the applicant "is" permanent and stationary without any indication of "when" he achieved his permanent and stationary status.

Oswalt v. WCAB (2006) 71 CCC 1243 (writ denied; 1st DCA)

Case Summary: In 1997, while working as a police officer, applicant injured his right ankle. In approximately the year 2000, he began working as an apprentice embalmer. In October of 2001, he suffered multiple injuries to his low back. The case went to trial on the issues of nature and extent of permanent disability and apportionment. Applicant testified that before his 2001, low back injuries, he had completely rehabilitated himself from the old 1997, right ankle injury. He also testified his 1997, right ankle injury settled by way of a compromise and release. Defendant did not introduce the actual compromise and release document. However, defendant did produce a 1997, medical report describing applicant's work restrictions related to the 1997, right ankle injury.

The QME after reviewing medical records related to the 2001, multiple back injuries and the prior 1997, right ankle injury concluded applicant did not suffer any permanent disability. Based on medical reports from the QME, the WCJ found applicant's pre-existing disability from the 1997, right ankle injury "completely overlapped" the permanent disability caused by his 2001 injuries to his low back. Therefore he found the October 2001, low back injuries did not cause any compensable permanent disability.

Applicant filed a petition for reconsideration. In his report and recommendation on reconsideration the WCJ recommended the WCAB deny the petition for reconsideration. The WCAB adopted and incorporated the WCJ's opinion. Both the WCJ and the WCAB relied on Labor Code section 4664(b) that applicant was not entitled to any permanent disability since there was a complete overlap of disabilities between the old 1997, right

ankle injury and the 2001, multiple back injuries. Predictably, applicant filed a petition for review with the Court of Appeal. The WCAB conceded error. The Court noted that section 4664(b) establishes a conclusive presumption. The Court of Appeal indicated the WCAB had previously ruled in an en banc decision that defendant bears the burden of proving the existence of a prior award of permanent disability under section 4664(b). If defendant meets this burden a conclusive presumption applies. If the conclusive presumption is established, an injured worker is not permitted to show medical rehabilitation from the disabling effects of the earlier injury. Moreover, the Court of Appeal indicated that the WCAB held it was the applicant's burden to disprove overlap between the current and prior disability in order to obtain any permanent disability citing the Strong case.

The Court of Appeal did note that the WCJ found applicant had not disproved overlap existed. The WCJ therefore applied the conclusive presumption of Labor Code section 4664(b).

The Court of Appeal held the WCJ and the Board erred since the only evidence of a compromise and release with permanent disability was based on applicant's testimony that he settled the 1997, right ankle injury by way of a compromise and release. Citing the Posquotto case, the Court of Appeal indicated that an order approving a compromise and release in and of itself without more does not constitute an award of permanent disability sufficient to apply or establish the conclusive presumption of Labor Code Section 4664 (b). Since defendant failed to establish a prior award of permanent disability applicant could avoid apportionment by demonstrating that he had medically rehabilitated himself from the 1997, right ankle injury before he suffered his 2001, multiple back injuries. The Court of Appeal remanded the case back to the trial level for the WCJ to determine whether applicant's claim of medical rehabilitation was credible and if so whether his prior permanent disability may nevertheless be an other factor that is causing his current disability pursuant section 4663 consistent with the Pasquatto decision.

McGlover v. Healthsouth Corporation(2008)(2008)73CCC xv (September); 2008 Cal.Wrk.Comp.P.D. LEXIS 340 (Noteworthy Panel Decision).

Case Summary: Applicant suffered a low back injury on August 28, 2002. The WCAB found valid Labor Code section 4663 apportionment of 50% to "other factors" related to applicant's prior 1999, low back and neck injury. In addition to valid Labor Code section 4663 apportionment of 50%, defendant wanted additional apportionment under Labor Code section 4664 (b) related to applicant's prior award of 18% stemming from the 1999 injury.

The WCAB denied the defense request for additional apportionment under Labor Code section 4664(b), on the basis that any further apportionment over and above the 50% awarded under Labor Code section 4663 would be "duplicative and result in a windfall to defendant."

5. Petitions to Reopen.

Vargas v. Atascadero State Hospital, S.C.I.F. (2006) 71 CCC 500 (WCAB opinion en banc).

