

“Apportionment: Case law update focusing on themes, trends, and problem areas.”

(2012 Case Update Supplement)

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Fundamental Analytical Principles.

Labor Code Section 4663

The following are three critical portions or provisions of Labor Code Section 4663 as enacted by SB 899 on April 19, 2004:

- (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) "...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."

Comments: As reflected in the cases in the outline dealing with causation of injury, AOE/COE as opposed to causation of impairment or disability, Labor Code Section 4663 deals only with causation of permanent disability and not causation of injury.

The other significant issue is the net cast by Labor Code Section 4663 is extremely broad in terms of what may constitute legal apportionment. You will note the reference to "other factors" and not just to injuries or disability. The term "factors" is much broader than an injury whether that injury occurred prior to or subsequent to the industrial injury in question. The critical legal and medical questions to be resolved are to determine all the contributing causal factors of the applicant's permanent disability and impairment at the time of the MMI evaluation(s) in any case. A "factor" or "factors" that can be a contributing cause of impairment or disability are myriad and contingent on the specific medical record and facts. For example, in a psychiatric case, as indicated by cases in the outline, a "factor" contributing to an applicant's psychiatric impairment or disability may be a pre-existing personality disorder or other mental condition that is a contributing cause of the applicant's current psychiatric or psychological disability. As is also demonstrated repeatedly in the outline, a contributing "factor" to disability can be an asymptomatic pre-existing condition so long as that condition is a contributing cause or factor of the applicant's present impairment, i.e., making it worse than it would have been without the underlying causative factor.

Radical Change

Labor Code Section 4663 has been described in terms of its impact and change on pre-existing apportionment law as “radical”, “a diametrical change”, and a “new regime”.

From a historical perspective, it must be kept in mind that from 1932 to 1968, a period of 36 years, the law of apportionment in California was basically the same as it is currently under SB 899, as reflected in Labor Code Sections 4663 and 4664. For the period of 1968 to the enactment of SB 899 in 2004, a span of another 36 years, there was basically very little opportunity for a defendant to obtain valid Labor Code Section 4663 apportionment since the case law during this period essentially placed the burden on defendant to establish injuries and other factors that were labor disabling as a basis for valid legal apportionment. From 1968 to 2004, there was no valid basis for apportionment to pre-existing pathology and other factors that may have been a contributing cause of the ultimate disability in a case if that contributing factor was not labor disabling in and of itself.

The California Supreme Court in Brodie v. WCAB (2007) 40 Cal. 4th 1313, 72 Cal Comp. Cases 565 discussed in detail the new “regime” of apportionment based on causation. The Brodie Court discussed the distinction and differences in pre-SB 899 Labor Code Section 4663 apportionment and post-SB 899 Labor Code Section 4663 apportionment as follows:

Until 2004, former section 4663 and case law interpreting the workers’ compensation scheme closely circumscribed the bases for apportionment. Apportionment based on causation was prohibited. (Pullman Kellogg v. WCAB (1980) 26 Cal. 3d 450, 454, 45 Cal. Comp. Cases 170)

Under these rules, in case after case courts properly rejected apportionment of a single disability with multiple causes (See, e.g., Pullman Kellogg v. WCAB, supra, 26 Cal. 3d at pp 454-455) no apportionment of lung injury between industrial inhalation of toxic fumes and nonindustrial pack-a-day smoking habit]; Zemke v. WCAB (1968) 68 Cal. 2d 794, 796-799, 33 Cal. Comp. Cases 358] [no apportionment of back disability between industrial back injury and nonindustrial arthritis]; Berry v. WCAB (1968) 68 Cal. 2d. 786, 788-790, 33 Cal. Comp. Cases 352] [no apportionment of knee disability where industrial knee injury triggered “advancement” of previously dormant nonindustrial fungal disease]; Idaho Maryland etc. Corp. v. IAC (1951) 104 Cal. App. 2d 567, 16 Cal. Comp. Cases 146] [no apportionment between industrial exposure to mine gas and nonindustrial latent heart disease].” In short, so long as the industrial cause was a but-for proximate cause of the disability, the employer would be liable for the entire disability without apportionment.

The Supreme Court, in contrasting current Labor Code Section 4663 with previous apportionment law and principles under Labor Code Section 4663, the Court stated:

The plain language of sections 4663 and 4664 demonstrates they were intended to reverse these features of former sections 4663 and 4750. (Kleeman v. WCAB (2005) 127 Cal. Applicant. 4th 274, 284-285, 70 Cal. Comp. Cases 133.) Thus, new sections 4663, subdivision (a) and 4664, subdivision (a) eliminate the bar against apportionment based on pathology and asymptomatic causes. (E.L. Yeager Construction v. WCAB (2006) 145 Cal. Applicant. 4th 922, 71 Cal. Comp. Cases 1687; Escobedo v. Marshalls (2005) 70 Cal. Comp. Cases 604,617 (en banc))

Perhaps the most insightful comment or characterization the Supreme Court indicated in the Brodie decision as to the fundamental principle of applying Labor Code Section 4663 as enacted under SB 899 was as follows:

“...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. This approach requires thorough consideration of past injuries, not disregard of them.”

Perhaps another way of characterizing the fundamental principles of new Labor Code Section 4663 in terms of causation of impairment is that in Brodie, Escobedo, and Gatten a reporting physician under Labor Code Section 4663 must give an opinion and the WCAB to make a finding, on what percentage of applicant’s current overall permanent disability is attributable to each contributing cause industrial or non-industrial. As recognized by the Brodie court, multiple causes frequently interact to cause permanent disability. In essence, the purpose of apportionment is to limit the employer’s liability to that percentage of actual permanent disability caused by the industrial injury, not to determine what the level of permanent disability would have been absent the non-industrial cause.

Basically, Labor Code Section 4663 comports with logic, common sense, and medicine in that with respect to any disability or impairment there may be multiple contributing causes and not one cause. These fundamental principles and concepts must be understood and applied by physicians, lawyers, WCJs as well as the WCAB and the Court of Appeal.

Given the radical change in apportionment under new Labor Code Section 4663, it was understandable that immediately after the enactment of SB 899 there was a very unsettled period of time when both the applicant’s and defense bar expounded different theories and concepts as to the meaning of Labor Code Section 4663 and how it should be applied.

It was not until the WCAB issued its en banc decision Escobedo that the workers’ compensation community had any clear guidance on how the new apportionment statutes should be implemented. In Escobedo (2005) 70 CCC 604, the WCAB basically provided an analytical

roadmap as to the construction and application of the new apportionment statutes. However, a careful review of numerous WCAB panel decisions in the immediate aftermath of the Escobedo en banc decision demonstrated that both WCJs and the WCAB began to fully comprehend the dramatic and sometimes harsh impact Labor Code Section 4663 would have on many cases. Unfortunately, many of these early panel decisions and decisions from line WCJs continued to mistakenly apply the pre-SB 899 requirement that there had to be an injury or a factor that was labor disabling in order to have valid apportionment under new Labor Code Section 4663.

It was not until the Court of Appeal issued a decision which was certified for publication in E.L. Yeager Construction v. WCAB (Gatten) (2006) 145 Cal. App. 4th 922, 71 CCC 1687 where the Court reversed the WCAB reminding the Board of their own earlier en banc decision in Escobedo and reaffirming the correct legal standards and principles in applying Labor Code Section 4663 apportionment.

The other significant case, as discussed hereinabove, was the California Supreme Court's decision in Brodie in 2007. (Brodie v. WCAB (2007) 40 Cal. 4th 1313, 72 Cal. Comp. Cases 565) The California Supreme Court articulated a number of core principles with respect to their analysis of Labor Code Section 4663, distinguishing and differentiating it from pre-SB 899 apportionment law and principles.

Valid/Legal Apportionment Determinations.

Allen v. UC San Francisco (2011) 2011Cal. Wrk. P.D. LEXIS 411 (Panel Decision)

Case Summary: Applicant employed as an administrative assistant, suffered a specific injury on January 31, 2006, to her bilateral knees. The WCJ initially issued a Findings and Award awarding the applicant 45% permanent disability without apportionment. Defendant filed a Petition for Reconsideration. The WCAB granted defendant's Petition for Reconsideration affirming certain portions of the WCJ's Finding and Award and reversing the WCJ's finding of no apportionment and instead indicated that applicant should be awarded 24% after the application of valid Labor Code Section 4663 apportionment.

Comments/Analysis: Applicant originally injured her right knee on January 31, 2006. This was followed by right knee surgery. However, even before the right knee surgery, applicant as a result of favoring her right knee, developed symptoms to her left knee. Applicant then had left knee surgery.

