“Apportionment: Case law update focusing on themes, trends, and problem areas.”
(January 2018 Supplement)

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Fundamental Analytical Principles

Introduction:

In my 2013 Apportionment Case Law update I included for the first time a section dealing with “fundamental analytical principles,” based on the working assumption that it would provide an ongoing resource to the workers’ compensation community as a reference and guide dealing with the critical underlying fundamental analytical concepts and principles related to Labor Code §4663 and Labor Code §4664, as well as a separate commentary on substantial medical evidence and correct legal standards. In subsequent outlines I intentionally eliminated or removed this section based on the belief that most, if not all, workers’ compensation practitioners, judges, and evaluating physicians for the most part understood the basic fundamental analytical principles and concepts underlying the radical change in the law of apportionment effectuated by the passage of SB899 and Labor Code §§4663 and 4664.

However, in the intervening years since 2013, and after my review and analysis of numerous recent apportionment cases, it is abundantly clear that a significant number of practitioners and evaluating physicians still do not fully comprehend the fundamental core analytical principles and concepts essential to understanding the correct application of Labor Code §§4663 and 4664 and related substantial medical evidence standards.

Graphic examples to support my decision to once again include this section in the outline are exemplified by two recent cases, and numerous other recent cases, which clearly show a fairly widespread misunderstanding of the fundamental principles underlying Labor Code §§4663 and 4664. In the case of Caires v. Sharp Health Care (2014) Cal.Wrk.Com. P.D. LEXIS 145 (WCAB panel decision), three different evaluating physicians in the same case all failed to demonstrate a basic understanding of the core concepts and principles related to Labor Code §4663 apportionment. What is striking about the Caires case is the fact the apportionment issue was fairly straightforward, involving whether or not there was valid legal apportionment related to preexisting degenerative conditions. Caires also deals with an important issue related to whether the AMA Guides can be used by reporting physicians to determine valid legal apportionment under Labor Code §§4663 and 4664.

Perhaps a more graphic example is the very recent case of Pattiz v. SCIF/MTC Trucking, Inc. 2015 Cal.Wrk.Com. P.D. LEXIS 541, 43 CWCR 201, in which a workers’ compensation judge in issuing a joint Findings of Fact and Award in two cases incorrectly dealt with four separate apportionment issues in the same case, including Benson, Labor Code §4663 nonindustrial apportionment, the interaction of medical evidence of apportionment and vocational evidence, and finally erroneously construed and applied the Labor Code §4662(b) determination of permanent total disability “in accordance with the fact.” (sic). The fact a judge ten years after
the passage of SB899 and Labor Code §§4663 and 4664 could render an incorrect and erroneous
decision on a “quartet” of apportionment issues in a single case is troublesome. The WCAB
granted defendant’s Petition for Reconsideration and rescinded the WCJ’s Award. These cases
and similar cases underscore the fact the core concepts and fundamental analytical principles
underlying Labor Code §§4663 and 4664 require continued and repeated reemphasis.

**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 basis 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. App. 4th 274, 284-285, 70 Cal. Comp. Cases 133.) Thus, new sections 4663, subdivision (a) and 4664, subdivision (a) eliminates the bar against apportionment based on pathology and asymptomatic causes. (E.L. Yeager Construction v. WCAB (Gatten) (2006) 145 Cal. App. 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 hereinafore, 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.

**Labor Code §4664**

Labor Code §4664 has three critical provisions.

Labor Code §4664(a) provides as follows: “the employer shall only be liable for the percentage of permanent disability directly caused by the injury arising out of and occurring in the course of employment.”

Labor Code §4664(b) provides as follows:

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

Labor Code §4664(c)(1) provides as follows:

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

(A) Hearing.
(B) Vision.
(C) Mental and behavioral disorders.
(D) The spine.
(E) The upper extremities, including the shoulders.
(F) The lower extremities, including the hip joints.
(G) The head, face, cardiovascular system, respiratory system and all other systems or regions of body not listed in sub paragraphs (a) to (f), inclusive.

Labor Code §4664(c)(2) provides as follows “Nothing in this section shall be construed to permit the permanent disability rating for each individual injury sustained by an employee arising from the same industrial accident when added together from exceeding 100%.

Comment: Subsequent to the enactment of Labor Code §4664, most employers and defendants focused on Labor Code §4664(b) related to the conclusive presumption afforded/accorded to prior awards of permanent disability. Unfortunately, through evolving case law, what appeared to be a relatively straight forward concept became a quagmire related to burden of proof as to what constitutes an award and defendant’s burden to prove overlapping factors of disability related to prior awards.

For example, many defendants and employers thought that if an applicant had a prior Findings & Award or Stipulated Award to the lumbar spine of 25% under the 1997 Permanent Disability Rating Schedule, and then suffered a subsequent injury to the lumbar spine under the AMA Guides of 30% after adjustment for age and occupation, they would be entitled to a conclusive presumption that the prior permanent disability, i.e. the 25% award existed at the time of the subsequent or second injury.
However, in 2006 the Court of Appeal in *Kopping v. WCAB* (2006) 142 Cal. App.4th 1099; 71 CCC 1229, in a well reasoned decision held that with respect to Labor Code §4664(b) defendants faced a difficult burden of proof. In *Kopping*, the Court of Appeal held that in each and every case involving Labor Code §4664(b), the defendant had the dual burden of proving the existence of a prior award and more importantly the additional burden of proving the overlap of factors of disability between the prior award and the current award.

As set forth in the primary apportionment outline, dealing with cases up to 2011, under the section dealing with overlap issues (burden of proof) and in this supplemental outline, defendants in case after case have been basically unable to meet their burden with respect to proving or showing the overlap of factors of disability between a prior award under the 1997 Permanent Disability Rating Schedule and the 2005 Permanent Disability Rating Schedule. However, the longer Labor Code §4664(b) remains in effect, the burden of proving overlapping factors of disability will diminish since there will be a prior award under the same Permanent Disability Rating Schedule, i.e., under the 2005 PDRS/AMA Guides. If there is an award and disability is determined under the 2005 Permanent Disability Rating Schedule, and there is a successive or later injury also under the 2005 Permanent Disability Rating Schedule/AMA Guides, then defendant will have a much easier time proving overlapping factors of disability.
Substantial Medical Evidence and Correct Legal Standards

As reflected and manifested in many of the decisions in this outline, reports from physicians whether they are AMEs, primary treating physicians, QMEs, or SPQMEs repeatedly fail to apply the correct legal standards with respect to apportionment determinations as outlined by the California Supreme Court in Brodie, by the Court of Appeal in a certified for publication case in Gatten, and the WCAB in their en banc decision in Escobedo.

In terms of assessing and evaluating a physician’s opinion on apportionment it is critical to determine whether or not the physician has applied the correct legal standard or standards as articulated by the courts in the above referenced cases. In Gay v. WCAB (1979) 96 Cal. App. 3rd 555; 44 CCC 817, the Court stated, “physicians in workers’ compensation matters must accordingly be educated by the parties of the correct legal standards.” It needs to be emphasized repeatedly that physicians in workers’ compensation matters write “medical-legal reports” not just medical reports. As a consequence reporting physicians must understand and apply the correct legal standards in order to render an opinion that constitutes substantial medical evidence whether that opinion is manifested in the form of a report or during the course of a deposition. “A medical opinion that refuses to accept correct legal principles does not constitute substantial medical evidence.” (Hegglin v. WCAB (1971) 4 Cal. 3d 162; 36 CCC 93; Zemke v. WCAB (1968) 68 Cal. 2d 794, 33 CCC 358)

In order for a medical report to constitute substantial evidence on the issue of apportionment, a medical opinion “must disclose familiarity with the concepts of apportionment, describe in detail the exact nature of the apportionable disability, and set forth the basis for the opinion.” (E.L. Yeager Construction v. WCAB (Gatten) (2006) 145 Cal. App. 4th 992, 71 CCC 1687) A medical opinion based upon an incorrect legal theory is not substantial medical evidence (Hegglin v. WCAB (1971) 4 Cal. 3d 162, 36 CCC 93; Place v. WCAB (1970) 3 Cal. 3d 372, 35 CCC 525)

Also in Blackledge v. Bank of America (2010) 75 CCC 613, in footnote 10, the WCAB again emphasized it was the duty of the parties to educate reporting physicians as to the utilization of the correct legal standards in every single case. Thus it is important for every evaluating physician to understand all pertinent legal concepts so they may correctly apply those standards to the specific facts of each case.

In terms of reasonable medical probability and substantial evidence, the Court of Appeal in Gay v. WCAB stated:

We do not comprehend how the parties can expect any physician to properly report in workers’ compensation matters unless he is advised of the controlling legal principles. Physicians are trained to discover the etiology of an illness.
Finding the cause is important in preventative medicine and curing illness once developed. **Legal apportionment is not identical to theories of medical causation.** Physicians in workers’ compensation matters must accordingly be educated by the parties in the correct legal standards of apportionment. (Emphasis added)

Labor Code section 4663(c) also indicates that a physician in making an apportionment determination may use an “approximate” percentage in determining industrial causes of permanent disability and non-industrial contributing causal factors. The fact a doctor makes an “estimate” or “approximation” does not render the opinion speculative.

As stated in **Anderson v. W.C.A.B.** (2007) 149 Cal. App.4th, 1369, 72 Cal.Comp. Cases 389, 398, the fact that “percentages [of causation of permanent disability that the physician] provided are approximations that are not precise and require some intuition and medical judgment…does not mean his conclusions are speculative [where the physician] stated the factual bases (sic) for his determinations based on his medical expertise.”
Genetics, Gender, and Age

Age and Gender Cases

The issue of alleged gender or age discrimination related to apportionment determinations by reporting physicians under Labor Code sections 4663 and 4664 is distinct from issues related to apportionment determinations involving genetics and heritability.

It's important to understand that pursuant to applicable statutes and related case law, there are certain impermissible, invalid and potentially unlawful nonindustrial contributing causal factors of permanent disability that should not be used to establish nonindustrial apportionment under sections 4663 and 4664. These impermissible and potentially unlawful factors would include but are not necessarily limited to age alone and gender alone. There are two primary Government Code sections applicable, section 12940(a) which deals with discrimination involving compensation, and section 11135(a) dealing with age and gender discrimination.

In general, the majority of workers’ compensation cases dealing with alleged age and gender discrimination tend to support the premise that nonindustrial apportionment determinations where age or gender is but one factor among a multiplicity of other factors reflected in an injured workers medical history will not in and of itself serve to automatically render a nonindustrial apportionment determination invalid or unlawful. Discussed hereinafter, is a sampling of cases dealing with alleged age and gender discrimination.

In Slagle v. WCAB (2012) 77 Cal. Comp. Cases 467 (writ denied) a 64 year old applicant suffered a specific injury involving both his right knee and right hip. The AME determined that 80% of applicant’s disability was industrial and the other 20% attributable to nonindustrial causative degenerative factors. The MRI diagnostic testing showed applicant had a mild medial degenerative joint disease process in the right knee and the operative report reflected a small interior patellar osteophyte. The applicant had knee surgery less than three months after the specific injury date. The operative report along with the MRI’s confirmed the osteophyte was related to degenerative changes and not a specific injury. The AME noted that it was unremarkable for a 64 year old person to have some degenerative changes in their knee. Applicant filed a Petition for Reconsideration and argued the apportionment was invalid and also constituted age discrimination.

The WCAB in denying applicant’s petition for reconsideration and affirming the nonindustrial apportionment determination indicated the AME did not apportion to age alone. Instead, apportionment was based on the degenerative changes that were objectively demonstrated as well as applicant’s medical records i.e., the operative report and the MRI’s. With respect to applicant’s contention that apportionment constituted unlawful age discrimination under
Government Code section 11135, the WCAB noted “that while there may be a relationship between age and degenerative changes, i.e., an increased probability for such changes, that does not mean that apportionment to degenerative changes, when such a apportionment is supported by substantial evidence in the record, constitutes age discrimination in every case involving an older person.” See also, Gerletti v. Santa Maria Airport District, 2009 Cal.Wrk.Comp. P.D. LEXIS 300 (WCAB panel decision), where the WCAB affirmed 50% nonindustrial apportionment of applicant’s cervical spine disability based on a degenerative condition which developed “in response to both genetic and age related factors.” The WCAB indicated this did not equate to improper apportionment to those factors, but rather to the underlying degenerative condition itself.

