

1 **WORKERS' COMPENSATION APPEALS BOARD**

2 **STATE OF CALIFORNIA**

3  
4 **MARLENE ESCOBEDO,**

5 *Applicant,*

6 **vs.**

7 **MARSHALLS; and CNA INSURANCE CO.,**

8 *Defendant(s).*

**Case No. GRO 0029816  
GRO 0029817**

**OPINION AND DECISION  
AFTER RECONSIDERATION  
(EN BANC)**

9  
10  
11 The Appeals Board granted reconsideration of the June 29, 2004 Findings and Award  
12 issued by the workers' compensation administrative law judge ("WCJ"), to further study the  
13 record and the applicable law. This is our Decision After Reconsideration.

14 In the June 29, 2004 decision, the WCJ found that Marlene Escobedo ("applicant")  
15 sustained an October 28, 2002 industrial injury to her left knee, and to her right knee as a  
16 compensable consequence, while employed as a sale associate by Marshalls, the insured of CNA  
17 Insurance Company ("defendant"). In relevant part, the WCJ also found that applicant's bilateral  
18 knee injury entitled her to a 27% permanent disability award, after determining that 50% of her  
19 permanent disability was caused by the effects of preexisting degenerative arthritis in both knees.  
20 The WCJ applied the provisions of Labor Code section 4663,<sup>1</sup> as enacted by Senate Bill 899 ("SB  
21 899") and effective on April 19, 2004 (Stats. 2004, ch. 34, §34), in making this 50%  
22 apportionment determination.

23 In her petition for reconsideration, applicant contends in substance: (1) new section 4663  
24 cannot be retroactively applied to cases where the date of injury was prior to the effective date of  
25 SB 899; (2) new section 4663 does not authorize the apportionment of disability to pathology in  
26 the absence of express legislative intent; and (3) the medical report relied upon by the WCJ to

27  

---

<sup>1</sup> All further statutory references are to the Labor Code, unless otherwise specified.

1 justify apportionment to applicant's preexisting arthritis does not constitute substantial medical  
2 evidence because it fails to explain in adequate detail how that condition caused permanent  
3 disability.<sup>2</sup>

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

7 Because of the important legal issues presented as to the meaning and application of  
8 section 4663 with regard to the issue of apportionment of permanent disability based on causation,  
9 and in order to secure uniformity of decision in the future, the Chairman of the Appeals Board,  
10 upon a majority vote of its members, assigned this case to the Appeals Board as a whole for an en  
11 banc decision. (Lab. Code, §115.)<sup>3</sup>

12 Based on our review of the relevant statutory and case law, we hold that:

- 13 1) Section 4663(a)'s statement that the apportionment of permanent  
14 disability shall be based on "causation" refers to the causation of the  
15 permanent disability, not causation of the injury, and the analysis of the  
16 causal factors of permanent disability for purposes of apportionment may  
17 be different from the analysis of the causal factors of the injury itself.
- 18 2) Section 4663(c) not only prescribes what determinations a reporting  
19 physician must make with respect to apportionment, it also prescribes  
20 what standards the WCAB must use in deciding apportionment; that is,  
21

---

22 <sup>2</sup> Applicant's petition for reconsideration captions both Case No. GRO 00029816 (i.e., the October  
23 28, 2002 bilateral knee injury) and Case No. GRO 00029817 (a claimed April 2003 through June 4, 2003  
24 cumulative injury to the right knee). In Case No. GRO 00029817, however, the WCJ found that applicant's  
25 right knee injury related solely to her October 28, 2002 specific injury, and he ordered that applicant take  
nothing in the cumulative injury case. Applicant's petition raises no contentions with respect to the claimed  
cumulative right knee injury.

26 <sup>3</sup> The Appeals Board's en banc decisions are binding precedent on all Appeals Board panels and  
27 WCJs. (Cal. Code Regs., tit. 8, §10341; *City of Long Beach v. Workers' Comp. Appeals Bd. (Garcia)*  
(2005) 126 Cal.App.4th 298, 313, fn. 5 [70 Cal.Comp.Cases 109]; *Gee v. Workers' Comp. Appeals Board*  
(2002) 96 Cal.App.4th 1418, 1425, fn. 6 [67 Cal.Comp.Cases 236]; see also Govt. Code, §11425.60(b).)

1 both a reporting physician and the WCAB must make determinations of  
2 what percentage of the permanent disability was directly caused by the  
3 industrial injury and what percentage was caused by other factors.

4 3) Under section 4663, the applicant has the burden of establishing the  
5 percentage of permanent disability directly caused by the industrial injury,  
6 and the defendant has the burden of establishing the percentage of  
7 disability caused by other factors.

8 4) Apportionment of permanent disability caused by “other factors both  
9 before and subsequent to the industrial injury, including prior industrial  
10 injuries,” may include not only disability that could have been apportioned  
11 prior to SB 899, but it also may include disability that formerly could not  
12 have been apportioned (e.g., pathology, asymptomatic prior conditions,  
13 and retroactive prophylactic work preclusions), provided there is  
14 substantial medical evidence establishing that these other factors have  
15 caused permanent disability.

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

## 21 **BACKGROUND**

22 Applicant sustained injury to her left knee on October 28, 2002, when she fell at her job as  
23 a sales associate with Marshalls, a retail clothing store. As a compensable consequence of that  
24 injury, she also developed right knee problems.

25 Applicant testified that, prior to her fall, she had never had any knee problems or  
26 limitations, and she had never consulted a doctor about her knees. Although her treating  
27 physician, Dr. Cronin, had diagnosed her as having arthritis about ten years earlier, he did not

1 impose any work restrictions as a consequence of her arthritis.

