

The California Commission on Health and Safety and Workers' Compensation



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

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INTRODUCTION

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

THE PROBLEM

SB 899 repealed venerable Labor Code §§4663 and 4750.¹ The former provided that if a preexisting disease was aggravated by a compensable injury, compensation was allowed only for the portion of the disability due to the aggravation reasonably attributed to the injury. The latter provided that an employee "suffering from a previous permanent disability or physical impairment" could not receive compensation for a subsequent injury in excess of the compensation allowed for the subsequent injury "when considered by itself and not in conjunction with or in relation to the previous disability or impairment" and that the employer was not liable "for the combined disability, but only for that portion due to the later injury as though no prior disability or impairment had existed."

¹ The repealed text of Sections 4663, 4750, and 4750.5 of the Labor Code provided as follows:

4663. In case of aggravation of any disease existing prior to a compensable injury, compensation shall be allowed only for the proportion of the disability due to the aggravation of such prior disease which is reasonably attributed to the injury.

4750. An employee who is suffering from a previous permanent disability or physical impairment and sustains permanent injury thereafter shall not receive from the employer compensation for the later injury in excess of the compensation allowed for such injury when considered by itself and not in conjunction with or in relation to the previous disability or impairment.

The employer shall not be liable for compensation to such an employee for the combined disability, but only for that portion due to the later injury as though no prior disability or impairment had existed.

4750.5. An employee who has sustained a compensable injury and who subsequently sustains an unrelated noncompensable injury, shall not receive permanent disability indemnity for any permanent disability caused solely by the subsequent noncompensable injury.

The purpose of this section is to overrule the decision in *Jensen v. WCAB*, 136 Cal.App.3d 1042.

To replace the repealed sections, Senate Bill 899 reenacted §4663 in an extensively revised form and added a new Section 4664.²

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

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

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

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

4663. (a) Apportionment of permanent disability shall be based on causation.

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

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

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

4664. (a) The employer shall only be liable for the percentage of permanent disability directly caused by the injury arising out of and occurring in the course of employment.

(b) If the applicant has received a prior award of permanent disability, it shall be conclusively presumed that the prior permanent disability exists at the time of any subsequent industrial injury. This presumption is a presumption affecting the burden of proof.

(c) (1) The accumulation of all permanent disability awards issued with respect to any one region of the body in favor of one individual employee shall not exceed 100 percent over the employee's lifetime unless the employee's injury or illness is conclusively presumed to be total in character pursuant to Section 4662. As used in this section, the regions of the body are the following:

(A) Hearing.

(B) Vision.

(C) Mental and behavioral disorders.

(D) The spine.

(E) The upper extremities, including the shoulders.

(F) The lower extremities, including the hip joints.

(G) The head, face, cardiovascular system, respiratory system, and all other systems or regions of the body not listed in subparagraphs (A) to (F), inclusive.

(2) Nothing in this section shall be construed to permit the permanent disability rating for each individual injury sustained by an employee arising from the same industrial accident, when added together, from exceeding 100 percent.

result of [the industrial injury] and what approximate percentage of the permanent disability was caused by other factors both before and subsequent to the industrial injury, including prior industrial injuries."

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

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

Subdivision 4664(b) provides:

(b) If the applicant has received a prior award of permanent disability, it shall be conclusively presumed that the prior permanent disability exists at the time of any subsequent industrial injury. This presumption is a presumption affecting the burden of proof.

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

On their face the repealed sections do not appear inconsistent with the new sections, but, at least to the extent that it precluded apportionment to causation and permitted proof that a previously established permanent disability no longer existed, the case law interpreting the repealed sections considerably limited their application.

