# 73 Cal. Comp. Cases 529; 2008 Cal. Wrk. Comp. LEXIS 83

Court of Appeal, First Appellate District, Division One

March 19, 2008

Civil No. A119773—

**Reporter**

73 Cal. Comp. Cases 529 \*; 2008 Cal. Wrk. Comp. LEXIS 83 \*\*

**Deborah Kos, Petitioner v. Workers' Compensation Appeals Board, Kimes-Morris Construction, State Compensation Insurance Fund, Respondents**

**Prior History:**
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 W.C.A.B. No. OAK 0283809—WCJ Christopher Miller (OAK); WCAB Panel: Commissioners Caplane, Brass, Murray (concurring, but not signing) [*see* Kos v. Kimes-Morris Construction, 2007 Cal. Wrk. Comp. P.D. LEXIS 147 (Appeals Board panel decision)]

**Disposition:** Petition for writ of review denied

**Headnotes**

CALIFORNIA COMPENSATION CASES HEADNOTES

 **Permanent Disability—Apportionment—WCAB held that substantial evidence supported apportionment of 90 percent of applicant's permanent total disability to non-industrial degenerative disc disease and 10 percent to her 3/18/2002 industrial back and leg injuries under Labor Code § 4663, and that,**  [\*530]  **even if Labor Code § 4663, to extent it allows apportionment to age-related degenerative disc disease, violates California Fair Employment and Housing Act's prohibition against age discrimination in employment, as set forth in Government Code § 12940(a), and violates Government Code § 11135, WCAB must construe Labor Code § 4663 to effectuate legislative**  **intent behind statute that apportionment to causation may be based on age-related degenerative**  [\*\*19] **conditions, and must adhere to later and more specific enactment of Labor Code § 4663 apportionment statute over earlier more general age discrimination provisions.** [See generally Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d §§ 8.05[1]-[3], 8.06[1], [4], [5], 8.07[1]; The Lawyer's Guide to the AMA *Guides* and California Workers' Compensation, Ch.7.]

**Permanent Disability—Apportionment—WCAB relied on *Escobedo v. Marshalls*** **(2005) 70 Cal. Comp. Cases 604 (Appeals Board en banc opinion) and its progeny to find that agreed medical examiner's opinion was not speculative and constituted substantial evidence to support apportionment of 90 percent of applicant's permanent total disability to non-industrial degenerative disc disease and 10 percent to her 3/18/2002 industrial back and leg injuries under Labor Code § 4663, when, relying on accurate history, agreed medical examiner opined that most of cause of applicant's disc herniation was related to her degenerative disc**  **disease, that very little was caused by her work activities, that pre-existing degenerative disc disease would equate to vulnerability such that simple act of sitting at work resulted in disc herniation, and that 10 percent**  [\*\*20] **of applicant's disability was directly caused by industrial injury and 90 percent by non-industrial factors.** [See generally Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d §§ 8.05[1]-[3], 8.06[1], [4], [5], 8.07[1]; The Lawyer's Guide to the AMA *Guides* and California Workers' Compensation, Ch. 7.]

**CALIFORNIA COMPENSATION CASES SUMMARY**

 Applicant sustained admitted industrial injuries to her back and legs on 3/18/2002, while working as an office manager for Defendant Kimes-Morris Construction. At the time of her injury, Applicant was 51 years old, weighed 340 pounds, and had diabetes with peripheral neuropathy. Her primary job duties consisted of doing paperwork, filing, and using the computer and telephone. According to the 10/7/2002 report of AME Dr. Fulton S. Chen, Applicant's injury occurred when she was simply sitting at her desk and suddenly developed severe pain in her back and right hip, radiating down her right leg. Applicant denied any particular event or trauma prior to the onset of low back pain.

 Dr. Chen diagnosed Applicant as having severe multilevel degenerative disease, with disc desiccation at L2–3 through L4–5. He noted that "[a]t L4–5 there is severe loss of her disc height where her L4  [\*\*2] and L5 vertebrae are essentially bone on bone anteriorly." Dr. Chen further diagnosed Applicant with foraminal stenosis at both L4–5 and L5-S1, as well as moderately severe central spinal canal stenosis at L5-S1. He described her main problem to be severe degenerative disc disease at L4–5, where the large left disc herniation was causing active denervation (i.e., active nerve  [\*531]  root injury) over the right L5 and S1 nerve roots. In his reports of 10/7/2002 and 10/20/2003, issued prior to the passage of SB 899, Dr. Chen found that Applicant's underlying degenerative disc disease was not caused by her work activities. However, Dr. Chen's reports also indicated that her prolonged sitting at work increased the pressures on her discs and "lit up" her pre-existing lumbar disc disease, helping to trigger a severe disc herniation. Accordingly, Dr. Chen's pre-SB 899 reports found no basis for apportionment.