2 Applicant was treated for her industrial injury by Daniel Woods, M.D., who performed  
3 arthroscopic surgery on February 12, 2003, to repair the medial meniscus in the left knee. On June  
4 5, 2003, Dr. Woods prepared a report declaring applicant to be permanent and stationary with  
5 bilateral knee disability resulting in a limitation to semi-sedentary work. He noted that applicant's  
6 job duties at Marshalls had required her to be on her feet, standing or walking, six to eight hours  
7 per day, and to kneel or squat up to three hours per day. He had attempted to have her return to  
8 work four hours per day, but she was unable to tolerate it because of right knee pain. With regard  
9 to the issue of apportionment, Dr. Woods noted that applicant had no history of any previous  
10 problems with her left knee, and thus he concluded that all of her disability was attributable to her  
11 industrial injury.

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

21 "Ms. Escobedo's left knee residuals are directly related to the  
22 October 28, 2002 injury. The Applicant developed right knee  
23 problems as a derivative of the left knee and not as a result of any  
24 subsequent cumulative trauma. In my opinion, there is a medically  
25 reasonable basis for apportionment given the trivial nature of the  
26 injury that occurred on October 28, 2002 and the almost immediate  
27 onset of right knee symptoms that occurred shortly after the left knee  
injury. The Applicant has obvious, significant degenerative arthritis  
in both knees and essentially worked in a fairly congenial  
environment. Although denying any prior problems with her knees,  
it is medically probable that she would have had fifty percent of her

1 current level of knee disability at the time of today's evaluation even  
2 in the absence of her employment at Marshalls. Dr. Woods did not  
3 take this into account when he discussed the issue of apportionment.  
4 Furthermore, when he saw the Applicant, he thought she had a  
5 lateral meniscus tear which was clearly not the case based on his  
6 operative findings (leading edge tears are of no clinical significance  
7 and would not have accounted for the Applicant's pathology and  
8 disability which relate to the medial and patellofemoral  
9 compartments)."

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

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

18 The WCJ determined that, overall, applicant's bilateral knee disability rated 53%, based on  
19 the factors of disability outlined in Dr. Ovadia's March 14, 2004 report. The WCJ, however, also  
20 apportioned 50% of applicant's permanent disability to non-industrial causation under section  
21 4663, relying on Dr. Ovadia's opinion that one-half of the disability was caused by her preexisting  
22 degenerative arthritis.

## 23 DISCUSSION

### 24 I.

25 We briefly address applicant's contention that new section 4663 does not apply to injuries  
26 sustained before the April 19, 2004 effective date of SB 899. This issue has been resolved by  
27 *Kleemann v. Workers' Comp. Appeals. Bd.* (2005) 127 Cal.App.4th 274 [70 Cal.Comp.Cases133],  
which held that the procedural and substantive aspects of new section 4663 apply to all cases that  
were pending as of the date of SB 899's enactment on April 19, 2004, as here.<sup>4</sup>

---

<sup>4</sup> *Kleemann* implicitly overruled the WCAB's en banc decision in *Scheftner v. Rio Linda School Dist.* (2004) 69 Cal. Comp. Cases 1281, to the extent that *Scheftner* held that submission orders and orders closing discovery, which issued prior to the enactment of SB 899, are "existing" orders that cannot be reopened due to the prohibition set forth in Section 47 of SB 899. The Appeals Board, of course, must

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27

**II.**

Section 4663 as amended by SB 899 provides:

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

“(b) Any physician who prepares a report addressing the issue of permanent disability due to a claimed industrial injury shall in that report address the issue of causation of the permanent disability.

“(c) In order for a physician’s report to be considered complete on the issue of permanent disability, it must include an apportionment determination. A physician shall make an apportionment determination by finding what approximate percentage of the permanent disability was caused by the direct result of injury arising out of and occurring in the course of employment and what approximate percentage of the permanent disability was caused by other factors both before and subsequent to the industrial injury, including prior industrial injuries. If the physician is unable to include an apportionment determination in his or her report, the physician shall state the specific reasons why the physician could not make a determination of the effect of that prior condition on the permanent disability arising from the injury. The physician shall then consult with other physicians or refer the employee to another physician from whom the employee is authorized to seek treatment or evaluation in accordance with this division in order to make the final determination.

“(d) An employee who claims an industrial injury shall, upon request, disclose all previous permanent disabilities or physical impairments.”

Also, newly enacted section 4664(a) states:

“The employer shall only be liable for the percentage of permanent disability directly caused by the injury arising out of and occurring in the course of employment.”

In construing a statute, the Appeals Board’s fundamental purpose is to determine and effectuate the Legislature’s intent. (*DuBois v. Workers’ Comp. Appeals Bd.* (1993) 5 Cal.4th 382,

---

follow *Kleemann* under the principle of stare decisis. (*Auto Equity Sales v. Superior Court* (1962) 57 Cal.2d 450, 455.)

1 387 [58 Cal.Comp.Cases 286]; *Nickelsberg v. Workers' Comp. Appeals Bd.* (1991) 54 Cal.3d 288,  
2 294 [56 Cal.Comp.Cases 476]; *Moyer v. Workmen's Comp. Appeals Bd.* (1973) 10 Cal.3d 222,  
3 230 [38 Cal.Comp.Cases 652].) Thus, the WCAB's first task is to look to the language of the  
4 statute itself. (*Ibid.*) The best indicator of legislative intent is the clear, unambiguous, and plain  
5 meaning of the statutory language. (*DuBois v. Workers' Comp. Appeals Bd., supra*, 5 Cal.4th at  
6 pp. 387-388; *Gaytan v. Workers' Comp. Appeals Bd.* (2003) 109 Cal.App.4th 200, 214 [68  
7 Cal.Comp.Cases 693]; *Boehm & Associates v. Workers' Comp. Appeals Bd. (Lopez)* (1999) 76  
8 Cal.App.4th 513, 516 [64 Cal.Comp.Cases 1350].) When the statutory language is clear and  
9 unambiguous, there is no room for interpretation and the WCAB must simply enforce the statute  
10 according to its plain terms. (*DuBois v. Workers' Comp. Appeals Bd., supra*, 5 Cal.4th at p. 387;  
11 *Atlantic Richfield Co. v. Workers' Comp. Appeals Bd. (Arvizu)* (1982) 31 Cal.3d 715, 726 [47  
12 Cal.Comp.Cases 500]; *Cal. Ins. Guar. Ass'n v. Workers' Compensation Appeals Bd. (Karaiskos)*  
13 (2004) 117 Cal.App.4th 350, 355 [69 Cal.Comp.Cases 183].)