In Kos v. WCAB (2008) 73 Cal. Comp.Cases 529 (writ denied) applicant while employed as an office manager, suffered and admitted specific injury in 2002, to her back and legs. At the time of injury applicant was 51 years old and weighed 340 lbs and had diabetes with peripheral neuropathy. The reporting a physician was an AME in Orthopedics. Based on MRI diagnostic studies shortly after the injury the AME diagnosed applicant with severe multilevel degenerative disc disease with disc desiccation. There was also a very severe loss of disc height at L 4-5 indicating bone-on-bone along with foraminal stenosis and active denervation. The AME determined that most of the cause of applicant’s disc herniation was related to the degenerative disease process and very little was related to applicant’s work activities since she was in a sedentary type job. The AME indicated that 90% of applicant’s permanent disability was caused by the aging process and by the degenerative disc disease. He did acknowledge that the simple act of sitting at work on the day of her injury aggravated accelerated the underlying disc herniation to the point that applicant became symptomatic at that time.

Notwithstanding the AME’s opinion that 90% of the applicant’s lumbar spine disability was non-industrial, the WCJ issued a Findings and Award that applicant was 100% permanently disabled without apportionment. Defendant filed a petition for reconsideration which was granted by the WCAB. The Board rescinded the WCJ's decision on the basis the AME’s opinion constituted substantial medical evidence that 90% of applicant’s permanent disability was apportionable to non-industrial causative factors. The WCAB cited Escobedo as well as subsequent appellate cases indicating that Labor Code section 4663 provides for apportionment of permanent disability caused by other factors both before and subsequent to the industrial injury, including prior industrial injuries and allows for apportionment of disability to pathology and asymptomatic prior conditions as long as such apportionment is based on substantial medical evidence citing the Supreme Court's decision in Brodie. Applicant also argued on reconsideration that the AME impermissibly and incorrectly assigned apportionment percentages to risk factors and also apportioned based on applicant’s age. With respect to alleged age discrimination, the WCAB stated “….that, even assuming that Labor Code section 4663 were (sic) inconsistent with the provisions of Government Code sections 12940(a) and 11135(a) to the extent that
Labor Code section 4663 allows apportionment to age-related degenerative disc disease, the WCAB’s decision would not be altered….”

The WCAB citing the California Supreme Court's decision in Brodie indicated that the “legislative intent of current section 4663 was to “eliminate the bar against apportionment based on pathology and asymptomatic causes.” As a consequence “… therefore, the Legislature intended that apportionment to causation under Section 4663 may be based on age - related disc disease…..” citing E.L. Yeager Construction v. WCAB (Gatten) 2006 145 Cal.App.4th 922, 71 Cal.Comp. Cases 1687. In Gatten the Court of Appeal remanded the case to the WCAB with specific directions to apportion 20% to the employee’s disability age-related degenerative disc disease, and stated that “apportionment may be based on pathology and asymptomatic prior conditions.” The WCAB also noted that Labor Code section 4663 was a later enacted and more specific statute then the “more general “age” discrimination provisions of Government Code sections 12940(a) and 11135(a).


This unpublished case from the Court of Appeal focuses on alleged age discrimination with respect to the AME’s apportionment determination of 20% nonindustrial. The WCJ found the AME’s apportionment opinion and determination did not constitute substantial evidence. However, based on a defense petition for reconsideration, the WCAB reversed and found the AME’s opinion on nonindustrial apportionment did constitute substantial medical evidence which was affirmed by the Court of Appeal in this non-published opinion.

Applicant suffered a 2003 specific back injury. She was 60 years old. As a consequence she had a surgical fusion. The reporting physician was an AME. There were two trials and the reason there was a second trial related exclusively as to what PDRS should apply either the 1997 PDRS or the 2005 PDRS. The AME’s nonindustrial apportionment was attributable to pre-existing pathology in the form of a moderate disc collapse at L 2-3 with related arthritis and stenosis. The AME formed his opinion in part by reviewing x-rays taken in 2002 before applicant’s industrial injury as well as recent x-rays which showed a compression fracture of L-4 which existed before the injury. In terms of other diagnostic testing, applicant also had a positive discogram which disclosed the basis for the stenosis and the need for surgical decompression. Also based on the operative report and other diagnostic findings the AME was of the opinion the need for the surgery could not have happened from or be related to one specific injury. The AME also indicated that some people develop arthritis more than other people. There are some 60 year olds that don't really have much arthritis, but with respect to the applicant it was more advanced than usual.
Notwithstanding the AME’s opinion that 20% of applicant’s lumbar spine disability was nonindustrial and attributable to pre-existing pathology, the WCJ awarded applicant permanent disability without apportionment. Defendant filed a petition for reconsideration that was granted. The WCAB reversed the WCJ and found the AME’s opinion and report constituted substantial medical evidence on apportionment under *Brodie, Escobedo and Gatten* and there was no age based discrimination. Applicant’s counsel specifically argued to the Court of Appeal that the WCAB violated California's prohibition against classification based discrimination under Government Code section 11135 by adopting the AME’s age based apportionment findings. In response both the WCAB and the Court of Appeal indicated as follows:

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

*Vaira v. WCAB* (2009) 72 Cal.Comp.Cases 1586 (not certified for publication) Although this case is not certified for publication, many of the cases cited in the opinion are. Moreover, there were a large number of briefs filed by several amicus curiae participants.

With respect to the apportionment issues, the AME confused causation of injury with causation of disability. Applicant also argued that the AME impermissibly apportioned to applicant’s age and gender in violation of Government Code section 11135(a). One of the amici also argued apportionment of disability to age is per se unlawful and apportionment to osteoporosis is improper because it disproportionately impacts women.

With respect to the “disparate impact” argument related to osteoporosis even assuming it exists, the court stated:

> Reducing permanent disability benefits based on a persisting condition that is a contributing factor of disability is not discrimination. When the WCAB determines a preexisting condition contributes to a given disability, and apportions accordingly, this is merely a recognition that a portion of the disability
exists independent of the industrial injury. The injured worker is being compensated only for the disability caused by the industrial injury. To this extent the injured worker is being treated no differently than an injured worker who does not suffer from the preexisting condition. Both would be compensated for the amount of disability caused by the industrial injury. This is no different than if the WCAB apportioned disability to a prior industrial injury. Such apportionment is not discrimination based on disability.

The court also indicated that the facts of this case did “…not present a claim that the WCAB has apportioned disability to a condition particular to women while failing to give equal treatment to a condition peculiar to men that may also contribute to disability. Such unequal treatment of disabling conditions peculiar to a particular race, ethnicity or gender may give rise to a claim of discrimination.”

As to the alleged age discrimination, the court stated:

To the extent osteoporosis or some other physical or mental condition that might contribute to a work-related disability arises or becomes more acute with age, we see no problem with apportioning disability to that condition. However, in such case, apportionment is not to age but to the disabling condition. In this case, when Dr. Johnson mentioned petitioner’s age as a contributing factor of her disability, he may have been referring to the fact that her osteoporosis has become more acute with age. On the other hand, he may have been using the term “age’ as a shorthand reference to the many other physical and mental conditions that tend to come with age.

Genetics

City of Jackson v. Workers’ Compensation Appeals Bd. (Rice) (2017)

Issues: Whether 49% nonindustrial apportionment under Labor Code §4663 attributable in large part to heredity and genetics, constituted valid legal apportionment under Labor Code §4663 and was supported by substantial evidence contrary to the WCAB’s determination that such apportionment was to, 1) “impermissible immutable factors; 2) apportionment to causation of injury as opposed to disability and, 3) that the medical opinion finding such apportionment valid was not based on substantial medical evidence.

Holding: The Court of Appeal in a decision certified for publication, annulled the WCAB’s decision, holding that valid legal apportionment under Labor Code §4663 even when in large
part based on heredity or genetics, constituted valid legal apportionment to nonindustrial contributing causal factors when supported by a medical opinion constituting substantial medical evidence. Applicant’s degenerative disc disease caused by genetic/hereditary factors did not reflect or constitute apportionment to “impermissible immutable factors; apportionment to causation of injury as opposed to causation of permanent disability, and the reporting physician’s opinion was supported by substantial evidence.

Overview and Discussion: Applicant was a police officer who had a short employment history as well as being only 29 years old when he filed his cumulative trauma claim ending in April of 2009.

Applicant worked as a reserve police officer in 2004 and became full time with the City of Jackson in 2005. He filed a cumulative trauma injury ending on April 22, 2009. He never alleged any specific mechanism of injury.

Following trial, the WCJ found 49% valid nonindustrial apportionment based on the orthopedic QME’s opinion that in large part there were genetic and hereditary factors contributing to applicant’s cervical spine disability. However, the WCJ rejected alleged nonindustrial apportionment of 17% based on applicant’s prior work activities and 17% to prior activities based on a lack of substantial evidence. Applicant’s attorney filed a Petition for Reconsideration arguing that 49% nonindustrial apportionment to genetic risk factors was not substantial medical evidence since there was no evidence that applicant’s family had a history of cervical degenerative disc disease and there was no genetic test for degenerative disc disease.

The WCAB reversed the WCJ, finding applicant was entitled to an unapportioned award. The WCAB cited three independent reasons for finding the Labor Code §4663 nonindustrial apportionment invalid. They were:

1. Any attempt to assign nonindustrial causation of permanent disability to genetics was deemed by the WCAB to be based on an “impermissible, immutable factor.”

2. Nonindustrial apportionment based on applicant’s genetic makeup reflects apportionment to causation of injury and not causation of disability and;

3. The orthopedic QME’s apportionment determination did not constitute substantial medical evidence.

Medical Evidence: On November 7, 2011, prior to applicant undergoing cervical spine surgery, applicant was evaluated by the QME in orthopedics. The QME reviewed medical records. Both
the QME and applicant believed applicant’s cervical pain symptomology was a consequence of repetitive bending and twisting of his head and neck.

The diagnostic pre-cervical spine surgery x-ray showed cervical degenerative disc disease. The QME’s diagnosis was cervical radiculopathy as well as cervical degenerative disc disease. After her first evaluation of the applicant, the QME made a preliminary apportionment determination finding four contributing causal factors of the applicant’s cervical spine disability consisting of 25% related to applicant’s work activities for the City of Jackson, 25% attributable to the applicant’s work activities prior to his employment with the City of Jackson, 25% to applicant’s personal activities consisting of prior injuries and recreational activities, and 25% to what was described as applicant’s personal history consisting of inheritability and genetics, history of smoking, and a diagnosis of lateral epicondylitis (tennis elbow).

The QME reevaluated the applicant after he had cervical spine surgery in May of 2013. Her diagnosis remained unchanged. However, the QME changed her apportionment determination. She increased her prior 25% nonindustrial apportionment to 49% based on inheritability and genetics, history of smoking, and diagnosis of lateral epicondylitis based on specific medical publications she indicated lent more support to nonindustrial causation based on “genomics, genetics, and inheritability issues related to applicant’s cervical spine disability. The QME cited three studies that supported genomics as a significant causative factor in cervical spine disability. As a consequence, the QME’s apportionment formula was revised to consist of 17% industrial related to applicant’s employment with the City of Jackson. 17% related to applicant’s previous employment, 17% related to applicant’s personal activities consisting of prior injuries and recreational activities and 49% to applicant’s personal history including genetic issues.

In a supplemental report the QME indicated she “could state to a reasonable degree of medical probability that genetics had played a role in Mr. Rice’s injury.” This was despite the fact there was no way to test for genetic factors.

With respect to the cited scientific/medical publications, the QME indicated that with respect to one study, inheritability constituted 73% of the contributing causal factors of degenerative disc disease with only smoking, age, and work contributing a small percentage of the contributing causal factors that resulted in cervical spine disability.

Another scientific journal/publication cited the role of inheritability in disc degeneration as 75% and another article at 73%. There was a fourth article consisting of twin studies that demonstrated that degeneration in adults may be explained up to 75% by genes alone. The same study found environmental factors to contribute little or not at all to disc degeneration.

The QME concluded these articles supported nonindustrial apportionment of 75% to applicant’s personal history. However, in an abundance of caution “she decided to err on the side of the
patient in case there was some unknown “inherent weakness” in the study and decided that 49% was the “lowest level that could reasonably be stated.”

In terms of clarification the QME stated that even without knowing the cause of applicant’s father’s background, the evidence that applicant’s degenerative disc disease having a predominantly genetic cause was “fairly strong” especially where there is no clear traumatic (specific) injury as in applicant’s case.