It is important to note that the non-industrial contributing factors supporting apportionment in this case were the applicant's long standing morbid obesity as well as documented pre-existing degenerative arthritis. The WCJ in the report on reconsideration, indicated there was no dispute that the "applicant's long- standing obesity, even as it existed before her industrial injury is a contributing factor". It appears the Board was concerned the WCJ had applied the pre SB 899 Labor Code Section 4663 "but for" standard of apportionment rather than the correct legal standard which is "to determine the extent the industrial and non-industrial factors contributed to applicant's permanent disability".

Koeplin v. Nella Oil Company (2011) 2011 Cal. Wrk. Comp. P.D. Lexis 35 (Panel Decision)

Case Summary: Applicant a cashier/clerk sustained injury to her low back as a result of a specific injury on November 8, 2001. The reporting physician was an AME in orthopedics. The WCJ issued a Findings and Award in which the applicant received 10% permanent disability after application of valid 50% Labor Code Section 4663 apportionment. Applicant filed a Petition for Reconsideration which was denied by the WCAB.

Comments/Analysis: This is an important case in terms of the principle that even though an industrial injury lights up a pre-existing symptomatic or asymptomatic condition, there may be a basis for valid Labor Code Section 4663 apportionment.

In this particular case, it was documented applicant had a history of many years of chronic back pain even prior to the industrial injury of November 8, 2001. Subsequent to the industrial injury of November 8, 2001, applicant also had an incident where her lumbar spine condition was lit up while sitting on the floor wrapping Christmas presents.

The AME in this case set forth a very thorough discussion with respect to Labor Code Section 4663 apportionment. Diagnostic studies supported the fact applicant had significant lumbar spinal degeneration/osteoarthritis. This degenerative condition was an existence at the time of her industrial injury and in fact was lit up by the injury in November 2001. After the November 2001 injury and treatment, she required medication, returned to prior levels of chiropractic adjustments, and returned to full duty and was also employed in a more demanding physical job with another company. Moreover, applicant's November 2001, spinal injury was lit up again when she was sitting on the floor wrapping presents in December 2007.

Costa v. WCAB (2011) 2011 Cal. Wrk. Comp. LEXIS 25 (Writ Denied)

Case Summary: On August 19, 2002, applicant suffered an injury to his low back, urologic system and GI tract. An MRI of applicant's lumbar spine that was obtained within 60 days of the injury dated August 19, 2002, showed underlying severe stenosis at L4-5 superimposed on a very large disc herniation. Applicant underwent lumbar spine decompression surgery but awoke paralyzed from the waist down with impotence and complete loss of bowel and bladder control. He was immediately diagnosed with cauda equina syndrome which required emergency surgery.

Applicant's primary treating physician at the time of the permanent and stationary/MMI evaluation diagnosed cauda equina syndrome, severe lumbar stenosis and a large lumbar disc herniation. He indicated applicant was permanently totally disabled but there was apportionment of 20% of the applicant's current low back disability to applicant's pre-existing congenital spinal stenosis. There was also a report from a defense QME in neurology who also indicated that although applicant was 100% permanently totally disabled, 20% should be apportioned to the applicant's pre-existing congenital spinal stenosis. In essence, the QME in neurology indicated applicant's pre-existing congenital spinal stenosis pre-disposed him to develop the cauda equina syndrome in the context of the August 19, 2002, specific injury.

Discussion: At the time of trial the WCJ rejected the primary treating physician's and defense QME's apportionment determination and awarded the applicant 100% permanent disability without apportionment. Defendant filed for reconsideration arguing there was substantial medical evidence to justify 20% apportionment of the applicant's permanent disability to the pre-existing congenital spinal stenosis. The WCAB granted reconsideration and remanded the case for further development of the record, specifically additional opinions from the reporting physicians on the issue of apportionment.

During the course of his deposition, the primary treating physician indicated the reason there should be apportionment to the pre-existing congenital spinal stenosis was because that condition made applicant's injury and disability worse. The primary treating physician conceded that prior to the industrial injury the applicant had no disability from the congenital spinal stenosis and that it was perhaps a risk factor with regard to the injury. He also testified that he could not say within reasonable medical probability that the congenital spinal stenosis would have caused any problem absent the industrial injury. However, he did indicate applicant's congenital spinal stenosis did make the injury more severe. The defense QME in neurology during the course of his deposition described the pre-existing congenital condition as a narrowing of the spinal canal making less room for the cauda equina to pass through. He explained the reason he apportioned to applicant's pre-existing spinal stenosis was because the narrower spinal canal made the applicant's cauda equina syndrome more severe than it would have been had applicant not had the congenital condition. He also agreed with the primary treating physician that the congenital spinal stenosis would not have led to development of cauda equina syndrome at this point in time absent the industrial injury.

The WCJ issued a second Findings & Award, this time indicating that the applicant incurred 80% permanent disability after valid 20% apportionment. Applicant filed a Petition for Reconsideration. He argued that the opinions of the primary treating physician and QME in neurology did not constitute substantial medical evidence and there was essentially apportionment to a risk factor and applicant's congenital spinal stenosis was dormant until it was lit up by the industrial injury.

On reconsideration which was granted, the WCAB affirmed the WCJ's apportionment determination. They noted that both the primary treating physician and defense QME found applicant's ultimate permanent disability was made worse by the existence of the pre-existing congenital spinal stenosis. The Board stated as follows:

Dr. Kent clearly stated that applicant's industrial injury would have produced a less severe cauda equina syndrome or perhaps none at all if the congenital narrowing of his spinal canal not been present. Dr. Akmakjian agreed that the pre-existing congenital spinal stenosis made his disability more severe. Thus the WCJ properly apportioned to the cause of applicant's permanent disability.

With respect to applicant's argument there was apportionment to a risk factor, the Board indicated the applicant's pre-existing congenital spinal stenosis went well beyond being a risk factor to being an actual cause of the applicant's increased permanent disability at the time the applicant sustained his industrial injury.

Also with respect to the argument that the applicant's congenital spinal stenosis was dormant until the specific injury and was lit up by the industrial injury the WCAB responded that basically the concept of "lighting up" is dead! The Board stated that "now that Labor Code Section 4663 requires that there be apportionment to the cause of permanent disability, the fact that an asymptomatic pathological condition is not labor disabling at the time of the industrial

injury, but is lit up by the injury, will not prevent apportionment. (*Escobedo v Marshalls* (2005) 70 Cal. Comp. Cases 604,611 (en banc))

LaRue v. Nordman, Cormany, Hair & Compton (2011) Cal. Wrk. Comp. P.D. LEXIS 37 (Panel Decision)

Case Summary: Applicant, a legal secretary, suffered a May 7, 1997 back injury. In terms of procedural history, the WCJ originally issued a Findings and Award determining the applicant was 100% permanently totally disabled without any basis for apportionment. Defendant filed a Petition for Reconsideration, which was granted. The WCAB rescinded the WCJ's finding of 100% permanent total disability without apportionment. Applicant's counsel then filed a Petition for Reconsideration of the WCAB's decision, which is the subject of this case. The WCAB reaffirmed its decision in rescinding the WCJ's award of 100% permanent total disability, indicating that 70% of the applicant's disability was caused by preexisting degenerative scoliosis and only 30% by her industrial injury.

Comments/Analysis: Although this is a panel decision, it is significant in that, when there is a finding or basis for legal apportionment under Labor Code §4663, it can dramatically alter the outcome of a case. In essence, the Board rescinded the WCJ's decision, remanded the case to the WCJ to review applicant's permanent disability, incorporating what they determined to be the valid apportionment determination of the defendant's QME who opined that 70% of applicant's disability was caused by nonindustrial factors, specifically, the applicant's preexisting degenerative scoliosis.

Williams v. Apollo Couriers (2011) 2011 Cal. Wrk. Comp. P.D. LEXIS 350 (Panel Decision)

Case Summary: A Findings and Award issued awarding applicant 18% permanent disability after apportionment of 50% to nonindustrial causes. The applicant suffered injury to her neck and upper back, and there was also a third party claim in which the applicant netted \$15,000.00. There was a reporting AME in orthopedics. Applicant filed a Petition for Reconsideration essentially arguing and alleging she should have received an unapportioned award.

Comments/Analysis: The AME's determination of nonindustrial apportionment was based on a combination of diagnostic studies, which included an MRI scan of applicant's cervical spine showing significant multi-level degenerative disc disease at four levels. The applicant also had been involved in multiple automobile accidents involving her low back at the age of 17 and again in 1995. Applicant stated or testified she had no residuals from the two prior auto accidents. The AME indicated the documented and established underlying degenerative disc disease was significant with respect to the issue of apportionment. The AME noted that the mechanism related to the specific 2007 injury would not have caused any of the significant degenerative

changes in the cervical spine. The major fact that the industrial injury caused the applicant's significant preexisting degenerative disc disease of the cervical and lumber spine to light up does not preclude apportionment. Therefore, the AME apportioned 50% of applicant's ultimate disability/impairment to the specific injury and 50% to the underlying degenerative disc disease in her neck and back. The WCJ and the Board characterized the AME's opinion as substantial and well-reasoned.