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

INITIAL PROCEDURE UNDER REPEALED STATUTES

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

An example of the latter method of apportionment can be found in *Baker v. IAC* (1966) 243 CA2d 380, 31 CCC 228, where the injured employee's lung disability from emphysema was

due in part to cigarette smoking and in part to inhalation of dust fumes at work. The commission's finding that 55 percent of his permanent disability was industrially caused and 45 percent by his smoking habit was affirmed by the Court of Appeal which said:

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

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

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

JUDICIAL INTERPRETATION OF REPEALED STATUTES

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

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

Preexisting disability could not be established by a "retroactive prophylactic work restriction" postulated after the subsequent industrial injury, i.e., it was deemed speculative for a doctor to

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

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

COMPUTING APPORTIONED PD AWARD BEFORE SB 899

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

In 1972, however, §4658 was amended to provide for progressive increases in the number of weekly payments for each one percent of PD with the severity of the injury on a cumulative basis. After this change the total PD indemnity payable for a 60% rating was substantially greater than that for two 30% ratings. The argument that awards should be computed by ascertaining the dollar amount for the combined disability and apportioning the dollar amount was initially rejected by the Supreme Court in *Fuentes v. WCAB* (1976) 16 CA3d 1, 41 CCC 42. The court held that when two or more injuries caused successive permanent disabilities, the percentage of disability caused by each injury was independently determined, and the employer at the time of the injury was liable for the number of weeks of permanent disability indemnity provided by §4658 for that percentage of disability. To do otherwise would have been contrary to former §4750, which limited liability of an employer for a subsequent injury to the compensation allowed for that injury when considered by itself and not in conjunction with, or in relation to, the previous disability or impairment.

The following year, the Supreme Court held that if successive injuries to the same part of the body cause permanent disabilities that cannot be separated because they became permanent

and stationary at the same time, the worker was entitled to an award based on the combined disability. *Wilkinson v. WCAB* (1977) 19 C3d 491, 5 CWCR 87, 42 CCC 406. The *Wilkinson* court explained that the decision was not inconsistent with *Fuentes* because *Fuentes* was concerned with apportionment of disabilities that fell within former §4750, and was not applicable to injuries that do not fall within the scope of that section because when both injuries become permanent and stationary at the same time, there is no "previous disability or impairment". *Wilkinson, supra*, 19 C3d at 500, 5 CWCR at 88, 42 CCC at 411. *Wilkinson* was followed by numerous cases explaining and expanding it.

INTERPRETING AND APPORTIONING UNDER SB 899

Because cases interpreting former §§4663 and 4750 extended over a half century, it is likely to be some time before the effect of the new legislation is fully resolved. Although new §§4663 and 4664 have been in effect since April 19, 2004, regardless of date of injury (*Kleemann v. WCAB* (2005) 127 CA4th 274, 33 CWCR 35, 70 CCC 133 (2nd District), *Marsh v. WCAB* (2005) 130 Cal.App.4th 906 (5th District), *Rio Linda Union School Dist. v. WCAB* (Scheftner) (2005) 131 Cal.App.4th 517 (3d District)), the WCAB had only filed two final decisions applying them as of August 15, 2005, i.e., *Escobedo v. CNA Insurance Company*, (2005) 33 CWCR 100, 70 CCC 604; *Nabors v. Piedmont Lumber & Mill Co.* (2005) 33 CWCR 159, 70 CCC 856.

DEFINITION OF APPORTIONMENT TO CAUSATION

The first issue requiring resolution is how medical evaluators are to apportion PD based on causation. The statute tells physicians only that they must make apportionment determinations by finding what approximate percentage of the permanent disability was caused by the direct result of the industrial injury and what "approximate" percentage of the PD was caused by other factors. Presumably the intent is to overrule cases, such as *Ferguson, supra*, precluding apportionment to prior non disabling conditions or pathology, and, such as *Franklin, supra*, saying that PD is not apportionable to causation. The Appeals Board has agreed.

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

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

Physicians evaluating PD are required to produce an impairment rating based on the AMA Guides to the Evaluation of Permanent Impairment, 5th Edition (DWC Form PR-4). Adm Dir Rule 9785(g). This gives rise to another enigma for evaluating physicians because the 2005 Schedule for Rating Permanent Disabilities requires them to make *impairment* ratings, but

§§4663 and 4664 require them to apportion *disability* that is not established until a disability evaluation specialist has applied the rating schedule to the impairment ratings determined by the physician. See 1 *California Workers' Compensation Practice* §§5.49E-5.49G (4th ed., Cal CEB 2005).