**Court of Appeal’s Analysis and Holding.**

The Court held that apportionment may be properly based on genetic/heritability as long as it is supported by substantial medical evidence.

The Court of Appeal noted the WCAB without explanation held that apportionment to “genetics” opens the door to apportionment of disability to immutable factors.” In a way the WCAB was hoisted on its own petard since the Court of Appeal indicated not only did they not perceive any impermissible apportionment in this case based on genetics and heredity, but more importantly there were a number of the WCAB’s own prior apportionment decisions under similar facts and circumstances that undermined the validity of the WCAB’s reasoning.

In holding under the particular facts of this case that valid nonindustrial apportionment under Labor Code §4663 could be properly based on genetics and heritability, the Court discussed in detail SB 899, and the California Supreme Court’s decision in *Brodie*. Also discussed was the 1968 California Supreme Court’s decision in *Zemke*, which had been clearly superseded by SB 899 as articulated by the California Supreme Court in *Brodie*. The Court noted that since the enactment of Senate Bill 899 “…apportionment of permanent disability is based on causation and the employer is liable only for the percentage of permanent disability directly caused by the industrial injury.” (*Brodie, supra*, 40 Cal.4th at pp. 1324-1325).

Apportionment may now be based on “other factors” that caused the disability, including “the natural progression of non-industrial condition or disease, a preexisting disability, or a post-injury disabling event [.,]…pathology, asymptomatic prior conditions, and retroactive prophylactic work preclusions…” (*Escobedo v. Marshalls* (2005) 70 Cal.Comp.Cases 604, 617-618 (*Escobedo*).)

Precluding apportionment based on “impermissible immutable factors” would preclude apportionment based on the very factors that the legislation now permits, i.e., apportionment based on pathology and asymptomatic prior conditions for which the worker has an *inherited predisposition*. (emphasis added)
The Court cited a prior decision by the WCAB in Kos v. WCAB (2008) 73 Cal.Comp.Cases 529, 530. In Kos the applicant developed back and hip pain while working as an office manager. She was diagnosed with multi-level degenerative disease. The reporting physician in Kos indicated applicant’s underlying degenerative disc disease was not directly caused by work activities but her prolonged sitting at work “lit up” her preexisting disc disease. More importantly the reporting physician testified that the worker’s “pre-existing genetic predisposition for degenerative disc disease would have contributed approximately 75% to her overall level of disability.” (Ibid). Nevertheless, the ALJ found no basis for apportioning the disability. (Id. at p. 532.) The Board granted reconsideration and rescinded the ALJ’s decision. (Id. at p.532.)

The Board stated that in degenerative disease cases, it is incorrect to conclude that the worker’s permanent disability is necessarily entirely caused by the industrial injury without apportionment. (Id. at p.533.) Thus, in Kos, the Board had no trouble apportioning disability where the degenerative disc disease was caused by a “pre-existing genetic predisposition.”

The Court also noted that in Escobedo, the WCAB found valid legal apportionment of 50% of the worker’s knee injury to non-industrial causation based on the medical evaluator’s opinion that the worker suffered from “significant degenerative arthritis.” In Escobedo, the Board stated:

In this case, the issue is whether an apportionment of permanent disability can be made based on the preexisting arthritis in applicant’s knees. Under pre-[Senate Bill No.] 899 [(2003-2004 Reg. Sess.)] apportionment law, there would have been a question of whether this would have constituted an impermissible apportionment to pathology or causative factors. [Citations.] Under [Senate Bill No.] 899 [(2003-2004 Reg. Sess.)], however, apportionment now can be based on non-industrial pathology, if it can be demonstrated by substantial medical evidence that the non-industrial pathology has caused permanent disability. Thus, the preexisting disability may arise from any source—congenital, developmental, pathological, or traumatic (Id. at pp. 617-619.) We perceive no relevant distinction between allowing apportionment based on a preexisting congenital or pathological condition and allowing apportionment based on a preexisting degenerative condition caused by heredity or genetics. (emphasis added).

In support of their decision the Court also discussed in depth Acme Steel v. WCAB (Borman) (2013) 218 Cal.App.4th 1137, where the Court of Appeal reversed the WCAB who had found no basis for nonindustrial apportionment and awarded the applicant 100% PTD. The Court of Appeal in Borman found 40% valid nonindustrial apportionment to the applicant’s hearing loss attributable to “congenital degeneration” of the cochlea. The Court in discussing Borman stated “Again, we see no relevant distinction between apportionment for a preexisting disease that is congenital and degenerative, and apportionment for a preexisting degenerative disease caused by heredity or genetics.”
The reporting physician properly apportioned to causation of disability and not causation of injury.

Both applicant’s counsel and the WCAB erroneously determined the orthopedic QME had invalidly apportioned applicant’s disability to causation of injury as opposed to causation of disability. The Court held that the QME had properly apportioned to causation of disability. In that regard the Court carefully distinguished what was being alleged as applicant’s injury and what was being asserted as his resultant disability. In terms of injury, the Court described the mechanism of injury as a cumulative trauma injury as opposed to a specific injury. Applicant’s injury was based on and caused by repetitive motion of his neck and head. The Court pointed out the QME did not conclude as the WCAB erroneously did, that this repetitive motion injury was caused by genetics at all. In contrast to applicant’s injury, his disability consisted of “neck pain and left arm, hand, and shoulder pain, which prevented him from sitting for more than two hours per day, lifting more than fifteen pounds, and any vibratory activities such as driving long distances. All of these activities were included in Rice’s job description.”

The orthopedic QME properly concluded and opined applicant’s cervical spine disability as described by the QME was caused only partially (17%) by his work activities for the City of Jackson and was caused primarily, i.e., 49% by his genetics. As the Court succinctly stated, “Contrary to the Board’s opinion, Dr. Blair did not apportion causation to injury rather than disability.”

The Orthopedic QME’s opinion was based on substantial evidence.

The Court reviewed pertinent cases setting forth principles of substantial evidence. Based on these standards, the QME’s opinion as to causation of the applicant’s cervical spine disability constitutes substantial medical evidence. The QME explained in her initial apportionment determination, that 25% of the cause of applicant’s cervical spine disability was attributable to his personal history. She also explained that studies taken from relevant medical literature indicated “heredity and genetics are significant causes of degenerative diseases of the spine…” The QME also “included in the personal history category, Rice’s history of smoking and a previous diagnosis of lateral epicondylitis.”

The Court also indicated applicant had incorrectly argued that the QME had concluded that genetics played a role in approximately 63% - 75% of degenerative disc disease cases. The Court noted that the QME had instead “indicated that degenerative disc disease in adults may be explained up to 75% by genes alone.” Explained another way, “Every case of degenerative disc disease in adults is caused in part by genetics or heredity, and the other part by other factors.”
Applicant also argued the QME had no way of knowing applicant’s degenerative disc disease was caused by genetics because the QME had never researched applicant’s family medical history.

The Court stated “It was unnecessary for Dr. Blair to conduct such an analysis because her research indicated that genetics or heredity was a majority factor in all cases of degenerative disc disease.”

The Court concluded that the QME’s reports met all of the requirements of Escobedo.

Dr. Blair’s reports reflect, without speculation, that Rice’s disability is the result of cervical radiculopathy and degenerative disc disease. Her diagnosis was based on medical history, physical examination, and diagnostic studies that included X-rays and MRI’s (magnetic resonance imaging scans). She determined that 49 percent of his condition was caused by heredity, genomics, and other personal history factors. Her conclusion was based on medical studies that were cited in her report, in addition to an adequate medical history and examination. Dr. Blair’s combined reports are more than sufficient to meet the standard of substantial medical evidence.

In Sobol v. State of California Department of Corrections and Rehabilitation 2017 Cal.Wrk.Comp. P.D. LEXIS 454 (WCAB panel decision), both the WCJ and WCAB found that an AME’s apportionment opinion of 25% to nonindustrial factors based on genetics did not constitute substantial medical evidence. With respect to the genetic basis for apportionment the AME stated, “[t]he cause of degenerative disease of the spine, particularly as it involves discs, has been convincingly shown to be principally genetic in determination.” The WCAB characterized this statement as “conclusory” and not “substantiated with sufficient medical rationale.”

In addition, the WCAB stated the AME,

“…[D]id not give one sentence of reasoning behind his opinion. He made bold, conclusionary statements such as that the cause of degenerative disc disease has been convincingly shown to be genetic, but he does not back that up with substantial medical evidence; he does not state how, why, when or where the cause of degenerative disc disease was shown to be genetic, he just makes the statement. He does not list any research studies or facts pertinent to the instant case that support causation outside the industrial exposure…”
On appeal counsel for defendant cited the *Rice* case and the medical studies relied on by the doctor in *Rice*. However, there was no evidence that the AME relied on these same studies to formulate his opinion on apportionment.

**Comment:** There are a number of other decisions not cited by the Court that support finding valid legal apportionment based on pathology caused by heredity, genetics, and congenital factors. See *Gerletti v. Santa Maria Airport District* 2009 Cal.Wrk.Comp. P.D. LEXIS 300 (WCAB panel decision). WCAB found 50% of applicant’s cervical spine disability was nonindustrial based on a cervical spine MRI confirming foraminal stenosis and degenerative spondylosis consistent with both age and genetic changes in the applicant’s spine. Also, *Costa v. WCAB* (2011) 76 Cal.Comp.Cases 261 (writ denied). In a 100% PTD cervical spine disability case, valid nonindustrial apportionment of 20% attributable to “preexisting congenital cervical spinal stenosis” causing applicant’s cervical spine disability to be greater than it otherwise would be.

There is also *Paredes v. WCAB* (2007) 72 Cal.Comp.Cases 690 (writ denied) 10% valid nonindustrial apportionment related to applicant’s cervical spine based on nonindustrial pathology consisting of mild stenosis confined by x-rays and MRIs taken shortly after his first injury. It was unnecessary for defendant to prove the nonindustrial pathology caused disability prior to the industrial injury, or that the pathology alone would have caused a particular amount of PD, absent the industrial injury.

However, there is a significant issue as to whether the “approximate” percentage figure related to nonindustrial contributing causal factors can be calculated or “quantified” directly from what caused a particular pathology as opposed to the actual pathology itself especially in progressive degenerative disease conditions that evolve over time. The following article discusses this provocative “dual” causation issue in depth.

**Apportionment of Permanent Disability Related to Genetics and Heredity: Is It A Causational Diversionary Red Herring?**

The recent decision from the Court of Appeal in *City of Jackson v. Workers’ Compensation Appeals Board (Rice)* (2017) 11 Cal.App. 5th 109, 2017 Cal.App. LEXIS 383 (certified for publication), has justifiably engendered wide spread controversy in the workers’ compensation community as evidenced by numerous articles and upcoming seminars related to analysis of the case as well as proposed litigation strategies all focused on what may be a causational diversionary red herring. Before I weighed in with my own analysis, commentary and opinion, I wanted to wait for the dust to settle. In my opinion as discussed in detail hereinafter, without further development of the record, the orthopedic QME’s determination of 49% nonindustrial apportionment in *Rice* is invalid and speculative. The nonindustrial apportionment in *Rice*
reflects apportionment to the etiology (genetics and heritability) expressed in percentage terms of what caused applicant’s pathology (cervical degenerative disc disease and related radiculopathy) and not to the pathology itself and more importantly the severity of the pathology after applicant’s neck surgery and when the QME’s maximum medical improvement (MMI) examination took place. So no one is confused, I am not talking about causation of injury versus causation of disability. The Court in *Rice* correctly analyzed that issue. The issue I am raising is much different. Apportionment to etiology is in my opinion not apportionment of or to disability as defined and discussed in *Rice* as “…actual incapacity to perform the tasks usually encountered in one’s employment and the wage loss resulting therefrom, and…physical impairment of the body that may or may not be incapacitating and …[p]ermanent disability is the irreversible residual of an injury…” (citations omitted).

While it may be interesting to know the etiology or cause of a particular underlying pathology (congenital, developmental, genetic, heredity, etc.), it can be argued that whether genetics or heredity may have played a “predominant” or “large part” in the actual causation or existence of the underlying pathology, it should be carefully distinguished from the separate issue under Labor Code Section 4663, as to what approximate percentage the *extent or severity* of the pathology or disease process itself (as confirmed by diagnostic studies and supported by substantial evidence) is a present contributing causal factor of the permanent disability at the time of the MMI examination determining permanent disability and apportionment.