1.1 Joint Replacement Issues

Solano County Probation Department v.WCAB (Aguilar) (2011) 76 Cal. Comp.Cases 1, (Court of Appeal, First Appellate District, not certified for publication)

Case Summary: Applicant suffered a cumulative trauma to her left shoulder, left elbow, low back, and left hip as a result of employment with the Solano County Probation Department. The primary reporting physician was an AME in orthopedics. The WCJ did not follow the AME's opinion that there was significant apportionment, finding applicant entitled to an unapportioned award. Defendant filed a Petition for Reconsideration that was denied, and subsequently filed for a Writ of Review with the Court of Appeal, which was granted. The Court of Appeal annulled the WCAB's decision and remanded the case for further proceedings.

Comments/Analysis: This case in terms of injuries and apportionment issues, spans the period before SB 899 as well as post-SB 899, and the changes to legal apportionment pursuant to Labor Code §4663. Over the span of several years the AME examined the applicant at least four times, issued several reports, and was deposed once. With respect to applicant's left hip, in October of 2002, prior to SB 899, the AME indicated applicant did have preexisting arthritis in her left hip, but concluded the arthritis was not symptomatic or disabling; therefore, he indicated all of the applicant's left hip disability should be apportioned to an industrial cumulative trauma and none to nonindustrial causes.

The AME then examined applicant again in January of 2005 with respect to her left hip after she had hip replacement surgery. He acknowledged in his report the new apportionment requirements under SB 899. He indicated there was, in his opinion, a basis to apportion the applicant's left hip disability. He apportioned approximately two-thirds of her disability as a direct result of the cumulative trauma and one-third as the result of disease and pathology. In essence, with respect to the left hip disease and pathology, he indicated in his reports and deposition that the nonindustrial causes of applicant's left hip disability was her obesity and arthritis. He indicated these two factors were connected, in that the arthritis was the cause of the hip injury and that the obesity was at least, in part, the cause of the arthritis, i.e., the arthritis was due to the obesity. With respect to the applicant's spine/back disability, he initially indicated he believed obesity played a role in her spinal disability to the extent that 10% was the direct result of disease and the pathology of obesity with the remainder to the industrial cumulative trauma. He reaffirmed his prior assessment as to the left hip disability, in that 67% of the disability was a direct result of the cumulative trauma and the remainder going to disease and pathology, including obesity. He reevaluated the applicant in 2006, and again indicated 10% of the spine disability was the result of pathology due to obesity and approximately 33% of the left hip disability was the result of obesity and arthritic degeneration. He also indicated in his later deposition that the applicant's arthritis led to her need for hip replacement surgery. In a report subsequent to his deposition in 2007, he revised his opinion on apportionment solely related to

the applicant's spine/back, indicating that he had reviewed new studies and, therefore, was not attributing any of the applicant's spinal disability to her obesity.

In annulling the WCAB's decision that there was no basis for apportionment, the Court of Appeal indicated the AME had consistently attributed one-third of applicant's left hip disability to nonindustrial causes, i.e., arthritis and obesity. He never wavered from this opinion.

With respect to the *Escobedo* and *Gatten* standards, the Court of Appeal found the AME's reports and testimony adequately explained the basis for his opinion on apportionment under the correct legal standards.

2. Failure of Proof (Defense)

Bridgestone Firestone v. WCAB (Fussell) (2011) (2011 Cal. Wrk. Comp. LEXIS 179 (Writ Denied)

Case Summary: Applicant suffered an admitted industrial injury to his left ankle on May 26, 2004, while employed as a territory manager for Bridgestone Firestone. He remained with his initial primary treating physician for the first year after the injury. Applicant had pre-existing diabetes and there was no documentation or medical records to indicate his diabetes was not fully controlled before the industrial injury of May 26, 2004. In fact, the treating physician indicated applicant had appropriate glycemic and nutrition control with respect to his pre-existing diabetes.

However, applicant's pre-existing diabetes did complicate the applicant's healing in recovering from both the industrial injury and two left ankle surgeries he had in June of 2004. Subsequent to his surgeries, applicant began to develop a pressure ulceration on his injured left ankle. Following surgery, applicant was off work for five months and then was released to return to work light duty. Subsequent to the surgeries, he was also using a cane and when possible a wheelchair. However, applicant lived in a second story apartment without an elevator and there were periods of time when he had to leave the wheelchair and essentially hop up a flight of stairs to his apartment which apparently aggravated and complicated his recovery from the two left ankle surgeries. Applicant's second treating physician recommended another surgery which applicant wanted to proceed with. However, he had a recurrence of left ankle ulcerations primarily related to his diabetic condition which made the proposed surgery inadvisable.

The left ankle ulcerations and other complications ultimately resulted in the necessity of a left below the knee amputation in July of 2006. Applicant was diagnosed with osteomyelitis as well as pressure ulcerations. It was determined that both the osteomyelitis and pressure ulcerations were essentially caused by a prescribed left ankle brace by applicant's first primary treating physician.

Discussion: In February 2011, the WCJ issued a Finding & Award awarding the applicant 100% permanent total disability without apportionment. The WCJ determined the amputation itself was a direct result of applicant's industrial injury without any apportionment related to the contributing factor of applicant's underlying diabetes. Defendant filed a Petition for Reconsideration contending there should be some apportionment pursuant to Labor Code § 4663 related to applicant's underlying diabetic condition which they contended was a contributing factor in his ultimate disability/impairment. Basically the WCAB in denying defendant's Petition for Reconsideration, followed the WCJ's reasoning, relying on persuasive medical evidence that although applicant was a diabetic, he did not develop his ulcerations, osteomyelitis, and Charcot joint prior to the industrial injury. There was no evidence indicating the normal progression of applicant's diabetes would have resulted in the below the knee amputation. The

WCJ concluded it was applicant's industrial left ankle injury, the non-union ankle joint and the first two failed ankle surgeries in June of 2004, as well as the ill advised recommended braces that aggravated applicant's asymptomatic and non-disabling diabetic neuropathy and caused a Charcot joint, pressure ulceration and severe left ankle varus deformity leading to amputation as opposed to the applicant's underlying previously well controlled diabetes.

Edwards v. SCIF (2011) 2011Cal. Wrk. Comp. P.D. LEXIS 429 (Panel Decision)

Case Summary: Applicant was employed by the State of California as a highway maintenance lead worker. She suffered admitted industrial injuries to her head, neck, brain, and psyche on August 22, 2005, and to her left ankle on October 11, 2002. It is important to note applicant's brain/head injury resulted in a traumatic brain injury, leading to dementia. The WCJ awarded 88% permanent disability after 15% apportionment related to applicant's pre-existing attention deficit hyperactivity disorder (ADHD). Applicant filed a Petition for Reconsideration essentially arguing she should receive 100% permanent total disability without apportionment and she should be deemed to have a presumed permanent total disability under Labor Code Section 4662 related to "incurable mental incapacity". The WCAB reversed the WCJ, rescinding the Joint Findings and Award returning the matter for a new decision indicating applicant should receive an award of 100% permanent total disability without apportionment.

Discussion: This case is interesting based on two different aspects. The formal rating instructions from the WCJ included among several factors that "applicant is totally precluded from the open labor market." There is a discussion by the WCJ in the report on reconsideration, that under the 2005 permanent disability rating schedule, permanent total disability represents the level of disability at which the employee has sustained a total loss of earning capacity. The Board also discussed the rather troublesome provision of Labor Code Section 4662 related to situations and circumstances in which permanent and total disability is presumptively found. Except for these presumptive cases, in all other cases, permanent and total disability shall be determined in accordance with the fact. There is a very refined and elaborate discussion of the interplay between Labor Code Sections 4658(d), 4659(b), and Labor Code Sections 4660, and 4662. The Board noted that Labor Code Section 4658(d) covers disabilities from 0%-99.75%. However, computation of any benefit owed when there is a permanent total disability is governed by Labor Code Section 4659(b). Because there are separate sections for computing disability payments in the cases of partial and total permanent disability, which lends support to the view there is a legally significant difference between disabilities that are a percentage of total disability and those that are total.

The Board indicated that Labor Code Sections 4662, and 4659(b) establish that separate statutory provisions may apply in cases of permanent total disability. They also noted that Section 4662 was unchanged by SB 899. In part it provided "permanent and total disability shall be determined in accordance with the fact". The Board also acknowledged this language had not

been definitively interpreted in a binding appellate or en banc decision. However, they indicated or characterized it as appearing to authorize a finding of permanent total disability based on an evaluation of the evidentiary record of an individual case.

The Board noted both the AME and the WCJ in this case concluded applicant was totally precluded from the open labor market. The Board then cited the Ogilvie decision which indicated there was no meaningful difference between the old characterization of ability to compete in the open labor market standard and the new “diminished future earning capacity” standard.