14 **A.**

15 **Section 4663(a)'s Statement That The Apportionment Of**  
16 **Permanent Disability Shall Be Based On "Causation" Refers To**  
17 **The Causation Of The Permanent Disability, Not Causation Of**  
18 **The Injury, And The Analysis Of The Causal Factors Of**  
19 **Permanent Disability For Purposes Of Apportionment May Be**  
**Different From The Analysis Of The Causal Factors Of The**  
**Injury.**

20 Section 4663(a) states that "[a]pportionment of permanent disability shall be based on  
21 causation." The plain reading of "causation" in this context is causation *of the permanent*  
22 *disability*. This reading is consistent with other provisions of section 4663 and 4664. That is:  
23 (1) section 4663(b) provides that a physician's report on permanent disability shall address "the  
24 issue of *causation of the permanent disability*;" (2) section 4663(c) provides that a physician's  
25 report shall find "what approximate percentage of the *permanent disability was caused* by the  
26 direct result of injury ... and what approximate percentage of the *permanent disability was caused*  
27 by other factors;" and (3) section 4664(a) provides that an employer "shall only be liable for the

1 percentage of *permanent disability* directly caused by the injury ... .” (Emphases added.)<sup>5</sup>

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

9 **B.**

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

18 Section 4663(c) provides, in part:

19 “In order for a physician’s report to be considered complete on the  
20 issue of permanent disability, it must include an apportionment  
21 determination. A physician shall make an apportionment  
22 determination by finding what approximate percentage of the  
23 permanent disability was caused by the direct result of injury arising  
24 out of and occurring in the course of employment and what  
25 approximate percentage of the permanent disability was caused by  
26 other factors both before and subsequent to the industrial injury,  
27 including prior industrial injuries.”

28 Section 4663(c) refers only to *a reporting physician’s* duty to make an apportionment  
29 determination by finding what approximate percentage of the permanent disability was caused by  
30 the direct result of the injury and what approximate percentage was caused by other factors. We

---

31 <sup>5</sup> Section 4663(c) refers to permanent disability “caused by the direct result of [the] injury,” while  
32 section 4664(a) refers to permanent disability “directly caused by the injury.” We see no significant  
33 difference in the meaning of these phrases and we will treat them as being the same.



1 conclude the same standards apply to the *adjudication* of permanent disability and apportionment,  
2 i.e., the WCAB must find what percentage of the permanent disability was directly caused by the  
3 injury and what percentage was caused by other factors. This conclusion is consistent both with  
4 the statement in section 4663(a) that “[a]pportionment of permanent disability shall be based on  
5 causation” and with the statement in section 4664(a) that “[t]he employer shall only be liable for  
6 the percentage of permanent disability directly caused by the injury.”

7  
8 **C.**

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

13 Under SB 899, the applicant continues to have the initial burden of establishing an  
14 industrial injury by a preponderance of the evidence. (Lab. Code §§3202.5, 5705; *McAllister v.*  
15 *Workers’ Comp. Appeals Bd.* (1968) 69 Cal.2d 408, 416 [33 Cal.Comp.Cases 660].) In addition,  
16 he or she still has the burden of proving, by a preponderance of the evidence, both the overall level  
17 of permanent disability and that at least some of this permanent disability was industrially-caused.  
18 (Lab. Code, §§3202.5, 5705; see *Peter Kiewit Sons v. Industrial Acc. Com. (McLaughlin)* (1965)  
19 234 Cal.App.2d 831, 838 [30 Cal.Comp.Cases 188]; *Sweeney v. Industrial Acc. Com.* (1951) 107  
20 Cal.App.2d 155, 158-159 [16 Cal.Comp.Cases 264].)

21 In accordance with section 4663(c), however, we conclude the applicant now also has the  
22 burden of establishing the approximate percentage of permanent disability directly caused by the  
23 industrial injury. The assignment of this burden to the applicant is consistent with Labor Code  
24 section 5705, which provides in relevant part: “The burden of proof rests upon the party ...  
25 holding the affirmative of the issue.” It is also consistent with Evidence Code section 500, which  
26 provides that “a party has the burden of proof as to each fact the existence or nonexistence of  
27 which is essential to the claim for relief or defense that he is asserting.” Because it is the applicant  
who claims permanent disability benefits, and because the applicant can be compensated only for

1 industrially-caused permanent disability, it is incumbent upon him or her to present evidence  
2 establishing the percentage of permanent disability directly caused by the industrial injury.

3 We also conclude, in accordance with section 4663(c), that the defendant has the burden of  
4 establishing the approximate percentage of permanent disability caused by factors other than the  
5 industrial injury. Again, the assignment of this burden to the defendant is consistent with Labor  
6 Code section 5705 and Evidence Code section 500. It is also consistent with the longstanding  
7 principle that, because it is the defendant that benefits from a finding of apportionment, it bears the  
8 burden of demonstrating that apportionment is appropriate. (*Pullman Kellogg v. Workers' Comp.*  
9 *Appeals Bd. (Normand)* (1980) 26 Cal.3d 450, 456 [45 Cal.Comp.Cases 170].)<sup>6</sup> Under section  
10 4663, it is still the defendant that benefits from a finding of apportionment, and we discern no  
11 legislative intent to do away with this long-established principle in the context of apportionment to  
12 non-industrial causation. (See *People v. Superior Court (Zamudio)* (2000) 23 Cal.4th 183, 199  
13 (when the Legislature enacts a statute, it is presumed the Legislature did not intend to overthrow  
14 long-established principles of law unless such an intention is clearly expressed or necessarily  
15 implied); accord: *Torres v. Automobile Club of So. Cal.* (1997) 15 Cal.4th 771, 779; *Fuentes v.*  
16 *Workers' Comp. Appeals Bd.* (1976) 16 Cal.3d 1, 7 [41 Cal.Comp.Cases 42]; *Theodor v. Superior*  
17 *Court* (1972) 8 Cal.3d 77, 92.)