It is extremely important to acknowledge that orthopedic related degenerative diseases and conditions such as the one in *Rice* (cervical degenerative disc disease) are generally not static, but are progressive over time and this progression over time can relate to both industrial and nonindustrial causative factors. This principle is evidenced by hundreds (if not thousands) of apportionment decisions involving degenerative disease pathology and orthopedic injuries decided by the WCAB since SB 899 was enacted in 2004, along with scores of writ denied cases and a number of published decisions by the Court of Appeal and the Supreme Court in *Brodie*.

The Court of Appeal in *Rice* tacitly recognized the significance of the critical causational distinction between etiology and pathology in stating that: “The QME concluded that the employee’s *disability*—neck, shoulder, arm, and hand pain—was caused by cervical degenerative disc disease, and the disease was, in turn, caused in large part by heredity or genetics.”(emphasis added). So if I understand the Court, there are actually two separate and distinct causal components. One related to causation of pathology and the other to the disability attributable to a particular pathology. Therefore, based on Labor Code 4663, apportionment should focus on the pathology itself and not the etiology of the pathology.

In *Rice* the QME in her second report after the applicant’s neck surgery, used or relied on various medical publications to justify and support her increasing the nonindustrial apportionment
percentage related to applicant’s cervical spine disability from 25% to 49%. The QME’s original diagnosis of cervical radiculopathy and cervical degenerative disc disease remained unchanged. While I agree with the QME that some approximate percentage of applicant’s neck permanent disability is nonindustrial as being causally related to his cervical spine pathology, I question whether her reliance on medical literature/studies alone warranted almost a doubling of the nonindustrial apportionment from 25% to 49%. In my opinion merely establishing the etiology or causation of the underlying pathology (cervical degenerative disc disease) as being attributable “largely” or “predominantly” to genetics and heritability does not automatically or necessarily translate into the degree or extent a particular pathology (the critical percentage approximation in the apportionment equation) is actually manifested in an individual injured worker at a given point in their life and more importantly at the time of the MMI examination assessing permanent disability. This requires a separate analysis and determination to be made by the reporting physician based upon a combination of a variety of factors including but not solely limited to diagnostic studies, operative reports, medical records, clinical findings, clinical judgment, and a complete and accurate medical history. In short, apportionment determinations and related approximate percentages of industrial and nonindustrial contributing causal factors of permanent disability based on and attributable to the etiology of a pathological disease or condition as opposed to pathology itself is inherently speculative and unreliable. My opinion on this issue may perhaps be viewed as “contrarian” or an “outlier” of sorts since it is radically different from the Court of Appeal’s holding in Rice and that of many recent commentators.

The Acme, Kos, and Escobedo Cases: The Court in Rice cited Acme Steel v. Workers’ Comp. Appeals Bd. (2013) 218 Cal.App.4th 1137, 1139 in support of their holding that “apportionment may be properly based on Genetics/Hereditability.” However, what must be emphasized is that in Acme, the AME in hearing loss in finding 40% nonindustrial apportionment based upon pathology consisting of a degenerative cochlea condition or disease process made this determination by relying on diagnostic audio testing that clearly established a portion (40%) of the applicant’s hearing loss was not related to industrial exposure. As to the nonindustrial component, the AME indicated this form or aspect of hearing loss was suspicious but was “most consistent [with] a congenital degeneration of the entire organ.” The AME did not base his nonindustrial apportionment determination on the etiology of the cochlear degeneration but on the pathology itself assessed by diagnostic testing as to severity of the hearing loss and causal components related to this worker at a particular time. Etiology was of interest but was not directly relevant in determining or assessing the severity of the pathology expressed as an approximate percentage for purposes of determining nonindustrial apportionment based on Labor Code 4663. See also, Costa v. WCAB (2011) 76 Cal.Comp.Cases 261, 2011 Cal.Wrk.Comp. LEXIS 25 (In a 100% permanent total disability case valid 20% nonindustrial apportionment related to applicant’s preexisting asymptomatic congenital lumbar spinal stenosis, the severity of which was confirmed by significant findings on MRI, CT studies.).
The Court also discussed *Kos v. Workers’ Comp. Appeals Bd.* (2008) 73 Cal.Comp.Cases 529 (writ denied) where the WCAB “….had no trouble apportioning disability where the degenerative disc disease was caused by a pre-existing genetic predisposition. However, in *Kos*, diagnostic testing in the form of an MRI taken less than six weeks after the applicant’s specific injury as well as her pre-injury chiropractic records were critical in assessing and determining the extreme severity of the applicant’s disc herniation/multi-level disc disease and in my opinion formed the basis for the reporting physician to find that approximately 90% of applicants permanent total disability was non-industrial. The reporting physician opined that the etiology or cause of the applicant’s degenerative disc disease was largely attributable to her “genetic predisposition.” However, in my opinion it was the extreme severity of the applicant’s degenerative disc disease as confirmed by MRI diagnostic testing shortly after the injury and her pre-injury medical records that provided the most compelling support for the valid 90% nonindustrial apportionment, not the etiology of the multi-level disc disease. In *Kos* there was apportionment to pathology not to what caused the pathology. Both *Acme* and *Kos* in my opinion support the argument that valid legal apportionment pursuant to Labor Code 4663 can be based on pathology but not directly to the etiology or cause of the pathology itself.

The WCAB’s en banc decision in *Escobedo v Marshalls* (2005) 70 Cal.Comp.Cases 604 (WCAB en banc) is also instructive on this issue. In *Escobedo* the WCAB found valid non-industrial apportionment of 50% based on the contributing causal factor of pre-existing pathology consisting of degenerative arthritis in the applicant’s knees. In *Escobedo*, the actual cause or source of the nonindustrial pathology whether congenital, genetic or hereditary was essentially irrelevant in determining valid nonindustrial apportionment since diagnostic tests in the form of an MRI and x-rays confirmed both the existence and more importantly the severity of the degenerative arthritis at a particular point in time. In *Rice* the Court emphasized that in *Escobedo* the injured worker had pathology in the form of significant degenerative arthritis to his knees. In *Escobedo*, the “significant” degenerative arthritis noted by the Court was based primarily on diagnostic studies not the etiology or cause of the significant degenerative arthritis itself. This is generally the scenario in the majority of orthopedic injuries involving degenerative diseases and conditions. In *Escobedo* the reporting physician’s opinion constituted substantial medical evidence since he explained in detail how and why applicant’s degenerative arthritis expressed as an approximate percentage was a nonindustrial contributing causal factor of the applicant’s knee disability.

*Both Brodie and Escobedo* found valid non-industrial apportionment based on pathology and asymptomatic causes without reference to or reliance on heredity and genetics: The Court of Appeal in *Rice* quoted extensively from both *Brodie v. Workers’ Comp. Appeals Bd.* (2007) 40 Cal.4th 1313 and *Escobedo v. Marshalls* (2005) 70 Cal.Comp.Cases 604 (WCAB en banc) related to apportionment based on an expansive set of contributing causal factors of permanent disability, including pathology and asymptomatic causes. Prior to SB 899,
apportionment to pathology and asymptomatic causes as well as instances where an industrial injury aggravated or accelerated an industrial injury were generally prohibited. As a consequence, employers were liable for the entire resulting disability without apportionment to nonindustrial contributing causal factors. In *Brodie*, the Supreme Court held that “[T]he plain language of new sections 4663 and 4664 demonstrates they were intended to reverse these features of former sections 4663 and 4750.” In citing *Brodie* and the radical diametrical changes engendered by 4663 and 4664, the Court in *Rice* stated:

Since the enactment of Senate Bill No. 899 (2003-2004 Reg. Sess.), apportionment of permanent disability is based on causation, and the employer is liable only for the percentage of permanent disability directly caused by the industrial injury. (*Brodie, supra*, 40 Cal. 4th at pp.1324-1325.) Apportionment may now be based on “other factors” that caused the disability, including “the natural progression of a non-industrial condition or disease, a preexisting disability, or a post-injury disabling event[,]…pathology, asymptomatic prior conditions, and retroactive prophylactic work preclusions….“(*Escobedo v Marshalls* (2005) 70 Cal.Comp.Cases 604, 617-618(*Escobedo*).) Precluding apportionment based on “impermissible immutable factors” would preclude apportionment based on the very factors that the legislation now permits, i.e., *apportionment based on pathology and asymptomatic prior conditions* for which the workers has an inherited predisposition. (emphasis added).

Prior to SB 899, any apportionment to pathology would have been invalid. In contrast, under current 4663 and 4664 the Court in *Rice* cited *Escobedo* in describing the expansive nature and extent of valid non-industrial contributing causal factors of disability as follows:

[H]owever, apportionment now can be based on non-industrial pathology, if it can be demonstrated by substantial medical evidence that the non-industrial *pathology* has caused permanent disability. Thus, the preexisting disability may arise from any source—*congenital, developmental, pathological, or traumatic.*”(*Id. at pp.617-619.*) We perceive no relevant distinction between allowing apportionment based on a preexisting congenital or pathological condition and allowing apportionment based on a preexisting degenerative condition caused by heredity or genetics. (emphasis added).

In *Rice*, it is undisputed the 29-year-old applicant with a relatively short cumulative trauma injury period, was diagnosed with cervical spine pathology consisting of cervical spine radiculopathy and degenerative disc disease. In my opinion, based on 4663 and 4664 as well as *Brodie* and *Escobedo* and a legion of related cases involving orthopedic injuries and degenerative diseases and conditions, the existence of pathology (whether symptomatic or
asymptomatic) provides a potential viable basis for nonindustrial apportionment so long as it is supported by a medical opinion that constitutes substantial medical evidence. The fact the QME in *Rice* identified the primary source or etiology of the pathological degenerative condition itself as being primarily caused by genetics and heredity to a “large” degree is largely irrelevant in terms of substantial medical evidence as to the approximate percentage the pathological degenerative condition or disease process or condition is a actual contributing cause of permanent disability at the particular point in time the applicant had his MMI examination after his neck surgery to determine his permanent disability and any basis for apportionment.

The Record in *Rice* should have been further developed in order for the QME to apportion properly to pathology and not etiology: The QME’s determination that the pathology itself was “largely” or “predominately” caused by genetics and heredity based on medical studies/literature to between 73% and 75% or a reduced percentage of 49%, does not mean these same percentage figures are at all relevant and somehow automatically equate to the approximate percentage the actual underlying pathology is a contributing nonindustrial causal factor of the applicant’s cervical spine disability.

Arguably applicant’s degenerative disc disease with related radiculopathy had progressed and was severe enough to cause the need for neck surgery. However, when the orthopedic QME reevaluated applicant after his neck surgery and issued her MMI supplemental report, it appears she did not analyze or discuss the operative report findings and any closely related cervical spine diagnostic testing. Such an analysis and detailed discussion of the diagnostic testing and operative report findings would clearly establish to a reasonable medical probability the severity of the pathology at that point in time and could have been used by the QME to help her “parcel out” all of the contributing industrial and nonindustrial contributing causal factors of applicant’s cervical spine disability without reference to any medical literature related to the etiology of the underlying pathology. As a consequence, we have no way of knowing to what extent applicant’s underlying degenerative disc disease had progressed at the time of his neck surgery and later MMI examination.

I believe the Court of Appeal in *Rice* should have remanded the case back to the WCAB for further development of the record. The QME should have been ordered to issue a supplemental report based on her review of the operative report findings from applicant’s neck surgery and any closely related cervical spine diagnostic testing in order for her to determine the severity of applicant’s degenerative disc disease at the time of the MMI evaluation. This would provide a reliable basis for her to determine the extent to which applicant’s cervical disc disease had progressed and enable her to form an opinion as to what approximate percentage the underlying pathology (not the etiology of the pathology) was a contributing causal factor of the applicant’s cervical spine disability.
In Summary Important Points to Consider Are:

1. Pursuant to *Brodie* and *Escobedo* and related cases, the fact that pathology whether symptomatic or asymptomatic is caused by genetics or hereditary is not a bar to valid legal apportionment.

2. The “approximate” percentage figure representing the industrial and nonindustrial contributing causal factors of an applicant’s permanent disability should be based on the pathology in question and not the percentage the underlying genetics caused the pathology itself.

3. The fact that genetics or heredity played a “large” or “predominant” role in causing the pathology at issue does not automatically equate to nor is it synonymous with an approximate percentage figure the pathology itself is a contributing causal factor under Labor Code 4663 of the applicant’s permanent disability.