With respect to the Labor Code Section 4663 issue of whether there should be any valid legal apportionment to applicant’s preexisting ADHD and depression, the Board noted that when an injured worker sustains a total and disabling industrial injury and an opinion indicates that a preexisting condition probably had adverse effects but was not in fact disabling is not necessarily a sufficient basis for legal apportionment. The Board did acknowledge that ratable disability prior to the industrial injury was not required under Labor Code Section 4663. They concluded that “however, in a case such as this one, where applicant’s industrial traumatic brain injury with resulting dementia was, in itself, totally disabling, apportionment to her pre existing, non-disabling, non-industrial condition would make sense only if percentages of permanent disability could exceed 100 percent”.

Sean Gilbert v. Oakland Raiders; ACE USA, Administered by ESIS (2011) (Panel Decision)

Case Summary: Applicant was a professional football player in the NFL for eleven seasons. He played for four different teams. The last team he played for was the Oakland Raiders in his NFL season in 2003 when he played in six games. However, the entire Labor Code Section 5500.5 liability period was with the Oakland Raiders. The WCJ issued an Award of 100% permanent total disability without any apportionment. Predictably, defendant filed a Petition for Reconsideration indicating that applicant’s QME failed to properly address issues of causation and apportionment between the applicant’s impairment and disability arising out of his employment with the Oakland Raiders and those related to prior injuries he had with previous employers. There was also an issue with respect to whether or not the WCJ determined the correct rate for permanent disability.

Discussion: Given the fact this was a pre-2005 injury, respective counsel selected their own reporting QMEs. The defense QME, in a succession of reports, postulated an apportionment opinion based on a formula of the percentage of time the applicant played for each NFL team over his eleven year career. Evidently the defense QME had been provided with information with the precise number of plays in which the applicant had participated for each team.

In contrast, applicant’s reporting QME opined applicant’s permanent total disability was attributable to a continuous trauma sustained throughout his career as a professional football

player and there was no evidence of non-industrial disability or other factors both before and subsequent to the industrial injury that could be apportioned to. Applicant's QME also issued a lengthy rebuttal of the formula used by the defense QME based on a percentage of time applicant played for each team.

It is important to note that for some unexplained reason defense counsel never cross-examined applicant's QME notwithstanding the potential for a 100% permanent total disability finding.

The WCAB, in denying defendant's Petition for Reconsideration, essentially characterized it as a failure of proof pointing out defendant had failed to cross-examine applicant's QME and it was defendant's burden to prove apportionment citing the Kopping case.

Commissioner Moresi dissented, indicating applicant's QME's opinions and reports did not constitute substantial medical evidence in view of applicant's multiple injuries and medical treatment prior to his employment with the Oakland Raiders and recommended the case should be remanded for further development of the record citing Benson and Escobedo cases.

Comments: This is a classic failure of proof. Evidently defense counsel had come up with a theory that he could somehow premise valid Labor Code Section 4663 apportionment on a percentage of plays the applicant had participated in for each of his NFL teams. It is unclear from the present record whether defense counsel even established a record via the applicant's deposition and medical records as to prior specific injuries the applicant may have suffered before he played for the Oakland Raiders or possibly a separate cumulative trauma. In any event, the failure to cross-examine applicant's reporting QME is mystifying!

This decision also requires some analysis and clarification of the interaction between the Benson case and Labor Code Section 4663. The author's analysis and review of the Benson case is that the focal issue of apportionment is between successive injuries where there is established California jurisdiction resulting in separate ADJ case numbers. There are no reported cases that the author is aware of under Benson where California jurisdiction and issue as to successive injuries.

The real issue in this case is not whether there it is to be a joint or separate Award, but rather strictly whether there are factors that contributed to the applicant's final level of impairment or disability that did relate to his employment with the Oakland Raiders. In this situation, jurisdiction is irrelevant. For example, if part of the applicant's impairment or disability related to his lumbar spine, and he suffered a specific lumbar spine injury while playing for another NFL team where he may have received treatment beyond first aid after the incident or lost time as manifested in practices or NFL games, then there clearly would be a potential basis for Labor Code Section 4663 apportionment of the Oakland Raiders liability to factors other than his employment with the Raiders.

3. Overlap Issues (Burden of Proof)

Robinson v. WCAB (County of Sonoma) (2011) 76 Cal. Comp. Cases 847; 2011 Cal. Wrk. Comp. LEXIS 112 (Writ Denied July 21, 2011; Writ of Review filed with Supreme Court denied on September 14, 2011)

Case Summary: This is an extremely complicated case procedurally, medically and factually. Applicant was employed as a correctional officer and originally suffered an admitted low back injury on November 25, 2001, which resulted in a 21% Stipulated Award issued on September 24, 2004. Applicant then suffered a subsequent admitted neck injury on June 27, 2005.

Procedural History/Chronology: The original Findings & Award issued by the WCJ in this case was on October 29, 2008, in which applicant was awarded 8% permanent disability for the specific June 27, 2005, low back injury after apportionment pursuant to both Labor Code Sections 4663 and 4664. Applicant filed for reconsideration alleging the WCJ committed error by apportioning 21% permanent disability from the prior Stipulated Award to the applicant's low back related to a specific injury of September 24, 2004. The WCAB granted reconsideration and rescinded the October 29, 2008, Findings & Award and returned the matter to the trial level for further development of the record and further proceedings related specifically to the issue of apportionment.

Subsequent to the remand by the WCAB, applicant had what appears to be another cervical spine surgery. On September 13, 2010, the WCJ issued a second Findings & Award that determined applicant's June 27, 2005, neck injury caused permanent disability of 12% after apportionment under both Labor Code Sections 4663 and 4664.

Applicant again filed a Petition for Reconsideration which was denied by the WCAB majority panel on April 25, 2011, with Commissioner Caplane dissenting.

Applicant's argument on reconsideration was essentially there was no evidence that the Legislature in enacting SB899 intended for both Labor Code Section 4663 and 4664 to be applied concurrently to the same case. In addition, with respect to the prior Award of 21% to applicant's low back, defendant failed to prove overlap essentially arguing the prior Award of September 24, 2004, was under the 1997 Permanent Disability Rating Schedule and the current neck impairment or disability for the June 27, 2005, neck injury was under the 2005 Permanent Disability Rating Schedule.

In the Report on Reconsideration, the WCJ indicated that for purposes of reconsideration, applicant no longer contested the finding of apportionment under Labor Code Section 4663 related to the neck injury of June 27, 2005, essentially conceding under Labor Code Section 4663 that 80% of applicant's cervical impairment was related to the industrial injury of June 27, 2005, and 20% due to non-industrial factors per Labor Code Section 4663. The primary

contention was the Labor Code Section 4664 issue of overlap and whether there were overlapping factors of disability between the June 27, 2005, neck injury and the prior specific low back injury of November 25, 2001, that resulted in a 21% Award issued on September 24, 2004.

In denying applicant's Petition for Reconsideration, the Board in their April 25, 2011, decision indicated there was no legislative intent they could find that prohibited the application of both Labor Code Sections 4663 and 4664(b) to the same case. They indicated the AME in the case was able to properly convert under the AMA Guides the disability caused by the November 25, 2001, low back injury to the 2005 Permanent Disability Rating Schedule by evaluating any impairment and disability under the relevant "Range of Motion" (ROM) Guidelines as set forth in the AMA Guides. The end result was that applicant's November 25, 2001, industrial neck injury caused permanent disability of 22% under the current 2005 schedule for rating permanent disabilities under the Range of Motion Method. Pursuant to Labor Code Section 4664, this 22% permanent disability rating was subtracted from 34% to produce a final rating of 12% disability.

Applicant then filed a Writ with the First District Court of Appeal which was denied on July 21, 2011. Applicant's subsequent Petition for Review to the Supreme Court as indicated above was denied on September 14, 2011.

Discussion: As indicated hereinabove, this is a very complex and intriguing case. It involves two significant issues. First, both the Court of Appeal and the WCAB indicated that in a proper situation both Labor Code Section 4663 and 4664(b) could be applied to the same case. The Court of Appeal quoted the WCAB's Determination and Opinion on the Labor Code Section 4663 and 4664 application to the same case by stating:

With regard to the applicant's argument that section 4663 apportionment and section 4664 apportionment cannot be applied in the same case, we see nothing in the language of the statutes or in their legislative purpose to support such a conclusion. As the Supreme Court held in *Brodie v. Workers' Comp. Appeal Bd.* (2007) 40 Cal. 4th 1313, 1328 [72 Cal. Comp. Cases 565], "the new approach to apportionment is to look at the current disability and parcel out its causative sources – non-industrial, prior industrial, current industrial – and decide the amount directly caused by the current industrial source." We agree that it is improper to apportion to the same prior industrial injury twice. However, in this case the WCJ apportioned to non-industrial factors pursuant to section 4663 and to a prior industrial injury pursuant to section 4664. There was no overlap between what was apportioned under section 4663 and section 4664.