18 These burdens apply whether there is one reporting physician (e.g., an agreed medical  
19 evaluator or a panel QME) or more than one reporting physician. Where a dispute arises on the  
20 issue of apportionment to industrial or non-industrial causation, a party's options include but are  
21 not limited to: (1) doing nothing, based on a belief that the assessment of the relative industrial and  
22 non-industrial causation percentages by the physician(s) upon whom it intends to rely is the most  
23 persuasive substantial medical evidence; (2) obtaining a supplemental report to clarify or bolster  
24

---

25 <sup>6</sup> See also *Fresno Unified School Dist. v. Workers' Compensation Appeals Bd. (Humphrey)* (2000)  
26 84 Cal.App.4th 1295, 1304 [65 Cal.Comp.Cases 1232]; *Ashley v. Workers' Comp. Appeals Bd.* (1995) 37  
27 Cal.App.4th 320, 326 [60 Cal.Comp.Cases 683]; *Calhoun v. Workers' Comp. Appeals Bd.* (1981) 127  
Cal.App.3d 1, 8 [46 Cal.Comp.Cases 1333].) *Robinson v. Workers' Comp. Appeals Bd.* (1981) 114  
Cal.App.3d 593, 603 [46 Cal.Comp.Cases 78].

1 the percentage causation determination of the physician upon who it intends to rely or, if there is  
2 more than one physician, to rebut the opposing physician’s percentage causation determinations;  
3 or (3) cross-examining the physician(s) by deposition for the same reasons.

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

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

12 **D.**

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

19 Prior to SB 899, the apportionment of permanent disability was based largely on the  
20 grounds specified in former sections 4663, 4750, and 4750.5. (*Fresno Unified School Dist. v.*  
21 *Workers’ Compensation Appeals Bd. (Humphrey)*, *supra*, 84 Cal.App.4th at p. 1305; *Franklin v.*  
22  
23  
24  
25  
26  
27

1 *Workers' Comp. Appeals Bd.* (1978) 79 Cal.App.3d 224, 236 [43 Cal.Comp.Cases 310].<sup>7</sup>

2 Former section 4663 provided:

3 “In case of aggravation of any disease existing prior to a  
4 compensable injury, compensation shall be allowed only for the  
5 proportion of the disability due to the aggravation of such prior  
6 disease which is reasonably attributed to the injury.”

7 In order to apportion under former section 4663, there must have been medical evidence  
8 establishing that some definable portion of the applicant's permanent disability would have  
9 occurred as the result of the natural progression of a non-industrial condition or disease, even  
10 absent the industrial injury. (*Pullman Kellogg v. Workers' Comp. Appeals Bd. (Normand)*, *supra*,  
11 26 Cal.3d at p. 454; *Zemke v. Workmen's Comp. Appeals Bd.* (1968) 68 Cal.2d 794, 796 [33  
12 Cal.Comp.Cases 358].) While it was not necessary that the preexisting condition or disease have  
13 been symptomatic and disabling at the time of the industrial injury (*Duthie v. Workers' Comp.*  
14 *Appeals Bd.* (1978) 86 Cal.App.3d 721, 728 [43 Cal.Comp.Cases 1214]; *Callahan v. Workers'*  
15 *Comp. Appeals Bd.* (1978) 85 Cal.App.3d 621, 629 [43 Cal.Comp.Cases 1097]; *Franklin v.*  
16 *Workers' Comp. Appeals Bd.*, *supra*, 79 Cal.App.3d at p. 245), it was necessary that the non-  
17 industrial disability would have developed by the time that the injured worker's industrial  
18 disability became permanent and stationary; i.e., it was insufficient that the non-industrial  
19 disability would have occurred at some indefinite future date. (*Gay v. Workers' Comp. Appeals*  
20 *Bd.* (1979) 96 Cal.App.3d 555, 562 [44 Cal.Comp.Cases 817]; *Duthie v. Workers' Comp. Appeals*  
21 *Bd.*, *supra*, 86 Cal.App.3d at p. 728; *Franklin v. Workers' Comp. Appeals Bd.*, *supra*, 79

22  
23 <sup>7</sup> The last paragraph of section 5500.5(a) also precludes the apportionment of permanent disability to  
24 any prior, uncompensated cumulative industrial trauma in a cumulative injury case. (*County of Los Angeles*  
25 *v. Workers' Comp. Appeals Bd. (Russell)* (1987) 52 Cal.Comp.Cases 395 (writ den.); *The Burbank Studios*  
26 *v. Workers' Comp. Appeals Bd. (Hannifin)* (1980) 45 Cal.Comp.Cases 670 (writ den.); *Hartford Accident*  
27 *and Indemnity Co. v. Workers' Comp. Appeals Bd. (Barrett)* (1978) 43 Cal.Comp.Cases 858 (writ den.); see  
also *Flesher v. Workers' Comp. Appeals Bd.* (1979) 23 Cal.3d 322, 324-327 [44 Cal.Comp.Cases 212]  
(although section 5500.5 limits the defendants who are liable for compensation, it does not limit the  
beginning date of the cumulative trauma for which the employee can plead and recover); *Rielli v. Workers'*  
*Comp. Appeals Bd.* (1982) 134 Cal.App.3d 721, 725, fn. 3 [47 Cal.Comp.Cases 828] (same).) Section  
5500.5(a) was not affected by SB 899. Although it still exists, it is not relevant to our present discussion.