Case Summary: Following the trial on the petition to reopen, the WCJ issued a recommended rating of 91.2%. The chronology in this case is extremely significant. The rating instructions and recommended rating were issued on April 8, 2004. On April 12, 2004, applicant filed a DOR requesting cross examination of the rater which was set for May 20, 2004. SB 899 was enacted on April 19, 2004. The WCJ immediately notified the parties that he would apply the apportionment provisions of SB 899 and further development of the record would be addressed at the May 20th hearing. At the May 20, 2004, hearing the WCJ affirmed his overall assessment of PD on the Petition to Reopen at 91.2%, but also ordered development of the medical record to address SB 899 apportionment issues. Applicant filed for Removal arguing the newly enacted apportionment provisions of SB 899 cannot be applied retroactively where medical reports were obtained prior to the enactment of SB 899.

The WCAB relying on the cases of *Marsh v. W.C.A.B.* (2005) 130 Cal.App.4th 906, 70 CCC 787 and *Kleemann v. WCAB* (2005) 127 Cal.App.4th 274, 70 CCC 133, held that the apportionment provisions of SB 899 apply to any Petition to Reopen that was pending and not final at the time SB 899 was enacted on April 19, 2004. However, consistent with Section 47 of SB 899, the new apportionment provisions cannot be applied retroactively to reach back and reduce or revisit the basis for the any original award that was final before SB 899 was enacted. "[T]he new apportionment statutes cannot be used to revisit or recalculated the level of permanent disability, or the presence or absence of apportionment, determined under a final order, decision, or award issued before April 19, 2004." (*Vargas*, supra. 72 CCC at 507.)

The Board also held that with respect to any increased PD awarded on the Petition to Reopen, the apportionment provisions of SB 899 could be fully applied as long as there is substantial medical evidence establishing the other "factors" set forth in LC section 4663 are a cause of applicant's increased disability.

Rocha v. TTX Company (2008) 73 CCC Sept.2008 xiv; 2008 Cal.Wrk.Comp.P.D. LEXIS 348 (Noteworthy Panel Decision)

Case Summary: On August 22, 2002, the underlying case settled by way of stipulated award for 39% permanent disability. The parties stipulated applicant sustained injury to his back, chest, and psyche. Following a trial on applicant's petition to reopen, the WCJ found applicant to be 100% permanently totally disabled an increase of 61% PD. Defendant tried to raise the defense of good-faith personnel action under Labor Code section 3208.3. The WCAB ruled that the prior stipulated award of 8/22/08, wherein applicant suffered a psychiatric injury, precluded defendant from reopening and re-litigating the issue of psychiatric injury AOE/COE.

With respect to the issue of apportionment as it relates to the Petition to Reopen, the board cited Vargas v. Atascadero State Hospital (2006) 71 CCC 500 (Appeals Board en banc), holding that the apportionment provisions of SB 899 apply only to the issue of increased permanent disability alleged and ultimately proven in a Petition to Reopen. In this case defendant failed to present any substantial medical evidence that legal apportionment should apply to applicant's increased 61% permanent disability i.e.; the difference between the prior 39% award and his current 100% permanent total disability award. Moreover, the Board denied a post trial defense request to reopen or develop the record, since defendant had the full opportunity before and at the time of trial, to obtain and present evidence that a portion of applicant's increased permanent disability was caused by nonindustrial factors. On this issue the Board relied on the case of Telles Transport v. WCAB (Zuniga)(2001) 92 Cal.App.4th 1159; 66 CCC 1290.

Bunnie Orange v. Hilton Hotel Corp., Specialty Risk Services (2008) 2008 Cal.Wrk.Comp.P.D. LEXIS 14 (Noteworthy Panel Decision)

Case Summary: Following trial the WCJ issued a findings and award wherein applicant while employed as a housekeeper, received 54% permanent disability without apportionment related to a cumulative trauma injury to her bilateral shoulders and neck. The WCJ used the 1997 PDRS for rating purposes.

The WCJ also dismissed applicant's multiple petitions to reopen related to an earlier CT and specific injuries to her right shoulder resulting in 18% permanent disability based on a finding that all of her increased permanent disability was solely attributable to the new cumulative trauma injury. Interestingly, the WCJ allowed defendant a credit for the

dollar value of the prior 18% stipulated award against the 54% permanent disability awarded applicant on the new CT injury.

Defendant filed for reconsideration predictably arguing the 2005 PDRS should have been used to rate applicant's disability. Defendant also contended the prior 18% permanent disability award should have been subtracted on a percentage basis not a dollar basis from applicant's current award of 54% permanent disability.

The WCAB granted reconsideration and rescinded the findings and award remanding for further proceedings on the dual issues of which rating schedule should be used and for a more focused analysis of the overlap issue. The WCAB instructed the WCJ to initially determine if the prior 18% stipulated award for the two prior injuries/cases overlapped in any way with the permanent disability from the current injury CT injury, citing the *Kopping*, *Sanchez*, and *Strong* cases. The Board emphasized defendant had the burden of proof on overlap.