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

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

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

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

DEFINITION OF "DIRECTLY CAUSED"

A major issue that the facts in *Escobedo, supra*, did not require the Board to resolve is the definition of "directly caused." Sections 4663 and 4664 require that to be compensable, PD must be "caused by the direct result of injury" and be "directly caused by the injury." There is lack of agreement on the definition of "caused by the direct result of injury" and "directly caused

by the injury," but there is considerable authority, including the 7th edition of Black's Law Dictionary, that "direct cause" is synonymous with "proximate cause."

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

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

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

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

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

How "directly caused" is defined in a particular case may well depend on the court's perception of the justice and fairness of the injured worker's claim and the court's interpretation of the social policy that "seeks (1) to ensure that the cost of industrial injuries will be part of the cost of goods rather than a burden on society, (2) to guarantee prompt, limited compensation for an employee's work injuries, regardless of fault, as an inevitable cost of production, (3) to spur increased industrial safety, and (4) in return, to insulate the employer from tort liability for his employees' injuries." *S.G. Borello & Sons, Inc. v. Dept. Ind. Relations* (1989) 48 Cal.3d 341,354, 54 CCC 80.

PROCEDURE

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

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

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

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

APPORTIONMENT IN AGGRAVATION CASES

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

One example might be a claim by a worker with no apparent disability or symptoms who bumps his knee on a desk while hurrying to answer the telephone in the course of his employment. The knee becomes swollen, painful and full of fluid. The illness is diagnosed as a disseminated fungus disease that had previously disseminated through his body but it had been dormant, the injury precipitated the localization of the fungus resulting in progression of the disease. When maximal medical improvement has occurred, both the treating physician and the qualified or agreed medical evaluator, following their understanding of SB 899, say that the primary cause of the disability was the fungus disease and the bump was a minor cause. They both apportion 10 percent to the injury and 90 percent to "other factors both before and subsequent to the industrial injury." A WCJ, reasoning that because the legislative objective was to reduce the cost to employers of workers' compensation and to replace the existing law on apportionment with a statute requiring apportionment of permanent disability based on causation, finds that the

injury caused 10 percent of the PD rating calculated from the impairments reported by the examining physicians. His opinion on decision says that because former §§4663 and 4750 have been repealed, there is no longer any bar to "apportionment of pathology or causative factors." When the Legislature deletes a statutory provision, it is assumed that a substantial change in the law was intended. *Lockheed Martin Corp. v. WCAB* (McCullough) (2002) 96 CA4th 1237, 30 CWCR 65, 67 CCC 245.

The applicant petitions for reconsideration contending that (1) when disability results from the lighting up of a pre-existing condition, the employer is required to compensate for the entire disability even though the injury might have caused little or no disability in a healthier person (*Tanenbaum v. IAC* (1935) 4 C2d 615, 20 IAC 390), and former §4663, which allowed apportionment to the portion of the disability not due to the aggravation, has been repealed, (2) asymptomatic fungus disease is not a ratable impairment, (3) the entire PD was proximately caused by the injury because "but for" the bump there would have been no PD, (4) the injury was the "direct cause" of the PD because it set in motion a chain of events that led to the PD without the intervention of any independent cause, (5) the defendant did not sustain its burden of proving apportionment, and (6) the medical opinion on which the WCJ relied was based on speculation, surmise or guess because the doctors could not say that absent the industrial injury the employee would have suffered disability.

The Appeals Board resolved some of these issues in *Escobedo, supra*, in which it ruled that the §4663(a) requirement that the apportionment "shall be based on causation" refers to the causation of the permanent disability, not causation of the injury. The applicant has the burden of establishing the percentage of PD directly caused by the injury, and the defendant has the burden of establishing the percentage of disability caused by other factors. "Other factors" may include pathology and asymptomatic prior conditions if there is substantial medical evidence establishing that these other factors have caused PD. A physician's opinion on apportionment may not be relied on unless it constitutes substantial evidence.