 In his deposition of June 4, 2004, after SB 899 became effective, Dr. Chen reiterated that Applicant's prolonged sitting at work contributed to the "lighting up" of her degenerative disc disease. He also stated that it would be speculative to determine what level of disability Applicant would  [\*\*3] now have, but for her industrial injury. He agreed with Applicant's counsel's statement that, absent her industrial injury, it was possible Applicant would have had no disability and no disc herniation. However, Dr. Chen concluded that, given that Applicant had a very large disc herniation compressing a nerve root, it was probable that Applicant would have had symptoms. On cross-examination by defense counsel, Dr. Chen estimated that, given the degree of Applicant's disability, Applicant's pre-existing genetic predisposition for degenerative disc disease would have contributed approximately 75 percent to her overall level of disability, with the 25-percent balance due to the industrial exposure of prolonged sitting. On further examination by Applicant's counsel, Dr. Chen said that, when he first saw Applicant, she did not have any calf atrophy, but that when he had seen her most recently, she had one-inch of atrophy in the calf of the right leg. Dr. Chen agreed that this finding would be supportive of the likelihood that there would be no disability now, absent the industrial exposure. Dr. Chen also admitted that Applicant's continued sitting activities at work caused, at least in  [\*\*4] some form, her disability, since Applicant was fully functional prior to her injury.

 On 3/4/2005, the WCJ issued an F&A, in which he made no actual findings on the issues of PD and apportionment, but did indicate his intention to find that Applicant had 100-percent PD, with 75 percent of the disability being caused by non-industrial factors. Applicant filed a Petition for Reconsideration, which was granted in order to allow further development of the record on the issue of apportionment in light of Labor Code § 4663, as enacted by SB 899, and *Escobedo v. Marshalls* (2005) 70 Cal. Comp. Cases 604 (Appeals Board en banc opinion).

 After remand, on 2/10/2006 Dr. Chen was again deposed. During questioning by Applicant's counsel, Dr. Chen said that, medically, there is no difference between a disc herniation and degenerative disc disease because a disc herniation is a form of degenerative disc disease. He stated that Applicant had multi-level degenerative disc disease prior to her industrial injury, although the degeneration was primarily at L4–5. He also stated that degenerative disc disease does not always lead to a herniation, and that he could not say whether Applicant actually had a  [\*\*5] disc herniation prior to her industrial injury. Later, Dr. Chen stated that he believed that most of the cause of Applicant's disc herniation was related to the degenerative  [\*532]  process, and that very little was related to her work activities, since the process of sitting was unlikely to cause disc herniation. He further indicated that, in his medical opinion, the disc herniation was the cause of Applicant's complaints. When questioned by defense counsel, Dr. Chen opined that less than 10 percent of Applicant's disability was caused by her work activities, and that approximately 90 percent was caused by the aging process and by degenerative disc disease. He also stated that the pre-existing disc degeneration left Applicant vulnerable, so that the simple act of sitting at work on the day of her injury resulted in either the occurrence or the enlargement of the disc herniation to the point that Applicant became symptomatic at that time.

 On 9/1/2006, the WCJ issued a new F&A, in which he determined that Applicant's industrial injuries caused 100-percent PD, without apportionment. In finding that Dr. Chen's opinion did not constitute a sufficient basis to support apportionment, the WCJ concluded  [\*\*6] that Dr. Chen's 90-percent apportionment of disability to non-industrial factors that left Applicant vulnerable to disc herniation was speculative, given his testimony that the disc herniation caused Applicant's disability.

 Defendant filed a Petition for Reconsideration, contending in substance that: (1) Dr. Chen's opinion constituted substantial evidence establishing that 90 percent (or at least 75 percent) of Applicant's PD should be apportioned to non-industrial pathology; or (2) in the alternative, if Dr. Chen's opinion did not constitute substantial evidence on the issue of non-industrial causation, it also did not constitute substantial evidence on the issue of industrial causation and that, therefore, the record should be further developed on the issue of apportionment. Applicant filed an Answer, contending in essence that Dr. Chen incorrectly attempted to apportion PD to the causation of her injury, rather than to the causation of her disability.

 The WCJ recommended that reconsideration be denied.