If defendant on remand successfully proves overlap, the percentage of disability (18%) is to be subtracted from the permanent disability found in the current case (54%). The difference between the two percentages (not dollars) is then used to calculate the dollar value of permanent disability connected consistent with the *Brodie* and *Fuentes* cases.

Case Comment: If applicant had prevailed on one or both of her petitions to reopen, then the WCJ would have been correct to subtract or give defendant credit for the dollar value of the prior 18% award. However, since the 54% PD in this case was entirely attributable to the new CT injury, a percentage from percentage formula is correct.

Cruz v Santa Barbara County Probation Dept.(2008) (WCAB, Noteworthy Panel Decision)

Case Summary: Petition to reopen filed on May 6, 2003, related to an underlying 59% permanent disability award on a cumulative trauma low back injury. The primary issue in the case involved the applicability of Labor Code section 4663 apportionment to petitions to reopen under the WCAB's en banc decision in *Vargas v. Atascadero State Hospital* (2006). *Vargas* essentially held that Labor Code section 4663 does apply to petitions to reopen, but only to the actual segregated component of new and further permanent disability and not to permanent disability attributable to the original injury that resulted in the underlying permanent disability award of 59%.

In this case, the AME improperly apportioned or attempted to apportion 75% of applicant's a new and further disability to pre-existing non-industrial factors or conditions related to the original injury. The AME failed to isolate/segregate and discuss

in a “how and why” fashion as required by *Escobedo* what approximate percentage of applicant’s pre-existing non-industrial factors of permanent disability were attributable to the new and further disability, as opposed to the original injury.

Milivojevich v United Airlines (2007) 72 CCC July 2007, p. xiv; 35 CWCR 317 (Noteworthy Panel Decision).

Case Summary: This case involves a petition to reopen. The WCJ relying on the AME’s opinion found 40% of applicant’s increased permanent disability apportioned to unspecified non-industrial factors. Applicant filed for reconsideration which was granted. The WCAB reversed the WCJ finding the AME’s opinion did not constitute substantial medical evidence under the *Escobedo* standards. The AME failed to properly distinguish causation of injury versus causation of permanent disability. The AME also failed to adequately explain and discuss in a “how and why” fashion the purported non-industrial factors that caused a percentage of applicant’s disability. In addition, the AME did not articulate his opinion within the context of reasonable medical probability.

Wilson-Marshall v. W.C.A.B. (2007) 72 CCC 1736(writ denied, 4th DCA)

Case Summary: Before the trial on the Petition to Reopen for new and further disability the parties stipulated applicant was 100% PTD. The only issue was apportionment. The WCJ relying on the AME in psychiatry apportioned 10% of applicant’s increased PD resulting in a 99% award after apportionment. The WCJ based his application of apportionment on the increased PD on *Vargas v Atascadero State Hospital*(2006) 71 CCC 500(Appeals Board en banc opinion).

Comments/Analysis: I am confused by the math. Assuming the previous award of 71%, defendant would be entitled to take credit for the dollar value of this award against any new and further PD. If the parties stipulated applicant was 100% before any apportionment then the new and further disability would be 29%. Ten percent of 29% would then equate to 2.9% rounded to 3% which would leave the applicant at 97%. So how the applicant received a 99% award is beyond my skills in mathematics at least based on the facts provided. There is also an interesting procedural note. Originally on 8/14/07, applicant filed for a petition for writ of review in the Fourth Appellate District. The Writ was eventually denied. However, for some reason on 8/20/07, just 6 days later, applicant filed a writ with the Second Appellate District, which was the wrong district. The Supreme Court predictably ordered the case transferred to the Fourth District where the writ was quickly denied.

Charon v. Ralphs Grocery Company(2008) 73 CCC xv (September); 2008 Cal.Wrk.Comp P.D. LEXIS 326 (Noteworthy Panel Decision).

Case Summary: This case involves a petition to reopen related to an August 15, 1997, psychiatric injury that resulted in an award of 48% permanent disability. Following a trial on the petition to reopen, the WCJ, relying on an AME report, apportioned 15% of applicant's total permanent disability to non-industrial factors.

Applicant filed a petition for reconsideration. The WCAB reversed the WCJ's apportionment determination on the basis the AME failed to specify and discuss what portion of applicant's 15% non-industrial apportionment was due to factors in existence before the 48% stipulated award issued in 1997, and what portions if any, were attributable to non-industrial factors that came into existence after applicant suffered new and further permanent disability.