With respect to the more troublesome issue as to whether or not defendant met their burden proving overlapping factors of disability, even though there were different body parts involved, i.e., the neck versus the low back and under different schedules per the requirements of Kopping and Minvielle, the WCAB and Court of Appeal indicated the AME was able to adequately explain how he converted the impairment and disability related to the applicant's prior low back

injury of November 25, 2001, to the AMA Guides using the ROM Method. Applying the ROM Method to the applicant's older low back injury the AME indicated it would equate to a 12% whole person impairment under the current AMA Guides. The WCJ then indicated in essence that:

Based, therefore, upon the Appeals Board Opinion and Order indicating that apportionment under Labor Code Section 4664 should be addressed by describing the present and prior spinal impairments under the same method of impairment determination, it was determined to utilize Dr. Ramsey's opinion that the applicant's present neck injury had caused 25% impairment under the ROM Method and Dr. Ramsey's opinion that the previous low back injury had caused a 12% whole person impairment under the ROM Method.

Both the Court of Appeal and the WCAB majority indicated that this case was distinguishable from Kopping and Minvielle. In Minvielle, the reporting AME indicated it was not possible to re-rate the prior disability using the same method as the subsequent disability. In this particular case, however, the AME was able to provide an AMA Guides rating using the same standard as the current injury. Therefore defendant properly proved overlap under Kopping, Sanchez, and Minvielle.

Wynne v. Lumend, Inc. (2011) 2011 Cal. Wrk. Comp. P.D. LEXIS 199 (Panel Decision)

Case Summary: Applicant, a medical engineer, suffered a cumulative trauma injury ending on May 19, 1999, to his back which resulted in an award of 55% permanent disability without apportionment.

Applicant had previously suffered a prior 1987 specific back injury which resulted in a 1990 lumbar fusion surgery. That case was resolved by way of a Compromise and Release.

At the time of trial defendant asserted there was a legal basis for both Labor Code §4664 and §4663 apportionment.

Discussion: Defendant's argument that there should be valid Labor Code §4663 apportionment was based solely on the fact there was a prior Compromise and Release for the specific 1987 back injury, which had a preclusion from no heavy work and had resulted in the 1990 lumbar fusion surgery. The reporting physician indicated the 1987 injury was "conclusively apportionable" pursuant to Labor Code §4664 because applicant was precluded from heavy work following that injury. The same physician indicated there was a basis for apportionment under Labor Code §4663 because the applicant's earlier back fusion surgery in 1990 "accelerated" the subsequent injury he incurred while working for his current employer.

The WCAB quickly dealt with the Labor Code §4664(b) issue discussing and applying the Kopping case. In essence, defendant failed to prove the existence of any prior award, or if there was a prior award, it overlapped with the current impairment or disability. It is defendant's dual burden to show both the existence of a prior award, which they did not do here, and also once the award is established to show the factors of disability overlap. Even if the defendant in this case had the benefit of a prior award, which the Compromise and Release in this case was not, it would have been difficult for them to prove the overlap element.

However, the more provocative issue in this case was Labor Code §4663 apportionment. Unlike Labor Code §4664, the concept of medical rehabilitation from a prior industrial injury or disability remains viable under current Labor Code §4663 after SB 899.

There was a plethora of details and testimony from the applicant that was essentially un rebutted. He testified that following his prior fusion surgery in 1990 he was symptom free after a period of time and was ultimately released to work without restrictions by his treating physician. He also indicated he had another surgery in 1994 where he lost time from work for only two weeks. Six months after his 1994 laminectomy, applicant testified he no longer had any complaints related to his back and he had no symptoms before his hire with Lumend. He testified that before he started working for Lumend in 1997 he was able to lift weights between 1995 and 1997, he was also working out, biking and running. By mid-1996, he was back to normal with no restrictions for lifting weights or repetitive motion from his treating physician. He was also released to return to work with no restrictions or accommodations.

Based on this un rebutted testimony that he had fully recovered from the disability caused by his earlier injury in 1987 and subsequent two surgeries, applicant established he was fully rehabilitated from his earlier disability before he incurred the industrial cumulative trauma.

Moran v. Department of Youth Authority, Legally Uninsured State Compensation Insurance Fund (2011) 2011 Cal. Wrk. P.D. LEXIS 43 (Panel Decision)

Case Summary: Applicant was employed as an office tech for defendant, Department of Youth Authority. She filed a cumulative trauma for the period of December 16, 1998 to March 27, 2001, related to her back, right shoulder, right upper extremity, psyche, opiate dependence, and gastrointestinal system. Previously, while working for the same employer, she suffered a specific injury on May 27, 1998, to her low back and tail bone resulting in an award of 24% permanent disability. In addition to the cumulative trauma, applicant filed a Petition to Reopen with respect to the old specific injury of May 27, 1999, and the award of July 5, 2000, for 24% related to that injury.

In terms of procedural history, the trial WCJ originally found applicant was permanently totally disabled, but that defendant was entitled to have applicant's prior award of 24% subtracted from her award of 100% permanent total disability. Applicant filed for reconsideration, which was

granted by the Board. The WCAB reversed the WCJ's determination and held applicant should be awarded 100% permanent total disability without deduction or subtraction of her prior award of 24%. Defendant then sought reconsideration of the Board's Opinion and Order reversing the WCJ.

Comments/Analysis: This is an extremely complicated and interesting case on the subtleties of overlap with respect to Labor Code §4664(b). The WCJ in the original Findings and Award finding overlap justifying a 24% reduction/deduction of the applicant's 100% permanent total disability award failed to deal with the intricacies of overlap as expressed by the *Kopping* decision as well as decisions prior to SB 899 on overlap. It should be noted applicant did have four surgeries on her right shoulder related to the new cumulative trauma injury. There was a reporting AME in the case. With respect to the AME's deposition taken in 2009, he testified that the direct cause of applicant's total disability was the shoulder injury and its sequelae, which included surgeries and narcotic dependence. He also indicated applicant would be totally disabled by reason of those conditions, i.e., the cumulative trauma injury irrespective of any specific low back injury she may have sustained. He also opined there was "no overlap between the cause of the total disability and any disability that flows from the low-back injury." The WCAB in reversing the WCJ's finding of overlapping 24% permanent disability related to the prior specific injury, indicated there was no overlap of any permanent disability related to the prior stipulated award and the permanent disability caused by the cumulative trauma injury. The WCAB's decision set forth several significant principles with respect to overlap.

Principles of Applying Overlap and Overlapping Disabilities:

Overlap of permanent disability occurs when factors of disability resulting from the current injury duplicate factors resulting from a different injury or condition, regardless of whether the injuries affect different body parts. (*Mercier v. WCAB* (1976) 16 Cal. 3d 711 (41 Cal.Comp.Cases 205).

The Board also pointed out that to the extent that permanent disabilities overlap, the injured worker is not entitled to recover twice for the same affected or diminished abilities. "However, permanent disabilities do not overlap if they affect different abilities to compete in the open labor market and earn." (*Sanchez v. County of Los Angeles* (2005) 70 CCC 1440 (Appeals Board En Banc).

The WCAB also cited a 1984 Court of Appeal case, *Newman v. WCAB* (1984) 152 Cal.App.3d 219 [49 Cal.Comp.Cases 126], with respect to a critical principle of overlap. In the *Newman* case:

“The court addressed the issue of overlapping disabilities in a case where the injured worker suffered a stroke resulting in total permanent disability from hearing loss, loss of the use of his left arm, decreased vision, loss of memory and learning disabilities. The injured workers had a pre-existing non-industrial condition, a childhood leg amputation, requiring him to walk with crutches and a cane. The Appeals Board apportioned the 78% permanent disability from the amputation from the 100% permanent disability caused by the stroke, resulting in an award of 22% permanent disability. Based upon the absence of proof of overlapping disabilities, the court reversed and ordered the Board to award permanent total disability”.

The court specifically held:

Apportionment is not proper merely by finding petitioner suffered two disabilities distinct in time. As our Supreme Court noted in *Mercier v. WCAB* (1976) 16 Cal.3d 711 [129 Cal.Rptr. 161, 548 P.2d 361], “Obviously, the mere occurrence of a second injury does not require apportionment. In each case it must be determined if the second injury impairs the employee’s ability to perform work in the same manner as the first injury. If so, apportionment is not proper, but only to the extent the two injuries overlap.” (Id., at p. 714, italics added.)

Applying these principles to the present case, the WCAB ruled the defendant had failed to carry its burden of proving that applicant’s permanent disability caused by the old 1998 specific low back and tail bone injury for which he received 24% overlapped with the permanent disability caused by the continuous trauma injury to the applicant’s right shoulder .