4. Diagnostic studies, operative report findings, medical records, clinical findings, clinical judgment, and a complete and accurate medical history are among but not the exclusive components or factors to be used in assessing the extent to which a given pathological condition or disease process is a contributing causal factor of the applicant’s permanent disability as reflected in many of the cases cited in the body of the article.
Risk Factors


**Issues:** Whether 20% nonindustrial apportionment of applicant’s lumbar spine disability related to preexisting nonindustrial spondylolisthesis and degenerative changes confirmed by diagnostic studies constituted valid legal apportionment or whether such apportionment was based on risk factors as opposed to causation of applicant’s lumbar spine disability.

**Holding:** The WCAB determined that the AME’s 20% nonindustrial apportionment did not constitute substantial medical evidence since the Board determined it was apportionment related to risk factors as opposed to causation of the applicant’s lumbar spine disability and did not meet the substantial medical evidence test set forth in *Escobedo v. Marshalls* (2005) 70 Cal.Comp.Cases 604, 611 (WCAB en banc).

**Overview and Discussion:** Applicant, a Vineyard worker, suffered an admitted October 13, 2011, specific injury to his lumbar spine. The reporting physician was an AME in orthopedics. The WCJ relying on the orthopedic AME’s opinion awarded applicant 50% permanent disability after 20% nonindustrial apportionment related to preexisting nonindustrial spondylolisthesis and degenerative changes. Both applicant and defendant filed Petitions for Reconsideration.

In addition to the issue of whether or not the AME’s opinion related to apportionment constituted substantial medical evidence, there were other issues related to the proper calculation of impairment under the AMA Guides and *Almaraz/Guzman*.

**The Apportionment Issue:** In preparing his reports, including the MMI report the AME reviewed lumbar spine diagnostic testing. There were two lumbar spine MRI findings of 10/27/11 and 6/23/13, which indicated there was an L5-S1 spondylolisthesis and interior wedge compression fractures of T12, L1, and L2. There was also confirmation of a 5-mm spondylolisthesis. The AME’s diagnosis was left L5-S1 radiculopathy, degenerative disc disease, and spondylolisthesis of L5 on S1 causing bilateral LS nerve root impingement. He also found multilevel mild spondylosis of the lumbar spine as well.

In addition to the diagnostic studies supporting to the AME’s diagnosis, he considered several scientific studies. It was still his opinion that 20% of applicant’s permanent disability should be apportioned to his nonindustrial spondylolisthesis and degenerative disc disease. The AME in orthopedics indicated applicant had a one-level spondylolisthesis, which he described as a
situation where vertebrae slip and overlap, creating an unstable back. As a consequence, the applicant was predisposed to develop back pain more than another individual who had no spondylolisthesis. In terms of the causation of the spondylolisthesis, the AME stated:

The most common cause is a developmental problem. By developmental, it develops, period. Very rarely would it develop—or occur secondary to trauma, and that would have to be a major trauma to fracture both sides of what we call the pars inter-articularis. It didn’t have that. So this is a nonindustrial, not from instantaneous injury or a CT.

He also indicated that even barring any injuries, the applicant would have low back pain because of his spondylolisthesis.

The WCAB found that the AME’s opinion did not constitute substantial medical evidence, applying the Escobedo standard. The WCAB majority concluded that the AME’s apportionment determination was based upon the risks that spondylolisthesis posed in the development of back pain. The AME found that applicant was predisposed to the development of back pain by virtue of this non-industrial condition. The WCAB in finding the AME’s apportionment invalid indicated that apportionment has to be to the cause of the disability and it is not appropriate to apportion to what they described as “risk factors.” Therefore, the WCAB found that applicant was entitled to an unapportioned award.


In describing a potential contributing causal factor of permanent disability as a “risk factor” it is critical to properly define and characterize whether the “risk factor” in question is really pathology. If the risk factor in question is in actuality pathology, then it is potentially apportionable based on Brodie and the cases cited hereinabove. Apportionment can be based on pathology even if the pathology is asymptomatic and did not result in any disability or medical treatment before the industrial injury in question. All that is required is a medical report and opinion that constitutes substantial medical evidence as to why the pathology in question or at issue is a contributing cause of the applicant’s permanent disability, i.e. would the applicant’s permanent disability be as great as it is in the absence of the underlying pathology.

Arguably, in this case the AME’s, opinion as the dissenting commissioner indicated, met the Escobedo standard of substantial medical evidence by considering the applicant’s entire medical
history, appropriate diagnostic studies, scientific/medical literature, and noting that the applicant’s disability would not be as great as it would be in the absence of the spondylolisthesis.

**The AMA Guides: Impairment versus Apportionment of Disability**

The AMA Guides under California’s workers’ compensation system are for determining whole person impairment (WPI) and not apportionment under Labor Code Labor Code §§4663 & 4664.

In three cases, *Caires v. Sharp Healthcare* (2014) Cal.Wrk.Comp. P.D. LEXIS 145 (WCAB panel decision) and *Hosino v. Xanterra Parks & Resorts* 2016 Cal.Wrk.Comp. P.D. LEXIS 351 (WCAB panel decision) and *Pini v. WCAB* (2007) 73 Cal.Comp.Cases 160 (writ denied), the WCAB held that while whole person impairment and permanent disability are closely related, they should not be equated nor are they synonymous when used by evaluating physicians to determine whether or not there is valid nonindustrial apportionment under the AMA Guides to the Evaluation of Permanent Impairment, Fifth Edition (AMA Guides).

In *Caires*, the WCJ awarded 9% permanent disability relying on WPI and apportionment opinions and determinations by a PQME in orthopedics, a primary treating physician in orthopedics, and an AME in psychiatry. Applicant filed a Petition for Reconsideration contending the opinions of all three evaluating physicians on apportionment did not constitute substantial medical evidence. The WCAB granted applicant’s Petition for Reconsideration, rescinded the award, and remanded the case back to the trial level for further development of the record. The WCAB found that all three reporting physicians’ opinions on apportionment were fundamentally flawed for different reasons. Moreover, in light of what appeared to be a clear lack of familiarity with the basic concepts and principles of valid legal apportionment under Labor Code §4663, the parties should consider the use of an AME, or if they were unable to do so, the WCJ may consider appointing a “regular physician” under Labor Code §5701.

A large part of the WCAB’s decision focused on the opinion of the SPQME in orthopedics who found that 87.5% of applicant’s 24% whole person impairment was related to nonindustrial degenerative conditions, leaving only 3% permanent disability as industrial.

In assessing and determining WPI, the SPQME in orthopedics utilized the range of motion method (ROM). However, with respect to apportionment and causation of orthopedic permanent disability, the SPQME used DRE lumbar Category IV. The SPQME was deposed by applicant’s counsel. He was specifically questioned as to why he determined impairment using ROM and then used DRE Category IV in determining apportionment. In trying to explain the methodology he used, the SPQME specifically referenced an example in the AMA Guides as follows:

A. Well, to answer your question about using rating—using impairment—rating impairment using range of motion and then apportionment using the DRE category four, actually, there’s a classic example in the AMA guides using the
same method of analysis. It’s actually the [*7] book. It’s one of the examples in the book. They rate a condition by range of motion, and then at the very end they say because there is a degenerative condition, one might use the DRE method to apportion out the preexisting condition. So it is within the AMA guides cited as one of the example cases. So that’s how I followed this rule. (Exh. E, September 9, 2009 deposition transcript, pp. 20:3-14.)

The WCAB found the SPQME’s opinion on apportionment did not constitute substantial medical evidence since he relied exclusively on an apportionment example in the AMA Guides as opposed to rendering an opinion on apportionment in accordance with Labor Code §§4663 and 4664, which the Board emphatically stated, “…defines apportionment without reference to the AMA Guides.” In footnote 3, in Caires, the WCAB stressed, that the Guides acknowledge that “[m]ost states have their own customized methods for calculating apportionment.” (Guides §1.6b, p.12). In a lengthy two and a half page analysis and discussion, the WCAB made a careful distinction between a determination of whole person impairment under the AMA Guides as opposed to a separate and distinct determination of disability and apportionment.

Initially, the WCAB indicated that under the Labor Code whole person impairment is merely a component of permanent disability. In that regard the Board stated:


In Caires, the WCAB also indicated that if an evaluating physician uses an example from the AMA Guides to make an apportionment determination, that example must be consistent with Labor Code §4663 and requires a detailed explanation by the evaluating physician.

“…[W]hen evaluating apportionment of permanent disability, a physician must offer an opinion in accordance with Labor Code sections 4663 and 4664, which define apportionment without reference to the AMA Guides. An example from the AMA Guides may be utilized by a physician if he or she explains how the example addresses the current cause of permanent disability under Labor Code section 4663 and Escobedo. *(emphasis added).*
In *Caires*, the SPQME in orthopedics failed to provide any explanation as to why the apportionment example he used from the AMA Guides was consistent with §4663 and applicable case law.

In *Pini v. WCAB* (2007) 73 Cal.Comp.Cases 160 (writ denied), the WCJ awarded applicant 46% P.D. without apportionment. Applicant’s QME cited an example from the AMA Guides related to the “aging process” and apportionment. The WCAB rescinded the award and remanded the case for further development of the record on apportionment stating the opinion of applicant’s QME on apportionment was not substantial evidence, “since it was based on the AMA Guides rather than on Labor Code Labor Code §4663 and the applicable case law.”

In the most recent case, *Hosino v. Xanterra Parks & Resorts* 2016 Cal.Wrk.Comp. P.D. LEXIS 351 (WCAB panel decision), the second and most recent case, the WCJ relying on the opinion of an AME in orthopedics related to an October 26, 2011, specific injury, awarded applicant 34% permanent disability after nonindustrial apportionment of 35%. Applicant filed for Reconsideration, which was granted by the WCAB. The case was returned to the trial level for further proceedings related to permanent disability and apportionment. The AME was deposed by applicant’s counsel and the WCAB included in its lengthy Opinion seven full pages from the AME’s deposition transcript.

The WCAB indicated there were numerous ambiguities and conflicts in the AME’s deposition testimony. The most significant flaw in the AME’s opinion and analysis was that the AME equated apportionment of impairment with apportionment of disability which the WCJ also erroneously adopted. The WCAB stated:

> We disagree with the WCJ’s statement that “the proper method of determining apportionment was utilized,” because Dr. Wood and the WCJ apportioned impairment not permanent disability. Of course impairment and permanent disability are closely related, but they should not be equated to determine apportionment.

The WCAB then cited *Caires* to remind the WCJ on remand that the AMA Guides can be used to evaluate whole person impairment but that with respect to determining apportionment, Labor Code §4663 is “controlling.” As it did in *Caires*, the WCAB in *Hosino* stated:

> In contrast, when evaluating apportionment of permanent disability, a physician must offer an opinion in accordance with Labor Code sections 4663 and 4664, which define apportionment without reference to the AMA Guides.” In *Caires*, the Board panel also noted in footnote 3 that “[t]he Guides acknowledge that [m]ost states have their own customized methods for calculating apportionment.” (Guides § 1.6b, p. 12).”
As a consequence the Board found that the AME’s opinion on apportionment did not constitute substantial medical evidence. While affirming parts of the WCJ’s Findings and Award the WCAB amended the Findings of Fact, indicating that the issues of permanent disability and apportionment should be deferred pending further proceedings and a new decision by the WCJ on remand with jurisdiction reserved. (See also, subsequent decision Hosino v. Xanterra Parks and Resorts 2017 Cal.Wrk.Comp. P.D. LEXIS 341 (WCAB panel decision) (WPI does not directly equate to permanent disability; when evaluating apportionment of permanent disability, a physician must offer an opinion in accordance with Labor Code §§4663 and 4664, which define apportionment without reference to the AMA Guides.)

The critical lessons and practice pointers from Caires, Hosino and Pini are:

1) While WPI and permanent disability are closely related, they are not synonymous. WPI does not directly equate to permanent disability. As a general rule the AMA Guides cannot be used by evaluating physicians or the parties to determine valid legal apportionment under Labor Code §§4663 & 4664.

2) Labor Code §4663 and related case law construing and applying §§4663 & 4664 define apportionment without reference to the AMA Guides, including any references or examples of apportionment in the Guides.