 The WCAB granted reconsideration, rescinded the WCJ's decision, and concluded that Dr. Chen's opinion did constitute substantial evidence that 90 percent of Applicant's PD was apportionable  [\*\*7] to non-industrial causation. Therefore, the WCAB found that Applicant's industrial PD was10 percent. The WCAB pointed out that, pursuant to the holding in *Escobedo*, as well as the holdings in subsequent appellate cases, the language in Labor Code § 4663, as enacted by SB 899, providing for apportionment of PD caused by "other factors both before and subsequent to the industrial injury, including prior industrial injuries," allows for apportionment of disability to pathology and asymptomatic prior conditions, as long as such apportionment is based on substantial medical evidence, citing *Brodie v. W.C.A.B.* (2007) 40 Cal. 4th 1313, 57 Cal. Rptr. 3d 644, 156 P.3d 1110, 72 Cal. Comp. Cases 565; *Anderson v. W.C.A.B.* (2007) 149 Cal. App. 4th 1369, 57 Cal. Rptr. 3d 839, 72 Cal. Comp. Cases 389; *State Compensation Insurance Fund v. W.C.A.B. (Echeverria)* (2007) 146 Cal. App. 4th 1311, 53 Cal. Rptr. 3d 568, 72 Cal. Comp. Cases 33; and *E.L. Yeager Construction v. W.C.A.B. (Gatten)* (2006) 145 Cal. App. 4th 922, 52 Cal. Rptr. 3d 133, 71 Cal. Comp. Cases 1687. In assessing whether a physician's apportionment opinion in a pre-existing degenerative disease case  [\*533]  is substantial evidence, the WCAB may  [\*\*8] consider a number of factors, including but not limited to: (1) the severity of the pre-existing degenerative condition, i.e., whether it was advanced or in its early or beginning stages; (2) the mechanics of the injury, i.e., whether the trauma involved was minor or significant; (3) the nature and extent of any pre-injury symptoms or treatment; and (4) the nature and extent of any pre-injury work restrictions or lost work time.

 Applying the standards for apportionment to the instant case, the WCAB stated in relevant respects:

"   . . . [W]e are persuaded that the opinion of the AME, Dr. Chen, that 90% of applicant's disability is caused by non-industrial factors constitutes substantial evidence and is not speculative.

 Preliminarily, we will address the WCJ's conclusion (and applicant's assertion) that Dr. Chen was apportioning to causation of the injury, rather than causation of the permanent disability, because Dr. Chen opined that applicant's severe, pre-existing degenerative disc disease left her in a position of *vulnerability* to disc herniation, but it was applicant's work activity that actually precipitated the herniation and the consequent disability. [*Emphasis by WCAB*]

 As discussed  [\*\*9] above, *Escobedo* stated that "[t]he issue of the causation of permanent disability, for purposes of apportionment, is distinct from the issue of the causation of an injury;" therefore, "the percentage to which an applicant's *injury* is causally related to his or her employment *is not necessarily* the same as the percentage to which an applicant's *permanent disability* is causally related to his or her injury." (70 Cal.Comp.Cases at p. 611 (italics in original; underlining [*i.e., italics of "is not necessarily"*] added [*by WCAB*].) However, the fact that causation of the injury "is not necessarily" the same as causation of the disability does not mean they cannot be the same. Moreover, under current sections 4663 and 4664(a) and the cases interpreting them, it would be incorrect to conclude that, in degenerative disease cases, an applicant's permanent disability is necessarily entirely "directly caused" by the industrial injury, with no possible apportionment to non-industrial causation: (1) if the injury was the "straw that broke the camel's back;" (2) if, but for the industrial injury, it is not clear when, or if, the degenerative condition would have progressed to cause disability; or  [\*\*10] (3) if the degenerative condition was asymptomatic or largely asymptomatic before the injury occurred. To the contrary, any such conclusion would be inconsistent with the holding of *Escobedo* that section 4663 allows for apportionment to pathology and asymptomatic prior conditions. (70 Cal.Comp.Cases at pp. 607, 614–617.) Furthermore, it would be inconsistent with the holdings of *Brodie* that current section 4663 was intended to "eliminate the bar against apportionment based on pathology and asymptomatic causes" (40 Cal.4th at p. 1327);  [\*534]  that "[t]he plain language of new section[] 4663 demonstrates [it was] intended to reverse [certain] features of former sections 4663 and 4750" (40 Cal.4th at p. 1327)—including the case law that interpreted those former sections to bar apportionment if, "but for" the industrial injury, the nonindustrial cause would not alone have given rise to a disability (40 Cal.4th at p. 1326); that "former sections 4663 and 4750 . . . , as interpreted by the courts, were inconsistent with the new regime of apportionment based on causation" (40 Cal.4th at p. 1327); and that "the new approach to apportionment is to look at the current disability and parcel out its  [\*\*11] causative sources—nonindustrial, prior industrial, current industrial—and decide the amount directly caused by the current industrial source." (40 Cal.4th at p. 1328.) It would also be consistent with the holding of *Gatten* that "apportionment may be based on pathology and asymptomatic prior conditions." (145 Cal.App.4th at p. 927.)