Citing the *Kopping* case, the WCAB in the instant case stated:

There is no basis to conclude that the permanent disabilities caused by the prior injury to applicant’s low back and tailbone and her cumulative trauma injury to her right shoulder affect the same abilities to compete in the open labor market and earn. Accordingly, we find that defendant failed to prove overlap and that it is not entitled to apportionment pursuant to section 4664. (*Kopping v. WCAB* (2006) 142 Cal.App.4th 1099 [71 Cal.Comp.Cases 1229].)

In short, the Board indicated the medical evidence from the AME established applicant was permanently totally disabled solely as a consequence of her right shoulder injury, which is a condition unrelated to her prior low back injury. Any other conclusion, finding, or opinion fails to fully consider the totality of the medical evidence.

Lakew v. San Francisco Hilton Hotel & Tower (2011) 2011 Cal. Wrk. Comp. P.D. Lexis 326 (Panel Decision)

Case Summary: Applicant while employed as a waitress suffered a cumulative trauma injury ending on July 8, 2003. She received a 100% permanent total disability award related to injuries to her bilateral upper extremities, bilateral lower extremities, psyche, low back, and neck. Applicant worked for the San Francisco Hilton Hotel for approximately 24 years. She also had received a prior award in 1994 for a specific injury she suffered on January 22, 1993, to her low back of 25½% permanent disability. Defendant filed a Petition for Reconsideration that was denied alleging entitlement to both Labor Code Section 4663 and 4664 apportionment. The WCAB denied reconsideration.

Comments/Analysis: With respect to the Labor Code Section 4663 issue, it should be noted the applicant did have bilateral carpal tunnel surgery and had significant psychiatric impairment. With respect to the alleged basis for Labor Code Section 4663 apportionment, the reporting AME in orthopedics indicated 10% of applicant's spine disability was related to non industrial factors, 40% to applicant's 1993 specific injury at the Hilton, and 50% to the cumulative trauma which ended in 2003. All of this related only to applicant's spine and not to any other orthopedic body part or condition. The WCJ in his report on reconsideration adopted by the WCAB, indicated he believed the AME's opinion with respect to 4663 apportionment did not meet the Escobedo standard and the AME did not clarify how and why applicant's non-industrial degenerative disease contributed to causation of her impairment or disability. The AME also failed to explain the mechanics by which such non-industrial anatomic or structural compromise contributed to overall causation of the applicant's ultimate impairment or disability. The WCJ noted also that with respect to all of the factors of disability and the rating instructions, after adjustment for age and occupation, applicant's psyche rated out to 92% permanent disability alone without even considering 27% to the spine, 31% to the upper extremities, and 23 % to the lower extremities.

With respect to Labor Code Section 4664 apportionment, defendant argued the WCJ should have deducted applicant's prior 25½% permanent disability award related to her low back. The WCJ issued a lengthy analysis and discussion of overlap between the old award and the disability related to applicant's spine under the new cumulative trauma injury. It is important to note this is not an overlap issue involving old schedule, new schedule, i.e. the 2005 Permanent Disability Rating Schedule versus the 1997 Permanent Disability Rating Schedule. This is a pure overlapping of factors under the same Permanent Disability Rating Schedule, i.e., the 1997 schedule. The WCJ noted that with respect to the applicant's prior award of 25½% spine permanent disability, it was based upon subjective factors of disability only. Although, there was a work restriction of a 15% standard indicated by one reporting physician for the applicant's old injury, the actual award of 25½% was based on subjective factors of disability alone. The WCJ carefully pointed out the current low back disability under the new CT was predicated only on a work restriction limiting the applicant to light work. In the WCJ's opinion, work restrictions or preclusions do not strictly overlap with subjective factors of disability and therefore, Labor Code Section 4664 apportionment was not warranted.

This is a very significant case even though it is a Panel decision on how intricate the overlap equation can become. Even when you have the same part of the body involved, there may not be overlapping factors of disability.

4. Benson Issues.

Joong Kwong v.Metro Building Maintenance, National Union Fire Insurance Company, CIGA (2011) 2011 Cal. Wrk. Comp. P.D. LEXIS 36 (Panel Decision)

Case Summary: The trial WCJ issued a Findings Award and Order on October 26, 2010, finding applicant a supervisor/loader/unloader suffered a specific April 20, 2000, injury to his spine as well as a cumulative trauma injury from October 24, 1999 to July 9, 2000, related to psychiatric injury, spine and internal systems in the form of bowel and incontinence. The WCAB awarded 84% permanent disability in a joint and several award without apportionment.

Both defendants filed a Petition for Reconsideration which was granted by the WCAB. The WCJ's Findings and Award were rescinded and the case returned to the trial level for further proceedings and new decision consistent with the WCAB's opinion.

Discussion: This case involved the Application of the principles in Benson, as well as the impact of stipulations as being binding upon the parties. There were a number of reporting physicians in this case including an AME in orthopedics. There were also reporting physicians in internal medicine, pain management and psychiatry. Originally the AME in orthopedics found no basis for apportionment. However, in a subsequent deposition the AME indicated the applicant suffered both an orthopedic cumulative injury and a specific injury although the resultant disability was mostly attributable to the cumulative trauma. The AME indicated that with respect to non-industrial causes 15% of the applicant's orthopedic disability was preexisting in that applicant had documented arthritis, which although it could be considered pathology, the applicant also had a history of symptomatic back pain. Moreover, at the time of trial the parties stipulated applicant sustained a specific injury to his spine on April 20, 2000, and also there was a stipulation by the parties that applicant suffered a cumulative trauma to his spine, internal system and psychiatric injury. Therefore, the only significant issues at trial were permanent disability and apportionment. Issues of contribution and reimbursement were deferred.

In rescinding the trial WCJ's 84% unapportioned award, the WCAB did a very thorough analysis of the Escobedo and Gatten cases. They indicated that based on a review of case law and Labor Code §4663, that under the new apportionment regime, there can be apportionment to pathology. The orthopedic AME in this case essentially apportioned causation of impairment two thirds to the cumulative trauma and one third to the specific injury. The Board also noted the parties stipulated to separate and successive injuries citing the Weatherall case 65 CCC 1. With respect to the internal injuries, the WCAB also noted that the reporting physician in internal medicine opined that apportionment with respect to the internal injury should follow the orthopedic apportionment. It was applicant's orthopedic condition that caused the underlying bowel incontinence. Therefore, the same apportionment formula between the specific and CT injuries applied being one third to the specific injury, and two thirds to the cumulative trauma injury.

With respect to whether or not there should be separate awards per Benson, or a joint award, the WCAB discussed the Benson holding and indicated based on their review of the medical reporting from the AME and other reporting physicians constituted substantial medical evidence, "that the industrial orthopedic disability is attributable one-third to the specific injury and two-

thirds to the cumulative trauma and that applicant is entitled to two separate awards rather than one”.

Comments/Analysis: The application of Benson by the WCAB in reversing the WCJ eliminated the joint single 84% award and resulted in two separate awards of 55% for the cumulative trauma injury, and 29% for the specific injury.

Lester v. WCAB (2011) 2011 Cal. Wrk. Comp. Lexis 162 (Writ denied)

Case Summary: This case has an extensive procedural history. Applicant was employed as a Tax Technician by the State of California Board of Equalization. Initially, she was awarded 100% permanent total disability based on a specific injury of October 16, 1992, involving injuries to her bilateral upper extremities, back and fibromyalgia. There was also a cumulative trauma from March 19, 1988 through January 1, 1996, for the same body parts and conditions. The reporting physician was characterized as an IME. The 100% award was rescinded on reconsideration and remanded for further development of the record.

A second Findings & Award issued once again determining applicant was 100% permanently totally disabled. The Board granted defendant’s Petition for Reconsideration, and remanded the case, instructing the WCJ to re-visit the issue of permanent disability and apportionment in light of the Benson decision. In terms of development of the record, Dr. Nagelberg’s deposition was rescheduled.

It should be noted that Dr. Nagelberg was deposed three times. The first on August 24, 2005, the second on May 28, 2008, and the third and final deposition on April 20, 2010. In his first two depositions, Dr. Nagelberg definitively opined that 50% of applicant’s permanent disability was apportionable to the specific and the other 50% to the cumulative trauma. In the second deposition on May 28, 2008, he once again reaffirmed his first opinion in his August 24, 2005, deposition that his opinion on apportionment between the two injuries had not changed. He also indicated in his second deposition that both the specific and CT injuries were significant and could have separately resulted in the diagnosis of fibromyalgia. In his third and last deposition on April 20, 2010, Dr. Nagelberg reversed his prior opinion, indicating he believed the resultant impairment and disability from the two successive injuries were essentially intertwined and he could not reasonably apportion impairment or disability between the two injuries. He then used the “inextricably intertwined” mantra to support the complete change in his opinion.