3) If an evaluating physician attempts to utilize an example in the AMA Guides to determine apportionment, he or she must explain in detail how the apportionment example in the AMA Guides addresses the current causes of the applicants permanent disability under Labor Code §§4663 and 4664 as well as Brodie, Escobedo and other cases construing and applying §4663. The author believes very few, if any, evaluating physicians will be able to provide such an explanation that will constitute substantial medical evidence.
Petitions to Reopen/Vargas

Wilson v. 20/20 Administrative Services, The Hartford Insurance Company 2016
Cal.Wrk.Comp.  P.D. LEXIS 654  (WCAB panel decision)

Issues: What is the proper methodology to determine apportionment related to Petitions to Reopen for New and Further Disability under the WCAB’s en banc decision in Vargas v. Atascadero State Hospital (2006) 71 Cal.Comp.Cases 500 (WCAB en banc). In addition, whether defendant properly and timely raised the issue of apportionment.

Holding: The proper methodology to determine whether there is valid legal apportionment under Labor Code §§4663 and 4664 related to a Petition to Reopen for New and Further Disability under the Vargas case is to determine whether there are any nonindustrial contributing causal factors of the applicant’s increased permanent disability from the time of the prior award until the time of the P&S/MMI evaluation related to the Petition to Reopen for New and Further Disability. The fact permanent disability was identified as a disputed issue for trial is generally sufficient to raise the related issue of apportionment.

Overview and Discussion: Following trial the WCJ issued an amended Findings and Order related to a cumulative trauma from April 2007 to April 2008, where applicant sustained industrial injury to her neck, back, upper extremities, psyche, internal system, high blood pressure/nervous system, and sleep, with permanent disability of 68% after apportionment.

Applicant had also received a prior Stipulated Award on January 25, 2012, for 68%. Given the prior Award, the WCJ found the present permanent disability of 68% was no greater than the prior award of 68%, and that applicant take nothing further related to her Petition to Reopen for New and Further Disability.

Applicant filed a Petition for Reconsideration arguing that the AME in psychology and the PQME in internal medicine had both found new and further permanent disability and that any apportionment related to the new and further disability found by the WCJ was not supported by substantial medical evidence. Applicant also argued defendant had not timely raised the issue of apportionment before the case was tried and submitted.

Whether defendant properly raised apportionment as an issue before the case was tried and submitted.

On Reconsideration the WCAB found that defendant had properly and timely raised the issue of apportionment. In that regard the WCAB stated:
Even though the “apportionment” box on page three of the Pretrial Conference Statement of July 13, 2015 was not checked, the “other issues” box at the bottom of the same page was checked, and “LC 4664” was handwritten within the list of “other issues.” Secondly, the issue of permanent disability was identified in the “Stipulations and Issues” statement in the Minutes of Hearing at trial on February 3, 2016, and although “apportionment” was not specifically raised, the identification of permanent disability as a disputed issue was sufficient to raise the issue of apportionment. (See Bontempo v. Workers’ Comp. Appeals Bd. (2009) 173 Cal.App.4th 689, 704 (74 Cal.Comp.Cases 419): (Raising the issues of permanent disability (Lab. Code §4660) and apportionment (Lab. Code, §§4663, 4664) was sufficient to raise the 15% increase in permanent disability under Labor Code section 4658(d).])

The reporting physicians in psychiatry and internal medicine and the WCJ failed to properly determine apportionment related to applicant’s Petition to Reopen for New and Further Disability.

In every case involving a Petition to Reopen for New and Further Disability the methodology for calculating nonindustrial apportionment related to any purported new and further disability is set forth in the controlling case of Vargas v. Atascadero State Hospital (2006) 71 Cal.Comp.Cases 500 (WCAB en banc). Vargas requires that any new and further disability is to be determined commencing from the day after any prior award up to the MMI/P&S evaluation determining whether any new and further disability exists. Any alleged or purported nonindustrial apportionment related to any new and further disability must be assessed over this specific limited period of time. Any reference to apportionment that may have existed prior to the date of the Award is not to be considered.

Under the facts of this case, the reporting physician in orthopedics determined there was no new and further disability. However, the AME in psychiatry found there was new and further disability, but also applied 12% nonindustrial apportionment to applicant’s psychiatric disability. The PQME in internal medicine found there was 80% nonindustrial apportionment to applicant’s cardiovascular disability related to the Petition to Reopen for New and Further Disability. There was no indication by either of these reporting physicians that the percentage of nonindustrial apportionment was determined related to the specific time frame from immediately after the prior Stipulated Award of January 25, 2012, up until each of their respective MMI/P&S evaluations and related reports.

Moreover, the WCAB determined that the PQME in internal medicine’s opinion on apportionment did not comply with the Escobedo standards since he did not describe in detail the
exact nature of the apportionable disability caused by applicant’s preexisting hypertension and that the physician was “opaque” in setting forth the basis for his apportionment opinion. The WCAB also took issue with the fact the AME in psychology may have derived his apportionment percentage determination from the flawed apportionment opinion of the PQME in internal medicine.

As a consequence, the Board found good cause to develop the record further on the issue of apportionment and remanded the case for supplemental opinions consistent with their analysis. The WCAB stressed in Footnote No. 2 that, “the question for both physicians is whether there is a medical basis to apportion applicant’s present new and further permanent disability, if any, without reference to any apportionment that may have existed at the time of the prior Stipulated Award.”

**Editor’s Comment:** In the first few years after SB 899 and Labor Code §§4663 and 4664 were enacted, physicians, attorneys, and trial judges had an exceedingly difficult time determining how to properly calculate and determine apportionment in cases involving Petitions to Reopen for New and Further disability. This led to the WCAB’s en banc decision in Vargas v. Atascadero State Hospital (2006) 71 CCC 500, which provides explicit guidance with respect to the correct methodology in determining and applying valid legal apportionment under Labor Code §§4663 and 4664 related to Petitions to Reopen For New and Further Disability. For a medical opinion to constitute substantial medical evidence an applicant has suffered new and further disability over and above a prior award, the determination of valid legal apportionment must be based on a focal timeline between the date the prior Stipulated Award issued and the MMI/P&S evaluations in any related medical specialty. It is only during this defined and limited timeframe that any contributing nonindustrial causal factors of the applicant’s new and further disability must be determined without reference to any apportionment or basis for apportionment that may have existed at or before the date of the prior Stipulated Award.

**Benson**

*Tapia v. City of Watsonville, PSI 2017 Cal.Wrk.Comp P.D. LEXIS 50 (WCAB panel decision)*

**Issue:** Whether the AME where there were five separate and successive injuries consolidated for trial impermissibly combined and merged the disability from each separate injury into a single cumulative trauma without parceling out the approximate percentages to which each separate and distinct injury causally contributed to the applicant's overall permanent disability.

**Holding:** Both the AME and the WCJ in his decision and Award in the five consolidated cases, impermissibly merged separate and successive injuries into one cumulative trauma without parceling out the approximate percentages to which each separate and distinct injury causally contributed to the applicant's overall permanent disability contrary to Labor Code section 4663 and *Benson v. Workers’Comp.Appeals Bd.* (2009) 170 Cal.App.4th 1535, 74 Cal.Comp.Cases 114).

**Overview and Discussion:** Applicant, a fire captain, filed five Applications for separate industrial injuries, including two cumulative traumas and three specific injuries. The parties agreed to use an AME. Following trial the WCJ awarded applicant 73% permanent disability without any apportionment and indicated that all of applicant's disability was attributable to a single cumulative trauma period ending in 2014. Defendant filed a petition for reconsideration.

The AME by way of a supplemental report was asked to explain his opinion that applicant had sustained only a single cumulative trauma injury through 2014. In essence he stated:

The first question had to do with **apportionment** referable to the multiple dates of injury. As you can see from the information in the introductory portion of the report, the patient has a CT exposure through 2008 and then a CT exposure through 2014 with at least three dates of injury in between. The injuries in 2012 are only seven months apart. I had also noted on page 1 of my November 24, 2015 report that the situation of the patient’s left hip worsening after his surgery as well as his findings of bilateral carpal tunnel syndrome (CTS) warranted looking at this as a CT exposure. The number of injuries involves speaks for itself. This is a very common finding in fireman, policeman, and transit bus drivers. Multiple injuries occur over the course of their career and when they are looked at in retrospect represent a CT exposure. As I have noted on page 1 of my last report, I would look at all of these events intertwined and feel that it is best looked at as a single CT event. I'm not able to break out individual dates and levels of impairment.
Defendant filed a Petition for Reconsideration raising a number of issues but primarily that both the WCJ and the AME had impermissibly merged multiple separate and successive injuries in violation of Labor Code §4663 and Benson. The WCAB granted defendant’s Petition for Reconsideration and rescinded the 73% award and remanded the consolidated cases for further proceedings in the form of either supplemental reporting or a deposition of the AME on permanent disability and the Benson apportionment issue.

The WCAB noted pursuant to Benson that “The only instance in which a combined award a permanent disability may be justified is where the evaluating physician is unable, with reasonable medical probability, to parcel out the approximate percentages to which each distinct industrial injury causally contributed to the employee’s overall permanent disability.” Moreover, the WCAB indicated that the AME’s opinion that all of applicant’s disability should be attributable to a single cumulative trauma did not constitute substantial evidence since:

> Notwithstanding the clear evidence that applicant sustained three distinct industrial injuries …..Dr. Anderson does not assign specific levels of disability to these separate injuries or explain why he is unable to do so. Instead, he states, “I am not able to break out individual dates and levels of impairment.” The only attempt at an explanation is the suggestion that with police officers, firefighters and transit drivers it is common to find multiple injuries over the course of their careers that actually represent a cumulative trauma exposure. That commentary is insufficient to meet the requirements of section 4663(c). Dr. Anderson must either assign a specific level of disability to each of applicant’s industrial injuries or expound as to the exact reasons he is unable to do so.

**Editor’s Comment:** See also, *Guerrero v. Walker Corporation* 2017 Cal.Wrk.Comp. P.D. LEXIS 195 (WCAB panel decision) (WCAB affirmed WCJ’s finding that applicant suffered two periods of cumulative trauma since there was a lengthy break in applicant’s need for industrially-related medical treatment from 7/5/2011 to 12/26/2011, which the WCAB regarded as significant in separating the two distinct periods of cumulative trauma and is thus consistent with the Coltharp case and distinguishable from Western Growers v. WCAB (Austin).


**Issues:** Whether the WCJ improperly calculated the permanent disability from applicant’s four separate successive injuries under Benson by using a complicated mathematical formula to increase the permanent disability apportionment to each injury as well as the permanent disability apportioned to nonindustrial factors until the combined disability for three of the four injuries and nonindustrial disability under the Combined Values Chart totaled 100%.
**Holding:** The WCAB reversed the WCJ finding that the WCJ had erroneously calculated applicant’s permanent disability under both *Benson* and under Labor Code §4663 and amended the joint Findings and Award to reflect that fact.

**Overview and Discussion:** Applicant, a heavy equipment mechanic, suffered and filed four separate successive injuries consisting of three specific injuries and one cumulative trauma injury. The WCAB noted that it was uncontested that the scheduled permanent disability ratings would have rendered an award of 53% for one specific injury, 47% for another specific injury, and 67% for the cumulative trauma injury. However, the WCJ elected not to employ the scheduled ratings because “combining the scheduled disabilities, before apportioning to each injury and to nonindustrial factors, yielded overall 95% permanent disability.

Also the WCJ found that the overall 95% permanent disability had been rebutted by applicant’s vocational expert who had rendered an opinion that the applicant was unable to compete in the open labor market.

Defendant filed a Petition for Reconsideration indicating that the WCJ had committed error in making disability findings at variance with the scheduled disabilities and that applicant’s vocational expert’s opinion did not constitute substantial evidence.

The WCAB granted defendant’s Petition for Reconsideration. At the outset the WCAB found that applicant’s vocational expert’s opinions did not constitute substantial evidence under either *Ogilvie* or *Dahl*.

With respect to the *Benson* and Labor §4663 issue, the WCAB indicated that even if the evidence supported a conclusion that applicant was unable to compete in the open labor market solely as a result of his various work injuries both Labor Code §4663 and *Benson* were applicable. Labor Code §4663 and *Benson* would require applicant’s permanent disability to be apportioned among his various industrial injuries. The Board noted that “it is settled that disability is caused by separate injuries or non-industrial factors are separated by subtracting percentages of disability.” (citations omitted).

As a consequence after applying *Benson* the WCAB indicated that the scheduled ratings with consideration of both apportionment and *Benson* equated to separate awards of 53% for one specific injury, 47% for the other specific injury, and 67% for the cumulative trauma injury, all to be awarded applicant separately.

**Issue:** In a situation where there are two separate and successive specific injuries related to multiple body parts and conditions does apportionment under Benson require apportionment for each body part and condition with the resultant disability for each body part and condition to be allocated or apportioned to the separate and successive specific injuries.