Comments\analysis: This is another case illustrating the principle that based on the WCAB's en banc decision in Vargas, valid Labor Code section 4663 apportionment on a petition to reopen is strictly limited to the increased permanent disability and not to any previously awarded disability. It is extremely important that the respective parties advise and inform any reporting physician(s) of how to properly apply Labor Code section 4663 consistent with Vargas.

6. Benson Issues.

Lavigne v. County of Los Angeles, PSI (2008) 2008 Cal.Wrk.Comp.P.D. LEXIS 242 (Noteworthy Panel Decision)

Case Summary: The WCJ issued a joint findings and award involving four injuries suffered by a firefighter. The joint award related to three specific injuries and one cumulative trauma injury to applicant's ears, knees, hands, back, right foot and left hand resulting in a joint award of 89% permanent disability without apportionment.

Defendant filed for reconsideration contending the 2005 PDRS should have been applied and that there was also a legal basis for apportionment under Labor Code section 4663. Defendant also argued the Benson case required a separate finding of permanent disability for each date of injury.

On the Benson issue the Board noted that absent limited circumstances, combined awards of permanent disability for multiple injury dates previously permitted under the Wilkinson case are no longer proper. Pursuant to SB 899, the WCAB must determine and apportion the cause of disability for each injury separately. The WCJ's joint findings and award was rescinded and the case returned for further proceedings before a different WCJ, since the previously assigned WCJ had retired.

See also, *Ryan v. Penske Truck Leasing* (2008) 2008 Cal.Wrk.Comp.P.D. LEXIS 17 (same issue, same holding).

University of the Pacific v. WCAB(Hern)(2006) 71 CCC 312 (writ denied; 3rd DCA)

Case Summary: On 7/21/99, applicant suffered an admitted specific injury to his right upper extremity. The case resolved by way of stipulations with request for award. Applicant was awarded 24 ½% permanent disability. On July 2, 2003, applicant filed an application for adjudication alleging a cumulative trauma injury to his back and both knees. The end date of the CT was 5/31/03. The CT claim was amended to add an alleged injury to both upper extremities. Applicant also filed a petition to reopen the specific injury claim of July 21, 1999, alleging new and further disability. Defendant stipulated there was good cause to reopen applicant's specific injury claim.

The case went to trial in May of 2005. The parties relied on their respective QME's. Following trial, the WCJ issued recommended rating instructions based on the report

from applicant's QME. The DEU specialist recommended a permanent disability rating of 90%. Neither party filed a motion to strike the recommended rating or requested to cross examine the rating specialist. The WCJ applied the *Wilkinson* case and issued a joint Findings Award & Order awarding applicant 90% permanent disability with defendant to receive credit against the new joint PD award for the money paid pursuant to the prior stipulated award of 24 ½%. The WCJ found the report from applicant's QME more persuasive than the defense QME.

Defendant filed a petition for reconsideration. Defendant argued the 24 1/2% permanent disability award issued on 7/1/02, related to the 7/21/99, injury should have been subtracted from the new and further disability that resulting from applicant's 7/21/99, specific injury and also from the permanent disability sustained as a result of applicant's CT injury. Defendant also argued the report of applicant's QME did not justify a 90% permanent disability rating.

In his report on reconsideration, the WCJ indicated that defendant did not file a motion to strike the rating specialist's rating nor did defendant request an opportunity to cross-examine the rater resulting in a waiver of that issue. More importantly, the WCJ applied the *Wilkinson* case and stated that although there were two separate injuries, the first settled by stipulated award and was timely reopened. Defendant also stipulated there was good cause to reopen the old award. There was a no objection from the parties that both injuries were permanent and stationary at the same time. In essence, the WCJ concluded defendant had failed to meet its burden of proof to establish that the WCJ's method of apportioning applicant's permanent disability was erroneous. The WCAB panel on reconsideration adopted and incorporated the WCJ's report without further comment on the issues. Defendant filed a petition for writ of review essentially raising the same issues they had raised on reconsideration. The writ was denied by the Court of Appeal.

Comments/Analysis: This case was decided prior to *Benson*. Under *Benson* the WCJ would have to separate the CT and the Petition to Reopen on the old specific injury and issue separate awards. Defendant would receive credit for the dollar amount of the prior Award applied only against any increase in disability over 24 ½% on the old specific injury. It is the editor's opinion that defendant would not be entitled to any dollar credit related to any disability related to the new CT injury since *Benson* requires the awards and related disability related to both injuries be analyzed and segregated into separate awards.