The other contentions made by the applicant in the hypothetical case were not resolved by *Escobedo*. Some hint of the Board's interpretation may be gleaned from the cases that the Board has remanded to WCJs for further proceedings and new decisions. One of those remanded cases was one where the WCJ had applied the "but for" rule and refused to apportion to "other factors." *Lamotte v. UCSF*, SF 469155 (back injury to housekeeper with degenerative changes in spine).

The *Physician's Guide to Medical Practice in the California Workers' Compensation System* published by the former Industrial Medical Council before *SB 899* said at page 22 that if the disability would not now exist in its present form "but for" the injury, the injury will be considered to be the cause of the disability, even though there may have been other contributing causes, and some WCJs have reasoned similarly. The "but for" rule, however, is a rule of exclusion, not a rule of liability. For example, "but for" the injured worker's birth, he would not now have disability but the birth is too remote to be considered a proximate cause of the disability. Thus the Board could reject the argument that the entire PD was proximately caused by the injury because "but for" the injury it would not have existed.

In our hypothetical case, the Board would also be likely to reject the argument that the injury was the "direct cause" of the PD because it set in motion a chain of events that led to the PD without the intervention of any independent cause. The bump would not have resulted in any disability without the intervention of the fungus disease.

The applicant's reliance on *Tanenbaum v. IAC, supra*, might also be unavailing. Although the court in that case did cite with approval cases to the effect that the employer is required to compensate for the entire disability even though the injury might have caused little or no disability in a healthier person, it affirmed the IAC's apportionment of a portion of Tanenbaum's PD the natural progress of a preexisting dormant arthritis with the explanation:

As we read the record in this proceeding, the petitioner is now suffering from a disability made up in part of an industrial disability growing out of the injury, including the aggravation or "lighting up" of the preexisting dormant arthritic condition, and, in part, though in a lesser degree, of what may be termed a nonindustrial disability resulting from the normal progress of the preexisting arthritis. Obviously, the latter disability is not attributable to industry and should not be saddled thereon.

Successful reliance on *Tanenbaum v. IAC, supra*, would be dependent on medical evidence that none of the PD resulted from independent progression of the fungus disease.

APPORTIONMENT TO PREEXISTING DISABILITY

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

The WCJ finds that (1) applicant's overall PD is 50 percent, (2) one half of the disability was caused by each injury, and (3) the second injury caused a PD of 25%. The award is for the amount of compensation payable for a 25 percent PD pursuant to Labor Code §§4453 and 4658.

Both parties seek reconsideration. Defendant contends that its liability should not be more than a 20% PDR because it is conclusively presumed that applicant already had a 30% PD when injured. Applicant argues that (1) the prior PR should be rerated under the 2005 schedule and adjusted for age and occupation at the time of the second injury, (2) the presumption is not conclusive but one affecting the burden of proof and therefore rebuttable (Evidence Code §601), (3) the presumption was rebutted by substantial evidence, or (4) in the alternative, because applicant's PD was already 30% at the time of the subsequent injury, the PD award for

that injury should begin at 30% and go up to 50%, and (5) the WCJ should, therefore, have made an award for the dollar value of a 50% PDR less the dollar value of a 30% award.

The Board is likely to hold that the presumption is actually conclusive. Otherwise, there would be no change in the law. In *Davis v. City of Sacramento* (2004) 32 CWCR 132, in fact, the Board said without explanation that it is now "conclusively presumed" that if the applicant has received a prior award of permanent disability, that disability existed at the time of the subsequent injury. Although defendant had (and still has) the burden of proving apportionment before SB 899, that burden was carried by proving the prior award, and it was up to the applicant to prove rehabilitation. Assuming that the presumption is conclusive, does it prevail over the §4663 requirement that physicians reporting on PD make a percentage apportionment? Or is apportionment a matter for the WCAB? See *W.P. Fuller & Co. v. IAC* (Cassidy), *supra* (apportionment a proper subject for medical experts, but IAC not required to follow the exact percentage recommended by the expert). Assuming that the presumption is conclusive, the Board would probably grant reconsideration and reduce the PDR to 20 percent.