**Holding:** Where there are multiple separate and successive injuries, each reporting physician and their respective specialties must make an independent apportionment determination related to each and every body part and condition and then under Benson the resultant disability for each separate body part and condition should be apportioned between the separate and successive injuries unless in limited circumstances the evaluating physician or physicians cannot parcel out with reasonable medical probability the approximate percentage as to which each distinct industrial injury causally contributed to the employee’s overall permanent disability.

**Facts and Discussion:** Applicant, while employed as a utility dairy service truck driver suffered two separate successive specific injuries. The first was on April 26, 2010, as a result of an industrial motor vehicle accident in which he suffered injury to his right shoulder, brain, left knee, left shoulder, right knee, and psyche. Applicant received extensive treatment, especially with respect to his serious brain injury. Following treatment he did return to work, but with some physical restrictions and with simplified tasks. However, he did not have any driving restrictions.

On July 14, 2011, he suffered his second separate specific injury also as a result of an industrial motor vehicle accident with injuries to his brain, right shoulder, lumbar spine, left shoulder, right knee, and psyche.

Following trial, the WCJ found that the solvent insurer’s liability for one of the specific injuries was 70% and that CIGA’s share was 30%. Both CIGA and the solvent insurer, Imperium Insurance Company, filed Petitions for Reconsideration.

CIGA argued that there should have only been a joint award rather than separate awards since the applicant’s disability resulting from both separate and successive injuries was inextricably intertwined. In such a case there is joint and several liability between Imperium and CIGA, since under Insurance Code §1063.1(c)(9) there would be other insurance relieving CIGA of all liability.
The solvent insurer, Imperium, argued the WCJ should not have found the applicant to be 100% permanently totally disabled and that any resultant permanent disability is not inextricably intertwined or interwoven requiring separate awards under Benson.

There were multiple reporting physicians in the case, including multiple AMEs. There were AMEs in physical medicine, neuropsychology, and orthopedics as well as a PQME in psychology.

The AME in orthopedics apportioned 25% of applicant’s back disability as nonindustrial related to a preexisting disability, 65% to the 2010 specific injury, and 10% to the 2011 injury. The AME in neuropsychology apportioned 85% of the neuropsychological disorder to the 2010 injury and 15% to the 2011 injury. The SPQME psychology apportioned 70% of applicant’s psychiatric disability to the 2010 injury and 30% to the 2011 injury. The AME in physical medicine failed to provide an opinion regarding apportionment after applicant reached maximum medical improvement.

The WCAB granted the Petition for Reconsideration and reversed the WCJ and remanded the case back for further development of the record with respect to Benson apportionment and other issues.

The WCAB indicating that the WCJ failed to explain how permanent disability was allocated 70% to the solvent carrier, Imperium, and 30% to CIGA. In that regard the Board stated, “Given that applicant injured multiple body parts, it is unclear why the WCJ took the apportionment for a single body part (applicant’s psyche) and determined that applicant’s permanent disability should be apportioned or “allocated” 70/30).

The WCAB indicated that with respect to applicant’s permanent disability from the two separate and successive specific injuries, if it can be parcelled out, it “must be apportioned for each body part based on substantial medical evidence.” (emphasis added).

Of significance is the fact that even though permanent disability needs to be allocated between separate and successive injuries because CIGA is involved, and even though the permanent disability can be allocated or apportioned between separate and successive injuries only the solvent carrier, Imperium, is solely liable for vocational costs, the EDD lien, and medical treatment since all of those cannot be apportioned, and under Insurance Code §1063.1(c) CIGA is relieved of liability.
**Ibrahim v. California Dept. of Corrections and Rehabilitation (2017) 45 CWCR 203 (WCAB panel decision)**

**Holding:** Medical reports from three Agreed Medical Examiners in different specialty fields were found by the WCAB to not constitute substantial medical evidence on apportionment since each of the AMEs failed to adequately explain why they could not apportion the applicant’s permanent disability among several separate and successive injuries.

**Overview and Discussion:** Applicant filed twenty-one claim forms, but only filed Applications for Adjudication related to nine separate and successive dates of injury consisting of seven specific injuries and two cumulative trauma injuries.

Based on the reports and opinions of AMEs in orthopedics, internal medicine, and psychiatry, the WCJ issued a combined award related to only two specific injury claims with dates of June 27, 2007 and January 24, 2010. There was no finding by the WCJ of apportionment of the applicant’s permanent disability for any of the nine dates of injury, let alone the two specific injuries of June 27, 2007 and January 24, 2010 under *Benson*. Defendant filed a Petition for Reconsideration that was granted by the WCAB who rescinded the combined Joint Findings and Award and remanded for further development of the record.

It appears the AME in orthopedics did find some apportionment under Labor Code §4663 related to industrial and nonindustrial contributing causal factors of the applicant’s orthopedic PD, but failed to apportion any permanent disability between the two separate specific injuries.

The AME in internal medicine also found apportionment between industrial and nonindustrial contributing causal factors, but did not apportion applicant’s permanent disability among any of the nine separate and successive injuries, indicating the permanent disability was “inextricably intertwined” from an internal medicine standpoint.

The AME in psychiatry while indicating that 65% of applicant’s psychiatric disability was attributable to multiple and successive injuries also failed to apportion to any of the separate and successive injuries based on the rationale that the injuries were “inextricably intertwined” and it was not possible for him to apportion the psychiatric disability between the multiple and successive injuries.

**The WCAB’s Decision:** In rescinding the WCJ’s combined joint Findings and Award, the WCAB held that pursuant to *Benson*, permanent disability that is attributable to multiple injuries that cause permanent disability, the resulting permanent disability must be apportioned among
the separate and successive injuries unless an evaluating physician cannot parcel it out within reasonable medical probability.

The WCAB noted that the AME in orthopedics while finding two separate and successive specific injuries on July 27, 2007 and January 24, 2010, failed to apportion the applicant’s permanent disability between these two separate injuries and also failed to discuss the applicant’s other seven injuries, including five other specific injuries and two cumulative traumas. Although the orthopedic AME did find some valid Labor Code §4663 nonindustrial apportionment he failed to take the second step and apportion any resulting industrial permanent disability between the two specific injuries.

With respect to the other AMEs in internal medicine and psychiatry, the WCAB indicated their opinions did not constitute substantial medical evidence since their opinions were incomplete and they both “merely” stated in a conclusory manner that the injury claims were “inextricably intertwined.” Also, the AMEs failed to provide any plausible analysis or explanation of the basis for their respective opinions that the permanent disability from nine separate and successive injuries were “inextricably intertwined.”

*Cruz v. California Hospital Medical Center* 2016 Cal.Wrk.Comp. P.D. LEXIS 685 (WCAB panel decision)

**Issue:** Whether the WCJ in a case with two separate successive specific injuries properly found a combined award versus separate awards under *Benson* based on the opinion of the AME in orthopedics. The focal issue was whether or not the orthopedic AME’s opinion that the disability from the two separate successive specific injuries was “inextricably intertwined.”

**Holding:** The WCAB in granting defendant’s Petition for Reconsideration reversed the WCJ’s determination that applicant should receive one combined award of 94% as opposed to two separate awards related to the two separate and successive specific injuries that occurred in 2002 and 2005. The WCAB remanded the case to the trial level, indicating that the parties should attempt to reach an agreement on the use of another orthopedic AME and if that was not possible, the judge should appoint a “regular physician” under Labor Code §5701. The basis for the WCAB’s reversal of the WCJ’s combined award was based on the fact that the AME gave inconsistent and conflicting opinions on both the level of permanent disability and on whether or not the resulted disability should be apportioned to the two separate successive specific injuries. The WCAB found that the orthopedic AME’s opinion that the permanent disability from the two specific injuries was “inextricably intertwined” did not constitute substantial medical evidence. Moreover, the orthopedic AME failed to provide an explanation related to these inconsistencies. As a consequence his opinions with respect to permanent disability and apportionment cannot be relied on.
Overview and Discussion: Applicant was employed as a certified nurse assistant and suffered two admitted specific injuries. One on January 1, 2002 and the other on May 23, 2005. Applicant also claimed injury to her internal system which was not found to be AOE/COE by the WCJ. The WCJ awarded applicant a combined award of 94% permanent disability for both separate and successive specific injuries. Both applicant and defendant filed Petitions for Reconsideration. Applicant argued that the WCJ should have found the applicant to be 100% permanently disabled based on the opinion of her vocational expert. In contrast, defendant argued that the judge impermissibly merged two separate distinct specific injuries into one award of permanent disability and failed to apportion permanent disability between the two specific injuries as required by Labor Code §4663 and Benson.

One of the reporting physicians was an AME in orthopedics. Over the course of ten years he issued sixteen reports and was deposed three times.

While the WCAB acknowledged that the opinion of an AME should ordinarily be followed unless there is good reason to find the opinion unpersuasive. With respect to the requirements of Benson, the WCAB stated:

In the case of successive injuries to the same body part, we held that a combined award of permanent disability is inconsistent with the requirement that apportionment be based on causation. The “reporting physician is required to determine all of the causative sources of the employee’s permanent disability, giving consideration not only to the current industrial injury, but also to any prior or subsequent industrial injuries, as well as any prior or subsequent non-industrial injuries or conditions.” (Benson, supra, 72 Cal.Comp.Cases 1620 at 1631-1632.) If the physician cannot do so, he or she must state the reasons why, after an evaluation or consultation with at least one other physician. (Id., at p. 1632.) We did, however, acknowledge and leave room for a combined award in those rare instances where the physician, after complying with the mandates of section 4663, simply cannot “medically parcel out the degree to which each injury is causally contributing to the employee’s overall permanent disability.” (Id., at p. 1634.)

The reason the WCAB found the AME’s opinions expressed in his reports and during the course of his deposition inconsistent and conflicting was that in one report he was able to apportion the disability between the two specific injuries and in other reports he claimed he could not because they were “inextricably intertwined.” Moreover, the orthopedic AME failed to provide an explanation for various inconsistencies which would have required the Board to engage in speculation to determine which of the various opinions he offered was accurate.
The WCAB in finding the orthopedic AME’s opinions did not constitute substantial medical evidence also indicated the AME “does not offer a sound method in assessing applicant’s residual disability in view of the fact that permanent disability attributable to the 2002 injury is required to be determined pursuant to the 1997 PDRS, whereas permanent disability attributable to the 2005 injury is evaluated under the 2005 PDRS.”

The WCAB found the AME’s opinions contained numerous contradictions and inconsistencies in both his reports and deposition testimony. The WCAB was persuaded that overall his opinions did not constitute substantial evidence and as a consequence could not be relied upon.
Medical Treatment and Apportionment

*Hikida v. Workers’ Comp. Appeals Bd.*, (2017) 12 Cal.App.5th 1249 (certified for publication)

**Issue:** The issue in this case is whether an employer is entirely responsible for both medical treatment and permanent disability arising “directly” from unsuccessful medical intervention without apportionment even where the need for the surgery or medical intervention was necessitated by both industrial and nonindustrial factors.

**Factual and Procedural Overview and Discussion:** Applicant was a long-term employee. The WCJ found she suffered a number of industrial injuries and conditions including cervical spine, thoracic spine, upper extremities, carpal tunnel syndrome, psyche, fingers, elbows, headaches, memory loss, sleep disorder and deconditioning. In May of 2010, applicant stopped working and had carpal tunnel surgery. Due to a bad surgical outcome, she developed chronic regional pain syndrome (CRPS). The CRPS caused applicant debilitating pain in her upper extremities and severely impaired her ability to function. She never returned to work and became permanent and stationary in May of 2013.

One of the reporting physicians was an AME in Orthopedics. The AME indicated that with respect to the applicant’s carpal tunnel syndrome the permanent disability was 90% Industrial and 10% nonindustrial. However, he also found applicant’s permanent disability was due **entirely** to the effects of the CRPS applicant developed as a result of the failed carpal tunnel surgery. He determined applicant was permanently totally disabled from the labor market.