1 Cal.App.3d at p. 243.)

2 Former section 4750 provided:

3 “An employee who is suffering from a previous permanent disability  
4 or physical impairment and sustains permanent injury thereafter shall  
5 not receive from the employer compensation for the later injury in  
6 excess of the compensation allowed for such injury when considered  
7 by itself and not in conjunction with or in relation to the previous  
8 disability or impairment. [¶] The employer shall not be liable for  
9 compensation to such an employee for the combined disability, but  
10 only for that portion due to the later injury as though no prior  
11 disability or impairment had existed.”

12 In order to apportion under former section 4750, there must have been evidence of a preexisting  
13 condition that was in fact labor disabling prior to the occurrence of the industrial injury in  
14 question; that is, there must have been disability which would have been ratable had it been  
15 industrially caused. (*Ditler v. Workers’ Comp. Appeals Bd.* (1982) 131 Cal.App.3d 803, 812 [47  
16 Cal.Comp.Cases 492]; *Robinson v. Workers’ Comp. Appeals Bd., supra*, 114 Cal.App.3d at p. 602;  
17 *Franklin v. Workers’ Comp. Appeals Bd., supra*, 79 Cal.App.3d at p. 237.) Preexisting disability,  
18 however, could not be established by a “retroactive prophylactic work restriction,” that is, medical  
19 opinion that retroactively imposed a work limitation upon the injured worker, which opinion was  
20 postulated after the industrial injury and was made in the absence of evidence that the worker  
21 actually had been restricted in his or her work activities prior to the industrial injury. (*Ditler v.*  
22 *Workers’ Comp. Appeals Bd., supra*, 131 Cal.App.3d at p. 814; *Robinson v. Workers’ Comp.*  
23 *Appeals Bd., supra*, 114 Cal.App.3d at p. 602; *Franklin v. Workers’ Comp. Appeals Bd., supra*, 79  
24 Cal.App.3d at p. 238.)

25 Under both former sections 4663 and 4750, it was the permanent disability resulting from,  
26 not the cause of, a disease or condition which was the proper subject of apportionment;  
27 apportionment to “pathology” was not permissible. (*Pullman Kellogg v. Workers’ Comp. Appeals*  
*Bd. (Normand), supra*, 26 Cal.3d at pp. 454-455, 456 [at fn. 4]; *Fresno Unified School Dist. v.*  
*Workers’ Compensation Appeals Bd. (Humphrey), supra*, 84 Cal.App.4th at p. 1304; *Ashley v.*

1 *Workers' Comp. Appeals Bd., supra*, 37 Cal.App.4th at p. 327; *King v. Workers' Comp. Appeals*  
2 *Bd.* (1991) 231 Cal.App.3d 1640, 1647 [56 Cal.Comp.Cases 408]; *Duthie v. Workers' Comp.*  
3 *Appeals Bd., supra*, 86 Cal.App.3d at p. 728; *Franklin v. Workers' Comp. Appeals Bd., supra*, 79  
4 Cal.App.3d at p. 243.)

5 Former section 4750.5 provided:

6 “An employee who has sustained a compensable injury and who  
7 subsequently sustains an unrelated noncompensable injury, shall not  
8 receive permanent disability indemnity for any permanent disability  
9 caused solely by the subsequent noncompensable injury.”

10 Under former section 4750.5, an applicant could not receive permanent disability benefits for a  
11 post-injury disabling event that, had it been work-related, would have been compensable. (*Fresno*  
12 *Unified School Dist. v. Workers' Compensation Appeals Bd. (Humphrey), supra*, 84 Cal.App.4th at  
13 p. 1305; *Ashley v. Workers' Comp. Appeals Bd.* (1995) 37 Cal.App.4th 320, 327-329 [60  
14 Cal.Comp.Cases 683].)

15 SB 899, however, repealed former sections 4663, 4750, and 4750.5 (Stats. 2004, ch. 34,  
16 §§33, 37, 38) and it enacted new sections 4663 and 4664. (Stats. 2004, ch. 34, §§34, 35.) There is  
17 no doubt that, in taking this action, the Legislature intended to significantly change the law  
18 relating to apportionment of permanent disability. (See *People v. Mendoza* (2000) 23 Cal.4th 896,  
19 916 (the repeal of a prior statute, together with enactment of a new law on the same subject with  
20 important changes, strongly suggests the Legislature intended to change the law); *In re Lance W.*  
21 (1985) 37 Cal.3d 873, 887 (general rule is that a new enactment reflects a legislative purpose to  
22 change existing law); *Mosk v. Superior Court* (1979) 25 Cal.3d 474, 493 (a substantial change in  
23 the language of a statute by an amendment indicates an intention to change its meaning).)

24 We conclude that, in repealing former sections 4663, 4750, and 4750.5 and in adopting  
25 new sections 4663 and 4664(a), the Legislature intended to expand rather than narrow the scope of  
26 legally permissible apportionment. This legislative intent is established not only by its declaration  
27

1 in adopting SB 899,<sup>8</sup> but also by the language of section 4663 itself. That is, section 4663(c)  
2 provides for apportionment based on “what approximate percentage of the permanent disability  
3 was caused by *other factors both before and subsequent to the industrial injury, including prior*  
4 *industrial injuries.*” (Emphasis added.) The language stating that apportionment may be based on  
5 “other factors both before and subsequent to the industrial injury” does not limit what non-  
6 industrial factors may be considered as a cause of permanent disability purposes of apportionment.  
7 Thus, this language appears to require apportionment based on any “other [non-industrial] factor,”  
8 either pre- or post-injury. Similarly, because section 4663(c) states that the non-industrial factors  
9 are inclusive of “prior industrial injuries,” this language appears to reflect a legislative intent to  
10 enlarge the range of factors that may be considered in determining the cause of permanent  
11 disability. The word “including” is ordinarily a word of enlargement, not of limitation. (*Shell Oil*  
12 *Co. v. Winterthur Swiss Ins. Co.* (1993) 12 Cal.App.4th 715, 749; *Patricia J. v. Rio Linda Union*  
13 *Sch. Dist.* (1976) 61 Cal.App.3d 278, 286; *Estate of Johnson* (1970) 5 Cal.App.3d 173, 180.)