With regard to applicant's final point, the Board held in *Nabors v. State Comp. Ins. Fund* (2005) 33 CWCR 159, 70 CCC 856, that an award of permanent disability after apportionment is calculated by determining the overall percentage of PD, subtracting the percentage of PD previously awarded, and determining the amount of compensation payable for the remainder pursuant to *Labor Code* §§4453 and 4658. Nabors made no claim of rehabilitation. The majority considered that *Fuentes v. WCAB*, *supra*, is still controlling, but the decision was not unanimous. Commissioner Rabine would have determined the number of statutory weekly benefits authorized for the overall disability, multiplied it by the percentage of industrially related disability, and awarded PD for that number of weeks. Commissioner Caplane would have agreed with applicant and determined the monetary equivalent of the overall disability, subtracted the dollar value of the prior award, and awarded the remainder in weekly payments. On July 22, 2005, the applicant filed a Petition for Writ of Review, but as of this writing, the Court of Appeals has not yet granted or denied that petition. It remains to be seen whether the appellate courts will agree with the majority opinion of the Board expressed in *Nabors* or will adopt one of the alternative interpretations. Unless and until a writ is granted, *Nabors* remains the controlling precedent from the Board.

The argument that the prior PD should be rerated under the 2005 schedule and adjusted for age and occupation at the time of the second injury is problematic. Section 4664 says that "it shall be conclusively presumed that the prior permanent disability exists at the time of any subsequent industrial injury." In *Nabors*, *supra*, it was apparently assumed that means that the prior PD rating existed at the time of the second injury, and there was no indication that either party argued otherwise. Both ratings were determined under the 1997 schedule and were comparable. That is not true of the ratings in the hypothetical. Work limitations are not ratable under the AMA Guides, and the objective factors of disability present after the first injury may no longer rate 30 percent.

According to the AMA Guides, the subtraction method of apportionment used by the Board in *Nabors*, *supra*, "requires accurate and comparable data for both impairments." AMA Guides, p. 12. In Arizona, the total impairment is determined first, the preexisting impairment is then

determined and deducted, and the remaining impairment is the basis for the award. *Vargas v. Indust. Comm.* (1996) 926 P2d 533. It is reported, however, that a West Virginia court has approved apportioning out a PDR based on a more generous system when rating the subsequent injury under the AMA Guides. Babitski et al., *Understanding the AMA Guides in Workers' Compensation* (3d ed., Aspen 2002) p. 39. Section 4664, however, expressly requires deducting the prior PD, not the prior PDR.

The Administrative Director promulgated a rule to govern this situation, but then withdrew it before it was scheduled to take effect. The proposal was part of the emergency rulemaking when the new permanent disability rating schedule was adopted effective January 1, 2005. The reasons for withdrawing this part of the rule were not stated. One might observe that the Legislature directed the AD to adopt a new PD schedule, but the Legislature did not direct her to interpret the apportionment statutes. In the withdrawn rule 10151.5, the AD would have provided that it shall be conclusively presumed that the percentage of permanent disability specified in a prior award of permanent disability exists at the time of any subsequent industrial injury in accordance with subdivision (b) of Labor Code section 4664 where (1) The percentages of permanent disability attributable to both the current injury and the prior award are based on the permanent disability schedule adopted on or after January 1, 2005; or (2) The percentages of permanent disability attributable to both the current injury and the prior award are based on the permanent disability schedule as it existed prior to January 1, 2005. Where neither of those conditions is true, apportionment would be determined in accordance with subdivision (c) of Labor Code section 4663. Although this rule has not been adopted as an administrative regulation, it is nevertheless a plausible interpretation of the Labor Code.

In its decisions interpreting SB 899, the Board has repeatedly cited *DuBois v. WCAB* (1993) 5 C4th 382, 21 *CWCR* 191, 58 CCC 286, to the effect that if the statutory language is clear and unambiguous, there is no room for interpretation, and the Board must enforce the statute according to its plain terms. It might well conclude, therefore, that the prior PD should be rerated under the 2005 schedule before being subtracted from the overall PD.