 Therefore, the fact that applicant might not now have disability, but for her industrial injury, is no longer a proper test for the validity of an apportionment opinion. The relevant question is what percentage of her current disability is directly caused by her industrial injury and what percentage is caused by other factors.

 In this regard, Dr. Chen's reports and depositions point out that, at the time her L4–5 disc herniated (or her herniation enlarged to the point it became symptomatic), applicant was simply sitting at her desk. There was no clear traumatic event or incident (i.e., applicant was not engaged in bending, lifting, reaching, or any other significant physical activity). Therefore, the activity at work that precipitated the herniation (or the enlargement of the herniation) was even more "trivial" than the applicant's fall at work in *Escobedo*.  [\*\*12] (See *Escobedo v. Marshalls, supra*, 70 Cal.Comp.Cases at pp. 608, 622.)

 Moreover, when applicant's L4–5 disc herniated while she was merely sitting at her desk (or her herniation enlarged to the point it became symptomatic), she had "severe multilevel degenerative disease" and her "L4 and L5 vertebrae [we]re essentially bone on bone anteriorly," according to Dr. Chen's interpretation of an April 26, 2002 MRI, taken less than six weeks after her March 18, 2002 injury. Dr. Chen concluded, therefore, that the disc was vulnerable to herniation because there was a "weakening of the outside surface of the disc." Dr. Chen opined that the causes of this weakening of the surface of the disc were multifactorial, but were largely attributable to applicant's genetic predisposition and to her activities of daily living. As to the latter point, Dr. Chen stated that as people get older "things tend to wear out"—a process that "develops over a long period of time." Accordingly, Dr. Chen said: "I would think that most of the cause of the disc herniation is related to the degenerative process, and actually very little of the  [\*535]  disc herniation was caused by her work activities." [*Footnote by WCAB:* In this  [\*\*13] regard, Dr. Chen stated that, "[a]lthough the process of sitting does increase disc pressures, I would not consider that to be a substantial cause of disc herniations."] He said that the pre-existing degenerative disc disease "would equate to vulnerability," and that "she was vulnerable enough that the simple act of sitting that day resulted in the disc herniation." Therefore, his final determination on the issue of apportionment was that 10% of her permanent disability was directly caused by her March 18, 2002 admitted specific injury and 90% was caused by non-industrial factors.

 Accordingly, the AME, Dr. Chen, has explained the how and why of his apportionment opinion. Moreover, it appears to be undisputed that Dr. Chen had an adequate and accurate medical history (including a review of applicant's MRI and pre-injury chiropractic records) and that he had an adequate and accurate history of applicant's job duties (including what she was doing at the time her disc apparently actually herniated). Therefore, we find that Dr. Chen's opinion does constitute substantial evidence and is not "speculative." We will accept his determination that 90% of applicant's permanent disability was  [\*\*14] caused by non-industrial factors."

 Applicant filed a Petition for Reconsideration, contending in substance that: (1) the WCAB erred in finding that 90 percent of her PD was caused by non-industrial factors; (2) the WCAB erred in finding a specific injury, rather than a cumulative trauma; and (3) the WCAB's apportionment of 90 percent of Applicant's PD to non-industrial factors violated art. XIV, § 4, of the California Constitution, the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution, and the provisions of the California Government Code prohibiting age discrimination.