The WCAB granted defendants Petition for Reconsideration and reversed the WCJ’s combined award of 100% permanent disability.

Discussion: In reversing the WCJ and indicating applicant should receive two separate awards of 50%, the Board stated that Dr. Nagelberg’s testimony in his third deposition did not constitute substantial medical evidence to justify a combined award. The Board could not understand the basis for Dr. Nagelberg changing his opinion during the course of his April 20, 2010 deposition without any new information to support it.

Comments/Analysis: The obvious lesson here is that if a doctor after repeatedly reaffirming his opinion that he could apportion between a specific and successive CT injury and then reversing himself 180 degrees in a third deposition without any new information to support the change, will not constitute substantial medical evidence. This is just one more case in what appears to be a protracted and evolving battle about whether a physician's mere characterization of impairment and disability is allegedly so "inextricably intertwined" between successive injuries will constitute substantial medical evidence or be determined to be speculative.

Visalia Unified School District v. WCAB (Marshall) (2011) 2011 Cal. Wrk, Comp. Lexis 177 (Writ denied)

Case Summary: Within a short period of time the applicant, a teacher suffered two specific injuries. The first was on October 29, 2004, related to her low back, neck and right elbow. She then suffered another specific injury on February 2, 2005, to both upper extremities, low back, neck, and right toe. She also alleged injuries to her knees and urinary system.

The WCJ issued a combined Findings & Award in which the applicant received 78% permanent disability without apportionment between the two specific injuries. The reporting physician was an AME. Both applicant and defendant filed Petitions for Reconsideration. Defendant's Petition for Reconsideration alleged it was error for the WCJ to find a combined/joint award for the two separate specific injuries as opposed to two separate awards pursuant to Benson. The WCAB affirmed the WCJ's joint award and defendant's Writ was denied.

Discussion: The reporting AME in this case during the course of her deposition demonstrated a thorough understanding of the fundamental principles and requirements of the Benson decision. She indicated that in previous reports on other cases she had been able to separate out and apportion the disability between successive injuries. However, in this case she could not do so without speculating. Basically she indicated there were two dates of injury within a very close period of time. She did concede that both dates of injury contributed to disability, but after evaluating the applicant two years after the two injuries in question and considering all of the medical evidence, she could not within reasonable medical probability apportion between the two injuries. She described both injuries as "one big conglomeration of injury." The AME also made it clear she did not oppose apportioning between injuries when she had an adequate basis for doing so. The Board also indicated the Benson decision itself states that in certain limited circumstances, physicians may be unable to apportion between various causes of disability with respect to successive injuries. Based on the particular facts of this case and deposition of the AME, the WCJ and Board concluded the AME had reasonably analyzed all of the particular facts and persuasively concluded it was not medically reasonable to separate the intertwined causes in order to give an approximate percentage of apportionment between the successive injuries.

Harris v. State of California, Department of Consumer Affairs, SCIF (2011) 2011 Cal. Wrk. Comp. P.D. LEXIS 71 (Panel Decision)

Case Summary: Based on a timely filed Petition to Reopen a previously joined cumulative trauma injury ending in 1999 and a specific injury of October 25, 2000, the WCAB awarded and found applicant was 100% permanently totally disabled without any basis for apportionment related to the increase in the prior awarded disability of 65% which had increased to 100%. Defendant filed a Petition for Reconsideration arguing the WCJ had failed to apply *Labor Code §4663* apportionment to the increased permanent disability above 65% and also failed to apply apportionment under Benson by apportioning and finding separate awards, relative to the CT and specific injuries as opposed to one joint award. The WCAB denied defendant's Petition for Reconsideration and affirmed applicant's 100% permanent total disability award.

Discussion: Applicant originally filed a CT claim for the period of June 23, 1998 through June 23, 1999, which resulted in a Stipulated Findings & Award of 39% permanent disability that issued on May 7, 2000. Applicant then filed an additional claim for a specific injury of October 25, 2000. For some unexplained reason, the parties then entered into a new Stipulated Findings & Award providing that for both the CT and the specific, applicant now had overall permanent disability of 65%. Both the CT and the specific were expressly joined with respect to the new Stipulated Findings & Award of 65%. Moreover, the Stipulated Findings & Award did not have any details with respect to how much of the increase from 39% to 65% was due to the increase from the first injury, or how much PD was caused by the second injury i.e., the specific.

Applicant filed a timely Petition to reopen on the joined injuries. The WCAB properly described this joinder as "voluntary". The reporting AME indicated applicant was 100% permanently disabled with increased PD of 35% over the prior Joint Stipulated Findings & Award of 65%. The WCAB indicated that what defendant was trying to do was to "unjoin" the two dates of injury previously joined in order to try and apply and take advantage of the Benson decision. The WCAB noted that on a Petition to Reopen for new and further disability the Vargas case applies, but it only applies to any increase in permanent disability, not the previously awarded permanent disability of 65%. Moreover, for purposes of the trial, the parties jointly stipulated applicant was 100% permanently totally disabled and the only issue was one of apportionment or whether the award should be combined or separate with respect to the CT and specific injury. There was no opinion from the reporting AME or deposition testimony that supported any basis or argument by defendant that the increased permanent disability of 35% was related to any non-industrial factors between the time of the prior stipulated award of 65% and the AME's reevaluation. Moreover, there was no opinion indicting any evidence of apportionment between the voluntarily joined CT injury and specific injury. In essence there was a failure of proof.

Comment/Analysis: This is an interesting case in that it deals with both the Vargas and Benson cases and their application to a Petition to reopen for new and further disability.

Defendant clearly was hoisted on its own petard since they had previously voluntarily agreed to join the CT and the specific injuries with respect to the underlying 65% PD prior stipulated award. It was almost impossible for them to factually or medically separate the two injuries for purposes of reducing their liability under Benson.

State Compensation Insurance Fund v. WCAB (Dorsett) (2011) (Sixth District Court of Appeal Certified for Publication December 1, 2011)

Case Summary: Applicant, while working for two different glass companies, suffered a specific injury to his cervical spine on March 21, 2000, and a cumulative trauma injury while working for a second glass company/employer from November 15, 2002, to June 8, 2004. Following the first specific injury to his cervical spine on March 21, 2000, he underwent two cervical spine surgeries including a discectomy and fusion. However, he returned to work with restrictions.

From a procedural standpoint, the WCJ awarded the applicant 100% permanent total disability without apportionment pursuant to either Labor Code § 4663 or 4664. Both injuries were deemed to have become permanent and stationary at the same time and the WCJ in issuing his Joint Findings & Award indicated that “The permanent disability caused by each is not reasonably capable of separation or apportionment from the combined permanent disability.” Defendant SCIF filed a Petition for Reconsideration essentially arguing that applicant should have received two 50% separate Awards pursuant to Benson. The WCAB denied defendant’s Reconsideration affirming the WCJ’s decision. SCIF then filed a Petition for Writ of Review. The Court of Appeal annulled the WCAB’s Order Denying Reconsideration and remanded the matter back to the Board with directions for the WCJ to make an Award consistent with its opinion, i.e., two separate 50% Awards rather than a combined 100% permanent total disability Award.

Discussion: The reporting AME in this case was the same AME in the Benson case. The underlying facts are almost identical to Benson. The Court of Appeal noted that in the Benson case, the applicant also had a specific as well as a CT injury to her neck. She also had surgery to her cervical spine. Both became permanent and stationary on the same date. The Court of Appeal noted this same AME in reporting in the Benson case, had apportioned half of the employee’s permanent disability to the cumulative trauma and half to the specific injury. The Court also reiterated the principles in Benson. Section 4663(c) “specifically requires a physician to determine what percentage of disability was caused by each industrial injury, regardless of whether any particular industrial injury occurred before or after any particular injury or injuries.” (Benson supra, p. 1552). The Court of Appeal also noted the exception that there may be limited circumstances which they indicated were not present in Benson or in the instant case, where the evaluating physician cannot parcel out, with reasonable medical probability, the approximate percentages to which each distinct industrial injury causally contributed to the employee’s overall permanent disability. In such limited circumstances the injured worker would be entitled to a combined award of permanent disability.

For some strange reason, the reporting AME in this case opined that the cumulative trauma injury applicant suffered for her second employer from November 15, 2002, to June 8, 2004, was a compensable consequence of the specific injury of March 21, 2000, which the applicant suffered to his cervical spine. The AME did concede applicant had two injuries. The AME also conceded that the cause of the eventual final disability in this case was attributable to both the specific injury of March 21, 2000, the resultant surgery with the changes that occurred and also the subsequent separate cumulative trauma injury. During the course of his deposition, the AME

conceded that applicant's "current level of permanent disability whatever that level may be, is apportioned 50% to the specific injury and 50% to the cumulative trauma injury." SCIF's contention on appeal was basically that a cumulative trauma injury cannot be both a compensable consequence of an earlier injury and a second injury as well, especially if it is to the same body part.