LeBoeuf Issues/Considerations.

Nooner v. City of San Diego (2008) 2008 Cal.Wrk.Comp. P.D. LEXIS 343

Case Summary: Following trial, applicant a fire captain/firefighter, was determined to be 100% permanently totally disabled based in part on the application of the factors set forth in LeBoeuf v. WCAB(1983) 34 Cal.3rd 234, 48 CCC 587.

Applicant suffered a cumulative trauma injury during the period of May 1, 1961 to January 1, 1993, in the form of cancer (lymphoma) and compensable consequence injuries to his psyche, nose, lip, balance, hearing, and hypertension. The WCJ denied defendant's request to apply or consider apportionment under Labor Code sections 4663 or 4664. The WCJ stated that the reason he issued a 100% PTD award without apportionment was "...no apportionment applies in a case where total permanent disability is found because of a workers inability to compete in the open market as a result of the industrial injury". The WCJ failed to cite any legal authority for this conclusion.

Defendant filed for reconsideration alleging in part that the WCJ failed to apply or consider apportionment under Labor Code section 4664(b) related to applicant's prior 1995 stipulated award of 29% permanent partial disability for hypertension and hearing loss. The WCAB granted defendant's petition for reconsideration, and then remanded the case back to the WCJ to determine whether there was a legal basis to apply apportionment under Labor Code sections 4663 or 4664 (b).

With respect to the LeBoeuf issue, the WCAB indicated as follows:

Contrary to the WCJ, we consider LeBoeuf reconcilable with Labor Code sections 4663 and 4664, as enacted in Senate Bill 899. Leboeuf is a factor to be considered in arriving at overall disability before apportionment, but it does not preclude apportionment. Thus, in this case, the WCJ properly considered the rehabilitation counselor's opinion that applicant could not compete in the open labor market when the WCJ determined applicant's overall disability, before apportionment. Having determined that applicant was 100 percent disabled, the WCJ was then obligated by sections 4663 and 4664 to address apportionment of permanent disability to factors other than applicant's current industrial injury. (emphasis added).

In terms of guidance to the WCJ on remand, the Board cited both Escobedo and Kopping emphasizing that defendant had the burden of proof on apportionment. The mere fact applicant received a prior award in and of itself, is insufficient standing alone, to meet defendant's dual burden of proof. With respect to defendant's burden of proof, the WCAB stated:

With regard to section 4664 apportionment, defendant has met its burden of proving the existence of the prior award. However, defendant, in its petition, misstated the burden of proof on overlap. As noted above, Kopping established that the burden of proving that the current disability overlaps the disability compensated by a prior award falls to defendant. As to section 4663 apportionment of the psyche disability, the WCJ indicated that there should be apportionment, but he did not determine the percentage.

In essence the Board remanded the case due to the fact the WCJ misunderstood the application of LeBoeuf and how to properly determine apportionment under Labor Code sections 4663 and 4664.

Comments/Analysis: First, this is a case involving the 1997 PDRS, where LeBoeuf still applies notwithstanding SB 899. An applicant's inability to compete in the open labor market remains a critical factor in high PD cases. Second, in this particular case, the formula for calculating or applying 4663 or 4664 apportionment was done after application of LeBoeuf to unapportioned permanent disability in arriving at 100 permanent total disability.

Bacon v. County of Los Angeles (2008) (Recent Noteworthy Panel Decision; posted on 10/29/2008, LEXIS).

Case Summary: Applicant suffered back and psychiatric injuries related to a cumulative trauma injury for the period of 12/31/84-6/3/02. In contrast to the Nooner case, hereinabove, this case was rated under the 2005 PDRS i.e., the AMA guides. Before application of LeBoeuf, applicant's permanent disability was 75% under the AMA guides. Evidence of applicant's inability to compete in the open labor market under LeBoeuf, was then applied and his permanent disability was increased to 100% permanently totally disabled before apportionment.

However, the WCAB indicated that while LeBoeuf factors may be properly considered before apportionment under 4663 or 4664, applicant's inability to compete in the open labor market may not be used or applied to increase applicant's permanent disability beyond or above that which is directly caused by the industrial injury. In this case, applicant's inability to compete in the open labor market was due entirely to his pre-existing non-industrial factor(s) of cognitive deficits.

Comments/Analysis: Both this case and Nooner are consistent in that the Board applied 4663/4664 after LeBoeuf was factored in to increase the underlying/base permanent

disability. Moreover, consistent with *Nooner*, if there had been any other basis for 4663 or 4664 apportionment, it would have applied to the base PD of 75%.

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