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

21  
22  
23  
24  
25 <sup>8</sup> SB 899 stated: “This act is an urgency statute necessary for the immediate preservation of the  
26 public peace, health, or safety within the meaning of Article IV of the Constitution and shall go into  
27 immediate effect. The facts constituting the necessity are: [¶] In order to provide relief to the state from the  
effects of the current workers’ compensation crisis at the earliest possible time, it is necessary for this act to  
take effect immediately.” (Stats. 2004, ch. 34, §49; see also *Green v. Workers’ Comp. Appeals Bd.* (2005)  
\_\_\_ Cal.App.4th \_\_\_ [70 Cal.Comp.Cases \_\_\_, 2005 Cal. App. LEXIS 504, 2005 WL 714881, 6.]

1 evidence establishing that these other factors have caused permanent disability.<sup>9</sup>

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

11 Accordingly, section 4663(a) and (c) – as well as section 4664(a) – give renewed viability  
12 to cases such as *Baker v. Industrial Acc. Com.* (1966) 243 Cal.App.2d 380 [31 Cal.Comp.Cases  
13 228]. In *Baker*, the injured employee’s lung conditions, which had resulted in permanent total  
14 disability before apportionment, were caused both by industrial factors (asthma due to allergic  
15 reactions to wheat and rye flour at work) and non-industrial factors (including emphysema due to a  
16 40-year history of smoking at least one pack of cigarettes a day). The Court of Appeal held that if  
17 an employee “suffers from a disability which derives from both industrial and non-industrial  
18 causes,” then “[t]he employer is liable only for that part of the overall disability which is

---

19  
20 <sup>9</sup> We are aware of the principle that the employer takes the employee as it finds him or her, and that a  
21 person suffering from a preexisting disease or condition who is disabled by an industrial injury is entitled to  
22 compensation, even though the injury would not have adversely affected a normal person. (E.g., *Lamb v.*  
23 *Workmen’s Comp. Appeals Bd.* (1974) 11 Cal.3d 274, 282 [39 Cal.Comp.Cases 210]; *Zemke v. Workmen’s*  
24 *Compensation Appeals Bd.*, *supra*, 68 Cal.2d at pp. 796, 800; *Berry v. Workmen’s Comp. Appeals Bd.*  
25 (1968) 68 Cal.2d 786, 793 [33 Cal.Comp.Cases 352]; *Colonial Ins. Co. v. Industrial Acc. Com. (Pedroza)*  
26 29 Cal.2d 79, 83-84 [11 Cal.Comp.Cases 266]; *Tanenbaum v. Industrial Acc. Com.* (1935) 4 Cal.2d 615,  
27 617-618 [20 I.A.C. 390].) Accordingly, under pre-SB 899 law, to the extent that a subsequent industrial  
injury exacerbated, accelerated, aggravated, or “lit up” an applicant’s preexisting condition, the employer  
was liable for the resulting disability, without apportionment. (E.g., *Zemke v. Workmen’s Comp. Appeals*  
*Bd.*, *supra*, 68 Cal.2d at p. 796; *Berry v. Workmen’s Comp. Appeals Bd.*, *supra*, 68 Cal.2d at pp. 789-780;  
*Colonial Ins. Co. v. Industrial Acc. Com. (Pedroza)*, *supra*, 29 Cal.2d at pp. 83-84; *Tanenbaum v. Industrial*  
*Acc. Com.*, *supra*, 4 Cal.2d at pp. 617-618.) In this case, however, there is no assertion that applicant’s  
preexisting arthritis was exacerbated or accelerated by her industrial injury. Accordingly, we need not and  
will not now address the continuing the validity of these principles in light of new sections 4663 and  
4664(a).



1 reasonably attributable to industrial causation.” (*Baker v. Industrial Acc. Com.*, *supra*, 243  
2 Cal.App.2d at p. 390.) Thus, the Court approved a finding that the employee was entitled to only a  
3 55% permanent disability award, after apportionment of 45% of the disability to the non-industrial  
4 causes.

5 Some 14 years later, the Supreme Court expressly disapproved of *Baker* because its  
6 apportionment to causation did not comport with subsequently developed legal principles of  
7 apportionment under former section 4663. (See *Pullman Kellogg v. Workers’ Comp. Appeals Bd.*  
8 (*Normand*), *supra*, 26 Cal.3d at p. 456 [at fn. 4].) The Supreme Court implicitly suggested that,  
9 had *Baker* been decided under former 4663 using these principles, apportionment would not have  
10 been proper because it is the disability resulting from, rather than a cause of, a disease which is the  
11 proper subject of apportionment, and because there was no evidence in *Baker* that the employee’s  
12 smoking would have caused any disability had he not been exposed to substances at work.  
13 (*Pullman Kellogg v. Workers’ Comp. Appeals Bd. (Normand)*, *supra*, 26 Cal.3d at pp. 454-455 &  
14 456 [at fn. 5].)

15 However, old section 4663 was repealed by SB 899, and new section 4663 allows  
16 apportionment to causation, giving *Baker* and similar cases new life.

17 Applicant asserts that because SB 899 did not amend section 4751, relating to benefits  
18 payable by the Subsequent Injuries Benefits Trust Fund (“SIF”), this reflects a legislative intent  
19 that pathology is not one of the “other factors” upon which apportionment to non-industrial causes  
20 can be based. In essence, applicant asserts that if apportionment based on pathology were allowed,  
21 this would cause a flood of SIF benefit claims to be filed under section 4751. This is because, in  
22 applicant’s view, apportionment to pathology would decrease the percentage of disability for  
23 which the employer is responsible, while the overall level of disability would remain unchanged,  
24 leaving the SIF responsible for the difference. We disagree.