Comment/Analysis: It is extremely difficult to determine or understand how the WCAB Panel and the Trial WCJ in this case, before being reversed by the Court of Appeal, found there was no basis for separate 50% Awards since this case had essentially the same facts that existed in Benson. Admittedly there was some waffling by the AME during the course of his deposition which seemed to be based on his confusion between causation of injury and causation of actual disability. The ongoing challenge for the Board and Trial WCJ's in these situations is to determine whether a physician's characterization of the resultant disability from two separate and distinct injuries as being "inextricably intertwined" is really based on substantial medical evidence or rather a convenient way to artificially attempt to increase or maintain overall case value.

Blackmon v. Monterey Peninsula Unified School District (2011) 2011 Cal. Wrk. Comp. P.D. LEXIS 353 (Panel Decision)

Case Summary: The applicant while working for three successive employers, suffered an admitted specific injury on December 1, 1997 to his right wrist and elbow while employed with the Monterey Peninsula Unified School District (MPUSD) and a cumulative trauma injury from December 2, 1997 through August 1, 2001, while employed with American Plumbing from June 2000 to April 2001, and his last employer Selco for approximately three months.

Following his December 1, 1997, injury with MPUSD, applicant had two surgeries to his right upper extremity. He continued working without restrictions, but was laid off due to budget constraints. After working for his final employer Selco in August of 2001, he underwent five additional surgeries, which then brought his surgical total to seven. He also sustained a compensable psychiatric injury which required at least one hospitalization. There were reporting AME's in orthopedics and psychiatry.

The case has a rather protracted procedural history with numerous remands back for development of the record. The final issue on remand was for both the WCJ and WCAB to determine whether applicant was entitled to a combined unapportioned award of 100% permanent disability, or two separate awards for the separate specific and CT injuries as stipulated to by the parties. Both AMEs were re-deposed. There were supplemental reports. In essence the AME in orthopedics, indicated that in his opinion there was a basis for apportionment, but he based his apportionment formula on the number of surgeries the applicant had i.e., basically indicating 2/7 of the disability should be apportioned to the first employer MPUSD, since that is where he had two surgeries, and 5/7 of the disability should be apportioned to the two successive employers where the applicant suffered the CT injury. However, the orthopedic AME was unable to articulate how or why the timing of the applicant's particular

surgeries was or is a reasonable method for determining each injuries contribution as to the cause of applicant's disability at the time of his final MMI/P&S evaluation.

The WCJ and the Board concluded that the orthopedic AME's use of the surgery apportionment formula was basically attributable to the fact there was a large gap in the medical record from which the orthopedic AME could have otherwise made a reasonable apportionment determination based on reasonable medical probability. The AME in orthopedics during the course of his deposition lamented on the fact there were no contemporaneous real time medical records covering the applicant's protracted medical treatment as well as surgeries. The Board indicated the AME in orthopedics "has not articulated how or why the timing of the surgeries is a reasonable method for determining each injury's contribution of the cause of the applicant's disability at the time of his evaluation. It seems the underlying reason for using this "evidence" is because the medical record no longer exists from which he can make such a reasoned determination".

Comments/Analysis: Given the articulated absence of contemporaneous critical medical records the orthopedic AME could review, the Board indicated that to apportion the resultant disability from the admitted CT and specific injury would be pure speculation without the required how and why under the Gatten and Escobedo cases. The Board essentially found a Benson exception of a limited circumstance where the employer had failed to meet its burden of proof and therefore a combined award of permanent disability is justified.

5. LeBoeuf Issues/Considerations.

Bacon v. County of Los Angeles (2011) 2011 Cal. Wrk. Comp. P.D. LEXIS 148 (Panel Decision)

Case Summary: Applicant suffered injuries to his back, and psyche as a result of a cumulative trauma from 12/31/84-6/3/2002.

The case has a complicated procedural history. In 2008 applicant was awarded and found to be 100% permanently totally disabled. The applicant's award of 100% permanent total disability was based on applicants non- feasibility for vocational rehabilitation as indicated in the LeBoeuf case. Defendant filed for Reconsideration which was granted. The Board then issued its own opinion and decision indicating applicant's injury caused 75% permanent disability after apportionment. Applicant then filed for Reconsideration of the Board's decision which was granted. In 2009 the WCAB issued their second opinion and decision after reconsideration finding the 1997 Permanent Disability Rating Schedule applied and remanded the case for further proceedings. In January of 2011, the WCJ issued a Findings & Award indicating the applicant was 100% permanently totally disabled without apportionment. Defendant predictably filed for reconsideration. Reconsideration was granted and the WCAB rescinded the WCJ's decision issuing a new Findings and Award finding the applicant had suffered 94% permanent disability after apportionment based on the applicant's non- industrial cognitive deficiency which rendered the applicant non feasible for vocational rehabilitation services.

Discussion: This case is significant in that it deals with the interaction of Labor Code Section 4663 and the LeBoeuf doctrine or principle. The Board emphasized that in this case, LeBoeuf and the concept of vocational non-feasibility could not be used to increase the applicant's overall permanent disability. The Board stated:

We conclude that the doctrine of LeBoeuf here does not help applicant to increase his overall permanent disability since his pre-injury feasibility was primarily caused by non-industrial factors. Labor Code Section 4663 requires us to apportion applicant's disability to "other factors" which are present in this case. The employer shall only be liable for the percentage of permanent disability directly caused by the industrial injury. (Labor Code Section 4664)

The Board again stressed the applicant's non-feasibility for vocational rehabilitation was primarily caused by non-industrial factors which cannot be ignored for purposes of applying apportionment to causation under Labor Code Section 4663. The Board identified the non-industrial factor as applicant's long standing non-industrial cognitive deficiency.

6. Causation of Disability Versus Causation of Injury.

Parga v. City of Fresno (2011) 2011 Cal. Wrk. Comp. P.D. LEXIS 238 (Panel Decision)

Case Summary: Applicant, a police officer, suffered a cumulative trauma injury through December 1, 2006 to his right big toe and right knee, resulting in permanent disability of 9% after apportionment of 50%, i.e., applicant would have received an 18% Award, but for apportionment of 50%. Applicant filed a Petition for Reconsideration, which was granted. The WCAB amended the WCJ's decision and awarded applicant an unapportioned permanent disability Award of 18%.

Discussion: This case is significant, in that it deals with the issue of causation of injury versus causation of disability. There has been confusion on this issue by WCJs, physicians, and attorneys. While Labor Code §4663 uses the term "causation," it applies strictly to causation of disability or impairment, not causation of injury AOE/COE.

In this particular case, the applicant did have a diabetic condition at the time he experienced his cumulative trauma injury to his right big toe. Applicant was assigned to the Fresno airport and it was required that he wear certain boots, which met the regulations imposed by his employer. The reporting of the Panel QME indicated that as a result of the applicant being on his feet prolonged periods of time and wearing the required boots, applicant's right toe became infected and had to be amputated on January 4, 2007. With respect to apportionment, the Panel QME indicated the applicant was suffering from Type II diabetes, which he then also indicated was the underlying cause and preexisting pathology, which was aggravated as a result of the physical demands of applicant's job. This led to the 50% apportionment to the applicant's diabetes and 50% due to the applicant's industrial cumulative trauma.

The WCAB, in awarding applicant an unapportioned award of 18%, articulated their view as to the doctor's confusion as to causation of disability with causation of injury as follows:

"His January 4, 2009 report is faulty on the issue of apportionment under Labor Code §4663, because it confuses industrial causation and causation of permanent disability, which are two different issues. (Reyes v. Hart Plastering) (2005) 70 Cal.Comp.Cases 223 [Significant Panel Decision].) That is, applicant was susceptible to the big toe injury because of his diabetes, but it was the job activity of standing and walking in regulation boots which injured the susceptible big toe. As shown by Dr. Tabaddor's deposition testimony, once applicant's big toe was injured and amputated, this caused a permanent disability in which diabetes no longer played a part."

The Board also noted that during the course of his deposition the Panel QME indicated that, but for applicant wearing the boots he was required to wear at work, he would not have had the amputation of his big toe, and, more importantly, the doctor indicated there was no impairment rating attributable to the diabetes, only the amputation. Again, although it was the combination

of the industrial wear and tear on the toe and the non-industrial diabetes which caused the amputation, applicant's pre-existing diabetes was not causing disability at the time of the evaluation. The Board noted that with respect to apportionment, 50% of nothing is nothing! The doctor's opinion as to apportionment did not constitute substantial evidence under Labor Code §4663 because there was no impairment from the diabetes, nor was it causing disability at the time of the doctor's evaluation, citing Escobedo.