SUCCESSIVE PDs P&S AT SAME TIME

Assume the same fact situation except that there was no prior award and the disability from both injuries became permanent and stationary at the same time. Following the doctors' percentage apportionment, the WCJ finds that each injury caused a 25% PD and awards PDI in each case for the number of weeks of permanent disability indemnity provided by §4658 for a 25% PDR. Applicant petitions for reconsideration contending that (1) the WCJ erred in computing the award pursuant to *Fuentes, supra*, because, having been based on former §4750, it is no longer good law, and (2) the award should be computed based on the combined disability as provided in *Wilkinson, supra*.

The Board would likely reject the first argument because it held in *Nabors v. State Comp. Ins. Fund, supra*, that *Fuentes*, is still good law. In *Nabors*, however, the injuries did not become P&S at the same time. The rationale of *Wilkinson* was that apportionment under former §4750 was precluded because there was no "previous disability of impairment" when both injuries

became permanent and stationary at the same time. New §§4663 and 4664 do not provide for apportionment to "previous disability or impairment," but require that apportionment be made by finding what approximate percentage of the permanent disability was caused by "other factors both before and subsequent to the industrial injury, including prior industrial injuries." The date that the disability from the prior injury becomes P&S appears to be irrelevant under §4663.

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

APPORTIONMENT TO PRIOR UNCOMPENSATED CUMULATIVE INJURY

Apportionment in cumulative injury cases is still governed by §5500.5(a) which was not affected by SB 899. That section provides that liability for a cumulative injury or occupational disease may not be apportioned to prior or subsequent years of harmful exposure but may be apportioned to disability from a specific injury, disability due to non industrial causes, and disability previously compensated by an award, compromise and release, or voluntary payment. The result is that, in a cumulative trauma case, there can be no apportionment to a prior uncompensated cumulative injury. *Hartford Accident & Indem. Co. v. WCAB (Barrett)* (writ denied, 1978) 43 CCC 858.

EFFECT OF AMA GUIDELINES

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

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

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

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

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

Similarly, "apportionment" is defined as:

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

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

Even though a state bases its PD awards on the AMA guides, the rules on apportionment may be similar to the pre 2005 law in California. See Babitski et al., *Understanding the AMA Guides in Workers' Compensation* (3d ed., Aspen 2002) pp. 39-40. For example, in Colorado, there can be no apportionment to a preexisting asymptomatic degenerative condition. *Askew v. Industrial Claim Appeals Office* (1996) 927 P2d 1333. So also in Utah, *Crosland v. Bd of Review Ind. Comm.* (1992) 828 P2d 528. Arizona apparently follows the doctrine of *Tanenbaum, supra*. See *Southwest Gas Corp. v. Ind. Com. of Ariz.* (2001) 25 P3d 1164. In Kansas apportionment was denied in the case of a heavy smoker with pulmonary disease. *Burton v. Rockwell Int'l* (Kan 1998) 967 P2d 290. In New Mexico no apportionment was allowed to a preexisting spinal cancer in a twist and fall back injury. *Edmiston v. City of Hobbs* (NM 1997) 944 P2d 883.

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

GUIDANCE FOR PHYSICIANS

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

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

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

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

- (a) There is documentation of a prior or subsequent factor.
- (b) The current permanent impairment is greater as a result of the prior or subsequent factor.
- (c) There is evidence, based on reasonable probability (greater than 50% likelihood) that the prior or subsequent factor caused or contributed to the impairment.

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

(5) A detailed explanation of the apportionment must be included that:

- (a) considers the nature of the impairment and its relationship to each alleged factor;
- (b) explains the medical basis for the physician's conclusions.

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

A report written in accordance with those instructions should justify an "apportionment to causation" although it is always possible that in a "hard case" an appellate court could characterize it as "based on speculation, surmise or guess." In *Escobedo, supra*, the Board instructed that a PD evaluation must disclose familiarity with the concepts of apportionment, describe in detail the exact nature of the apportionable disability, and give the basis for the opinion. An opinion on apportionment must be framed in terms of reasonable medical probability and based on pertinent facts, an adequate examination, and a sufficient history. If a physician opines that a portion of the PD is caused by some other factor, the report must explain the nature of that factor, how and why it is causing PD at the time of the evaluation, and how and why it is responsible for part of the disability.

CONCLUSION

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

numerous additional cases with different fact situations to refine the definition with a degree of finality.