25 The SIF is a state fund that, under limited statutorily specified conditions, provides benefits  
26 to employees with preexisting permanent disability who sustain subsequent industrial injuries  
27 resulting in additional permanent disability. (Lab. Code, §4751.) The purpose of the SIF is both to

1 encourage disabled persons to seek employment and to encourage employers to hire them.  
2 (*Ferguson v. Industrial Acc. Com.* (1958) 50 Cal.2d 469, 474-475 [23 Cal.Comp.Cases 108]);  
3 *Subsequent Injuries Fund v. Industrial Acc. Com. (Patterson)* (1952) 39 Cal. 2d 83, 86 [17  
4 Cal.Comp.Cases 142].)

5 Under section 4751, the employee's preexisting disability may be industrial or  
6 nonindustrial in origin. (*Subsequent Injuries Fund v. Workmen's Comp. Appeals Bd. (Talcott)*  
7 (1970) 2 Cal.3d 56, 62 [35 Cal.Comp.Cases 80].) Thus, the preexisting disability may arise from  
8 any source – congenital, developmental, pathological, or traumatic.

9 Nevertheless, to qualify for SIF benefits, the injured employee must meet the requirements  
10 of section 4751. (*Brown v. Workers' Comp. Appeals Bd.* (1970) 20 Cal. App. 3d 903, 914 [36  
11 Cal.Comp.Cases 627].) And the chief requirement for SIF benefits is that the condition must have  
12 been "labor disabling" prior to the occurrence of the subsequent industrial injury. (*Ferguson v.*  
13 *Industrial Acc. Com.* (1958) 50 Cal.2d 469,477 [23 Cal.Comp.Cases 108]; *Franklin v. Workers'*  
14 *Comp. Appeals Bd., supra*, 79 Cal.App.3d at pp. 237-238.) Accordingly, if an applicant's non-  
15 industrial pathology causes apportionable permanent disability under section 4663 or 4664(a), then  
16 SIF benefits will not be payable under section 4751 unless the applicant demonstrates that the  
17 pathology was causing permanent disability prior to the subsequent industrial injury. Although  
18 this may mean that, in some cases, an injured employee will not get either permanent disability  
19 benefits or SIF benefits for the apportioned disability, this is not a major change from pre-SB 899  
20 law, which held that an injured employee was not entitled to SIF benefits based on an  
21 asymptomatic disease process that was not labor disabling prior to the industrial injury. (See *State*  
22 *of Cal. v. Industrial Acc. Com. (Bachrach)* (1957) 147 Cal.App.2d 818, 824 [22 Cal.Comp.Cases  
23 17]; *Urquiza v. Industrial Acc. Com.* (1956) 144 Cal.App.2d 322, 324 [21 Cal.Comp.Cases 286];  
24 *Subsequent Injuries Fund v. Industrial Acc. Com. (Strauss)* (1955) 135 Cal.App.2d 544, 551 [20  
25  
26  
27

1 Cal.Comp.Cases 230].)<sup>10</sup> In any event, it is an issue within the Legislature’s domain, not ours.

2 **E.**

3 **Even Where A Medical Report “Addresses” The Issue Of**  
4 **Causation Of The Permanent Disability And Makes An**  
5 **“Apportionment Determination” By Finding The Approximate**  
6 **Relative Percentages Of Industrial And Non-Industrial**  
7 **Causation Under Section 4663(a), The Report May Not Be**  
8 **Relied Upon Unless It Also Constitutes Substantial Evidence.**

9 Section 4663 sets out various requirements for doctors’ reports on the issue of  
10 apportionment, including that each report must “address” the issue of causation of the permanent  
11 disability and must make an “apportionment determination” by finding the approximate relative  
12 percentages of permanent disability directly caused by the industrial injury and that caused by  
13 other factors.<sup>11</sup>

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

22 <sup>10</sup> *Bachrach, Urquiza, and Strauss* were all disapproved on other grounds by *Subsequent Injuries*  
23 *Fund v. Industrial Acc. Com. (Allen)*, *supra*, 56 Cal.2d at p. 846, and by *Ferguson v. Industrial Acc. Com.*,  
24 *supra*, 50 Cal.2d at pp. 473, 479 (i.e., the Supreme Court held that proof of knowledge of the previous  
25 disability by the employee or the employer is not a prerequisite to SIF benefits).

26 <sup>11</sup> Present section 4663 requires the apportionment of permanent disability caused by other factors,  
27 both before *and subsequent to* the industrial injury. (Lab. Code, §4663(a) & (c); see also §4664(a).)  
Accordingly, a physician’s determination of the approximate percentages of industrial and non-industrial  
causation of permanent disability is to be based on the employee’s condition *as of the time of the*  
*physician’s examination* (provided that the industrial component of the disability is permanent and  
stationary). Therefore, requirements under former sections 4663 and 4750 regarding when the  
apportionable permanent disability had to exist or occur and regarding how the reporting physician had to  
frame and phrase the apportionment issue (see Section II-D, at 12:6-12:21 & 13:8-13:13, *supra*) are no  
longer controlling or dispositive.