 With respect to Applicant's first contention, the WCAB denied reconsideration for the reasons set forth in its prior Decision After Reconsideration, which it adopted and incorporated. According to the WCAB's prior decision, Dr. Chen's opinion established that 90 percent of Applicant's PD was caused by non-industrial factors. The WCAB also denied reconsideration with respect to Applicant's second contention, on the ground that the parties entered into a binding stipulation that Applicant sustained a specific injury on 3/18/2002. Moreover, Applicant waived the issue, since she did not  [\*\*15] seek reconsideration of the WCJ's 9/1/2006 finding of a 3/18/2002 specific injury. Finally, the WCAB denied reconsideration of Applicant's third contention, initially noting that it lacked authority, under Cal. Const., art. III, § 3.5, and *Greener v. W.C.A.B.* (1993) 6 Cal. 4th 1028, 25 Cal. Rptr. 2d 539, 863 P.2d 784, 58 Cal. Comp. Cases 793, to declare Labor Code § 4663 unconstitutional. Moreover, the WCAB stated that, even assuming that Labor Code § 4663 were inconsistent with the provisions of Government Code §§ 12940(a) and 11135(a)  [\*536]  to the extent that Labor Code § 4663 allows apportionment to age-related degenerative disc disease, the WCAB's decision would not be altered, based on the following rationale stated in pertinent part:

"   . . . In *Brodie v. Workers' Comp. Appeals Bd.* (2007) 40 Cal.4th 1313 [57 Cal. Rptr. 3d 644, 156 P.3d 1110] [72 Cal.Comp.Cases 565], the Supreme Court stated that the legislative intent of current section 4663 was to "eliminate the bar against apportionment based on pathology and asymptomatic causes." (40 Cal.4th at p. 1327.) The Supreme Court emphasized that "[t]he plain language of new section[] 4663 demonstrates [it was] intended to reverse [certain]  [\*\*16] features of former sections 4663 and 4750 (40 Cal.4th at p. 1327)—including the case law that interpreted those former sections to bar apportionment if, "but for" the industrial injury, the nonindustrial cause would not alone have given rise to a disability. (40 Cal.4th at p. 1326.) The Supreme Court said that "former sections 4663 and 4750 . . . , as interpreted by the courts, were inconsistent with the new regime of apportionment based on causation." (40 Cal.4th at p. 1327.) The Supreme Court further stated that "the new approach to apportionment is to look at the current disability and parcel out its causative sources—nonindustrial, prior industrial, current industrial—and decide the amount directly caused by the current industrial source." (40 Cal.4th at p. 1328.) Finally, the Supreme Court said that section 4663 "reflect[s] a clear intent to charge employers only with that percentage of permanent disability directly caused by the current industrial injury." (40 Cal.4th at p. 1332.) Therefore, the Legislature intended that apportionment to causation under section 4663 may be based on age-related degenerative conditions. (See also, *E.L. Yeager Construction v. Workers' Comp. Appeals Bd. (Gatten)* (2006) 145 Cal.App.4th 922 [52 Cal. Rptr. 3d 133] [71 Cal.Comp.Cases 1687]  [\*\*17] (Court of Appeal remanded to WCAB with directions to apportion 20% of the employees [*sic*] disability age-related degenerative disc disease, and stated that "apportionment may be based on pathology and asymptomatic prior conditions" (145 Cal.App.4th at p. 927).)

 Second, where statutes are otherwise irreconcilable, a later and more specific enactment will prevail over earlier and more general ones. ( Code Civ. Proc. § 1859; *Wells v. One2One Learning Foundation* (2006) 39 Cal.4th 1164, 1208 [48 Cal. Rptr. 3d 108, 131 P.3d 225].) Here, Labor Code section 4663, which specifically relates to apportionment of disability in workers' compensation cases, was enacted on April 19, 2004 (Stats. 2004, ch. 34, § 34)—which was well after the September 15, 2002 enactment of the more general "age" discrimination provisions of Government Code sections 12940(a) (Stats.2002, ch. 525, § 1) and 11135(a) (Stats.1977, ch. 972, § 1)."

 Applicant filed a Petition for Writ of Review, contending in relevant portion that: (1) the WCAB erred in finding that 90 percent of Applicant's PD was caused  [\*537]  by non-industrial factors because the AME incorrectly assigned apportionment percentages to risk factors for injury and  [\*\*18] not to causation of PD; and (2) the WCAB erred by finding 90 percent of Applicant's PD was caused by non-industrial factors when the AME apportioned based on age.

 Defendant filed an Answer, essentially contending that the WCAB's finding on apportionment was legally correct, and that Labor Code § 4663 does not violate the prohibition against age discrimination in Government Code § 11135.

 WRIT DENIED March 19, 2008.

**Counsel**

For petitioner—Boxer & Gerson, by Ralph W. Mann

For respondents employer and insurer—State Compensation Insurance Fund, by Robert W. Daneri, Chief Counsel, Suzanne Ah-Tye, Assistant Chief Counsel, Alan R. Canfield, Appellate Counsel

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