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

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

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

A germane portion of that legal history is the case law that specified the kind and quality of evidence required to justify apportionment. Apportionment was a question of fact, and it was the employer's burden to prove the proportion of disability attributable to nonindustrial factors. Although the Board normally relied on medical opinion in resolving apportionment issues, an opinion that did not rest upon relevant facts or that assumed an incorrect legal theory was not substantial evidence on which the Board could base an apportionment finding. The Board embraced these principles in *Escobedo, supra*.

The *Escobedo* decision is consistent with the discussion in this paper, but the Board could not resolve all of the problems raised by SB 899 with respect to apportionment on the facts of that case. A principal issue still unresolved is the definition of "directly caused." Because there was no issue of remote causation in *Escobedo*, the Board was not faced with that problem. Sections 4663 and 4664 require that compensable PD be "caused by the direct result of injury" and "directly caused by the injury." There is authority that "direct cause" is synonymous with "proximate cause."

Disability caused by an injury's acceleration, aggravation, or lighting up of a pre-existing condition is a proximate result of the injury to the extent that it would not have existed in the absence of the injury. Whether it is also a "direct" result will have to await an aggravation case such as that postulated above.

Another issue neither involved nor resolved in *Escobedo* is how to apply subdivision 4664(b) which provides:

(b) If the applicant has received a prior award of permanent disability, it shall be conclusively presumed that the prior permanent disability exists at the time of any subsequent industrial injury. This presumption is a presumption affecting the burden of proof.

Is an order approving a compromise an award within the meaning of §4664(b), and if so how is the preexisting PD determined? Even when the prior award contained a specific finding of a percentage of permanent disability, moreover, there is a problem of how to subtract a rating under the 1997 schedule from a rating under the 2005 schedule and the AMA Guides. If the prior rating was based on pain or work limitations, how is it converted to an impairment rating? If the prior PD is rerated, will future earning capacity, occupation, age, and earnings at the time of the subsequent injury in accordance with cases decided under former §4750? The Board was not required to face these issues in *Nabors, supra*, but that decision resolved how a PD award after apportionment is calculated.

The question of whether the §4664(b) presumption is conclusive or rebuttable has apparently been resolved to the satisfaction of a majority of the current members of the Appeals Board. In *Davis v. City of Sacramento* (2004) 32 CWCR 132, a panel of Commissioners Brass and O'Brien and Chairman Rabine referred to the presumption as conclusive. In *Reyes v. Fremont Comp. Ins. Co.* (2005) 33 CWCR 48, 70 CCC 223, a panel of Chairman Rabine and Commissioners Caplane and Cuneo wrote, "Section 4664 now creates a conclusive presumption that the permanent disability found in a prior award exists at the time of any subsequent industrial injury, . . ." A majority of the Board apparently deems the presumption conclusive despite the second sentence.

Escobedo, supra, has provided clarification and guidance to the extent that it makes it clear that (1) the §4663(a) causation requirement refers to the cause of PD and not the cause of the injury, (2) §4663(c) prescribes the standards the WCAB must employ in deciding apportionment issues, (3) the applicant has the burden of establishing the percentage of PD directly caused by the injury, and the defendant has the burden of establishing the percentage of disability caused by other factors, (4) "other factors both before and subsequent to the industrial injury" include pathology, asymptomatic prior conditions, and retroactive prophylactic work restrictions if there is substantial medical evidence establishing that these other factors have caused PD, and (5) a medical opinion on apportionment will not support an apportionment finding unless it constitutes substantial evidence.

The impact of *Escobedo* and *Nabors* is that WCJs have guidance on those six issues, and those issues will be on their way to final resolution by the appellate courts. The appellate courts will have the benefit of the Board's expertise and knowledge of the workers' compensation law and system. Although the ultimate interpretation of a statute is for the appellate courts, the WCAB's interpretation of a statute that it is charged with enforcing will be accorded great respect by the courts and will be followed if not clearly erroneous. *Judson Steel Corp. v. WCAB* (Maese) (1978) 22 C3d 658, 6 CWCR 215, 43 CCC 1205.