1 In this regard, it has been long established that, in order to constitute substantial evidence, a  
2 medical opinion must be predicated on reasonable medical probability. (*McAllister v. Workmen's*  
3 *Comp. Appeals Bd.* (1968) 69 Cal.2d 408, 413, 416-417, 419 [33 Cal.Comp.Cases 660]; *Travelers*  
4 *Ins. Co. v. Industrial Acc. Com. (Odello)* (1949) 33 Cal.2d 685, 687-688 [14 Cal.Comp.Cases 54];  
5 *Rosas v. Workers' Comp. Appeals Bd.* (1993) 16 Cal. App.4th 1692, 1700-1702, 1705 [58  
6 Cal.Comp.Cases 313].) Also, a medical opinion is not substantial evidence if it is based on facts  
7 no longer germane, on inadequate medical histories or examinations, on incorrect legal theories, or  
8 on surmise, speculation, conjecture, or guess. (*Hegglin v. Workmen's Comp. Appeals Bd.* (1971) 4  
9 Cal.3d 162, 169 [36 Cal.Comp.Cases 93]; *Place v. Workmen's Comp. Appeals Bd.* (1970) 3 Cal.3d  
10 372, 378-379 [35 Cal.Comp.Cases 525]; *Zemke v. Workmen's Comp. Appeals Bd., supra*, 68  
11 Cal.2d at p. 798.) Further, a medical report is not substantial evidence unless it sets forth the  
12 reasoning behind the physician's opinion, not merely his or her conclusions. (*Granado v. Workers'*  
13 *Comp. Appeals Bd.* (1970) 69 Cal. 2d 399, 407 (a mere legal conclusion does not furnish a basis  
14 for a finding); *Zemke v. Workmen's Comp. Appeals Bd., supra*, 68 Cal.2d at pp. 799, 800-801 (an  
15 opinion that fails to disclose its underlying basis and gives a bare legal conclusion does not  
16 constitute substantial evidence); see also *People v. Bassett* (1968) 69 Cal.2d 122, 141, 144 (the  
17 chief value of an expert's testimony rests upon the material from which his or her opinion is  
18 fashioned and the reasoning by which he or she progresses from the material to the conclusion, and  
19 it does not lie in the mere expression of the conclusion; thus, the opinion of an expert is no better  
20 than the reasons upon which it is based).)

21 Moreover, in the context of apportionment determinations, the medical opinion must  
22 disclose familiarity with the concepts of apportionment, describe in detail the exact nature of the  
23 apportionable disability, and set forth the basis for the opinion, so that the Board can determine  
24 whether the physician is properly apportioning under correct legal principles. (*Ashley v. Workers'*  
25 *Comp. Appeals Bd., supra*, 37 Cal.App.4th at pp. 326-327; *King v. Workers' Comp. Appeals Bd.,*  
26 *supra*, 231 Cal.App.3d at pp. 1646-1647; *Ditler v. Workers' Comp. Appeals Bd., supra*, 131  
27 Cal.App.3d at pp. 812-813.)

1 Thus, to be substantial evidence on the issue of the approximate percentages of permanent  
2 disability due to the direct results of the injury and the approximate percentage of permanent  
3 disability due to other factors, a medical opinion must be framed in terms of reasonable medical  
4 probability, it must not be speculative, it must be based on pertinent facts and on an adequate  
5 examination and history, and it must set forth reasoning in support of its conclusions.

6 For example, if a physician opines that approximately 50% of an employee's back  
7 disability is directly caused by the industrial injury, the physician must explain how and why the  
8 disability is causally related to the industrial injury (e.g., the industrial injury resulted in surgery  
9 which caused vulnerability that necessitates certain restrictions) and how and why the injury is  
10 responsible for approximately 50% of the disability.<sup>12</sup> And, if a physician opines that 50% of an  
11 employee's back disability is caused by degenerative disc disease, the physician must explain the  
12 nature of the degenerative disc disease, how and why it is causing permanent disability at the time  
13 of the evaluation, and how and why it is responsible for approximately 50% of the disability.

### 14 III.

#### 15 Application Of These Principles To The Present Case

16 Here, in opining under section 4663 that 50% of applicant's permanent disability was  
17 caused by "other factors" consisting of preexisting degenerative arthritis in both knees, the WCJ  
18 relied upon the apportionment determination of defendant's QME, Dr. Ovadia.

19 As discussed above, Dr. Ovadia opined that there is a "medically reasonable" basis for  
20 apportionment: (1) because of the "trivial nature" of applicant's October 28, 2002 left knee injury;  
21 (2) because of the almost immediate onset of right knee symptoms after that injury; and (3)  
22 because of the "obvious, significant degenerative arthritis in both knees" reflected in a pre-surgical  
23 MRI of applicant's left knee taken shortly after her October 28, 2002 injury and reflected in post-  
24 surgical x-rays. Dr. Ovadia also stated, "it is medically probable that she would have had fifty  
25

---

26 <sup>12</sup> A physician cannot make an arbitrary percentage finding simply because it is "fair" in a particular  
27 case. (Cf. *Zemke v. Workmen's Comp. Appeals Bd.*, *supra*, 68 Cal.2d at pp. 798, 800; *Berry v. Workmen's*  
*Comp. Appeals Bd.*, *supra*, 68 Cal.2d at pp. 790-791; *Callahan v. Workers' Comp. Appeals Bd.*, *supra*, 85  
Cal.App.3d at p. 630.)

1 percent of her current level of knee disability at the time of today's evaluation even in the absence  
2 of her employment at Marshalls."

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

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

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

23 ///

24 ///

25 ///

26 ///

27 ///

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27

For the foregoing reasons,

**IT IS ORDERED**, as the Decision After Reconsideration of the Board (En Banc), that the Findings and Award issued by the workers’ compensation administrative law judge on June 29, 2004, be, and it is hereby, **AFFIRMED**.

***WORKERS’ COMPENSATION APPEALS BOARD (EN BANC)***

\_\_\_\_\_  
***MERLE C. RABINE, Chairman***

\_\_\_\_\_  
***WILLIAM K. O’BRIEN, Commissioner***

\_\_\_\_\_  
***JAMES C. CUNEO, Commissioner***

\_\_\_\_\_  
***JANICE J. MURRAY, Commissioner***

\_\_\_\_\_  
***FRANK M. BRASS, Commissioner***

\_\_\_\_\_  
***RONNIE G. CAPLANE, Commissioner***

***DATED AND FILED AT SAN FRANCISCO, CALIFORNIA***

***SERVICE BY MAIL ON SAID DATE TO ALL PARTIES  
AS SHOWN ON THE OFFICIAL ADDRESS RECORD***