After the first trial, the WCJ found applicant’s permanent disability was 90% industrial and 10% nonindustrial. Applicant filed a petition for reconsideration. In a split panel decision, the WCAB affirmed the WCJ’s apportionment of 90% industrial and 10% non-industrial. In doing so, the WCAB reasoned there was a basis for nonindustrial apportionment because the CRPS was caused by the surgery to treat applicant’s industrial carpal tunnel syndrome which itself was 10% non-industrial. In affirming the WCJ’s apportionment determination the WCAB cited the California Supreme Court's decision in *Brodie*. However, based on other grounds, the WCAB remanded the case for further development of the record related to psychiatric permanent disability. Following remand the WCJ issued another decision finding applicant 98% permanently disabled but still apportioned applicant’s orthopedic disability related to the carpal tunnel syndrome and resulting surgery to 90% industrial and 10% non-industrial. Applicant filed a second petition for reconsideration on a number of grounds asking the Board to revisit and reconsider the appropriateness of apportionment. Once again the WCAB in a split panel decision denied reconsideration finding 10% nonindustrial apportionment valid. Applicant filed a writ with the Court of Appeal.
Procedural Issue: Defendant argued that applicant’s writ was untimely since applicant did not file a writ within 45 days of the WCAB’s initial February 8, 2016 opinion which defendant characterized as a “final decision.” However, the Court ruled that the WCAB’s initial decision on apportionment was not final and did not involve a threshold issue that would have necessitated the filing of an immediate writ. “The fact that an issue is significant or important to the litigation is not sufficient to support a finding that it is a threshold issue.” The Court held that the WCAB’s February 8, 2016 decision was not a final order disposing of the case especially as it related to apportionment or other issues.

The Apportionment Issue: The court initially discussed the significant changes in the law of apportionment engendered by SB 899 and Labor Code section 4663 as discussed by the California Supreme Court in *Brodie*. The court noted that both Labor Code sections 4663 and 4664 eliminated the bar against apportionment based on pathology and asymptomatic conditions ushering in a new regime of apportionment based on causation. However, the court did not discuss in detail or at length that both Labor Code sections 4663 and 4664 also allow for apportionment where an industrial injury aggravates, accelerates or lights up an underlying disease process, condition, or injury. The court ruled that applicant’s permanent total disability was caused not by her carpal tunnel syndrome but by the CRPS that was caused by the medical treatment the employer provided. They framed the issue as “….whether an employer is responsible for both the medical treatment and disability arising directly from unsuccessful medical intervention, without apportionment.” They concluded the employer was responsible for both the medical treatment and the permanent disability in such a situation. The important caveat was the resulting permanent disability had to arise *directly* from the unsuccessful medical intervention.

Although the Court of Appeal indicated that when there is an aggravation of an industrial injury by medical treatment, it is a foreseeable consequence of the original compensable injury. Accordingly, “….an employee is entitled to compensation for a new or aggravated injury which results from the medical or surgical treatment of an industrial injury, whether the doctor was furnished by the employer, his insurance carrier, or was selected by the employee.” The Court construed Labor Code sections 4663 and 4664 by stating “…the Legislature did not intend to transform the law requiring employers to pay for all medical treatment caused by an industrial injury including the foreseeable consequences of such medical treatment.” The court stated: “Nothing in the 2004 legislation had any impact on the reasoning that has long supported the employer's responsibility to compensate for medical treatment and the consequences of medical treatment without apportionment.”

Editor’s Comment: There is no dispute that applicant is entitled to compensation for a new or aggravated injury which results from the medical or surgical treatment of an industrial injury (*South Coast Framing, Inc. v. WCAB* (2015) 61 Cal.4th 291, 300). Moreover, it is undisputed
that reasonable medical treatment costs related to an industrial injury are also not subject to apportionment based on contributing industrial and nonindustrial causal factors. (Labor Code §4600) even if the need for medical treatment is partially caused by the industrial injury. The employer must pay for all of the injured worker’s reasonable medical treatment (Granado v. WCAB) (1968) 69 Cal.2d 399). There is also no apportionment of temporary disability indemnity between industrial and nonindustrial causes. (California Ins. Guarantee Assn. v. WCAB (Hernandez) (2007) 153 Cal.App.4th 524. Both medical treatment and temporary disability are nonpermanent disability benefits. In contrast, permanent disability benefits must be apportioned in accordance with the medical evidence.

In Hikida due to the unsuccessful carpal tunnel syndrome surgery, applicant’s industrial carpal tunnel syndrome was aggravated to the extent it evolved into a much more serious and disabling condition, chronic regional pain syndrome (CRPS). With respect to the Court of Appeals “aggravation” analysis, prior to SB 899 and Labor Code §§4663 and 4664 enactment in 2004, there was no basis for apportionment where an industrial injury aggravated or accelerated an underlying disease process or industrial injury. (Brodie v. WCAB 2007) 40 Cal.4th 1313). The question is whether any resulting increase in permanent disability based on an “aggravation” due to the failed carpal tunnel surgery causing CRPS is subject to apportionment under Labor Code §§4663 and 4664 which in the Supreme Court’s decision in Brodie “were intended to reverse these features of former §§4663 and 4750” baring apportionment related to aggravation and acceleration. (Brodie v. WCAB (2007) 40 Cal.4th 1313, 1327).

The Hikida court’s novel interpretation and construction of Labor Code §§4663 and 4664 seemingly negates any basis for apportionment of permanent disability directly and wholly attributable to the CRPS that developed as a result of the unsuccessful carpal tunnel surgery. The court’s holding appears to be at odds with the Supreme Court’s decision in Brodie construing Labor Code sections 4663 and 4664 as well as other cases finding a basis for valid legal apportionment in compensable consequence injury and aggravation scenarios even in unsuccessful surgery cases. It is also difficult to comprehend that all of applicant’s permanent disability is “directly and wholly” attributable to the CRPS since the carpal tunnel surgery was not successful, applicant’s carpal tunnel syndrome was not cured, or relieved and would appear to be either a factor or component of the CRPS with any resulting permanent disability attributable to both the CRPS and carpal tunnel syndrome. Since the carpal tunnel syndrome was 10% nonindustrial then some portion of the CRPS should also be nonindustrial.

In Costa v WCAB (2011) 76 Cal.Comp.Cases 261 (writ denied) Applicant suffered a specific lumbar spine injury. MRI diagnostic testing done shortly after the injury confirmed the existence of nonindustrial severe asymptomatic congenital lumbar spinal stenosis. Applicant’s condition gradually worsened resulting in lumbar decompression surgery at multiple levels. There were serious adverse complications directly attributable to the surgery resulting in applicant being paralyzed from the waist down, complete loss of bowel and bladder control as well as impotence.
Following surgery he was also diagnosed with cauda equina syndrome requiring emergency surgery. Both the applicant’s treating physician and the QME in neurology found applicant to be 100% PTD, but also determined 20% of applicant’s permanent disability was attributable to the preexisting nonindustrial asymptomatic congenital lumbar spinal stenosis.

In Costa, even though the lumbar surgery increased applicant’s permanent disability, the WCAB and the Court of Appeal found a basis for valid legal apportionment of 20% since even taking into consideration the failed back surgery, the underlying nonindustrial congenital spinal stenosis made applicant’s permanent disability more severe or worse than it would have been in the absence of the nonindustrial condition. It is also difficult to understand how the Hikida holding would change the result or analysis on Costa and similar cases where a diagnostically confirmed nonindustrial factor is a contributing causal factor of the increased permanent disability even after an unsuccessful surgery.

In Hikida both applicant and amicus curiae, California Applicant’s Attorneys Association (CAAA) cited and argued to the Court of Appeal a number of cases including Steinkamp v. City of Concord (2006) 71 Cal.Comp.Cases 1203 (writ denied) to support their argument there should not be any nonindustrial apportionment even where the need for the surgery in question was itself necessitated by both industrial and nonindustrial factors. However, it appears both applicant, CAAA and defendant failed to cite, discuss or distinguish a veritable legion of cases subsequent to Steinkamp where valid nonindustrial apportionment was found where the resultant surgery and permanent disability was caused by both industrial and nonindustrial factors. (see, Gunter v. WCAB (2008) 73 Cal.Comp.Cases 1699 (writ denied), Malcom v. WCAB (2008) 73 Cal Comp.Cases 1710 (writ denied), Williams v. WCAB (2009) 74 Cal.Comp.Cases 88, at 94, Campos v. The Vons Companies 2010 Cal.Wrk.Comp.P.D. LEXIS 402, Shadoan v. San Diego Community College 2015 Cal.Wrk.Comp.P.D. LEXIS 448, Gallegos v. Groth Brothers Chevrolet 2016 Cal.Wrk.Comp. P.D. LEXIS 455 (WCAB panel decision) (50% valid apportionment in a knee replacement case is indicated “where the medical evidence establishes the preexisting condition results in the need for surgery.” but cf., Burbank Unified School District v WCAB (Kline) (2016) 82 Cal.Comp.Cases 98 (writ denied) (reporting physician’s opinion on apportionment in a knee replacement case did not constitute substantial medical evidence since inadequate explanation of apportionment opinion based on Gatten.
Labor Code §4662


Issue: Whether WCJ’s determination that applicant was 100% permanently totally disabled without apportionment pursuant to Labor Code §4662(b) (in accordance with the fact) based on expert vocational evidence constituted substantial medical evidence.

Holding: The WCAB reversed the WCJ’s determination that applicant was permanently totally disabled in accordance with the fact under Labor Code §4662(b) since the vocational evidence the WCJ relied upon did not constitute substantial medical evidence since it did not consider that applicant’s alleged inability to compete in the open labor market was based on the effects of medication, some of which were for nonindustrial conditions and were taken before the industrial injury.

Applicant, a dock worker, suffered a January 5, 2010, admitted injury to his back and knees: There was an AME in orthopedics as well as a vocational expert reporting on behalf of applicant. The parties stipulated that a strict rating of the AME’s report would be 67% permanent disability before apportionment and 53% permanent disability after 10% nonindustrial apportionment related to applicant’s lumbar spine. At trial applicant testified as to his inability to perform any type of gainful employment on either a part time or full time basis. He also testified he was taking a number of medications. The WCJ indicated in her Opinion on Decision the applicant was not taking any of the medications prior to his industrial injury and the WCJ also indicated that both medical and vocational evidence indicated the side effects from these medications prohibited applicant from sustaining any type of gainful employment.

As a consequence, the WCJ found applicant to be 100% permanently totally disabled in accordance with the fact under Labor Code §4662(b) and ignored the 10% nonindustrial apportionment attributable to applicant’s lumbar spine disability.

Defendant filed a Petition for Reconsideration that was granted by the WCAB. The WCAB rescinded the WCJ’s Findings of Fact related to permanent disability and attorney fees. They also remanded the case to the trial level for development of the record related to supplemental reporting from the vocational expert and the AME on the issue that while applicant was taking prescribed medications some of it was prescribed for nonindustrial conditions, including his diabetes and some of these medications were prescribed prior to the industrial injury in question.

While the Board acknowledged that the effects of medication used by an injured worker are properly considered in evaluating the level of compensable permanent disability the WCJ’s
analysis was flawed in this case. The reason the WCJ’s analysis was flawed is that her finding of total permanent disability pursuant to Labor Code §4662(b) addressed the combined effects of all the medications taken by applicant, including medications prescribed for non-industrial conditions before he sustained his industrial injury, and not just the effects of the medications he used to treat his industrial condition.

It is permissible to consider lay testimony of the effects of medication, notwithstanding the absence of medical reporting concerning the effects of the medication. However, in this particular case the WCAB indicated the medications taken by applicant is complicated because they include medicine that was prescribed before he sustained an industrial injury contrary to the understanding and findings of the WCJ.

At trial applicant testified he was taking Lyrica for his nonindustrial diabetes before he sustained his industrial injury and that he may also have been prescribed Gabapentin. The WCAB in rescinding the WCJ’s findings and remanding the case stated: “The contribution of applicant’s non-industrial medications and conditions upon his overall level of permanent disability needs to be addressed in the medical reporting and record in order to assure a proper decision.”
Range of Evidence


Issue: Whether a WCJ has the authority to make an apportionment determination and finding based upon a “range of the medical evidence” that conflicts with different apportionment determinations made by multiple reporting physicians in different medical specialties.

Holding: If the apportionment opinions and determinations of multiple reporting physicians in different specialty areas constitute substantial medical evidence, a WCJ does not have the authority to make a different apportionment determination based on a “range of the medical evidence.”

Procedural and Factual Overview and Discussion: Applicant was employed by defendant as a field clerk who suffered an admitted cumulative trauma injury related to his cervical spine, lumbar spine, and psyche for the period of March 1, 2010 through March 1, 2011. The reporting physicians consisted of an AME in psychiatry and a Panel QME in orthopedics. In terms of impairment, the AME in psychiatry determined applicant’s psychiatric disability was 70% industrial and 30% nonindustrial. The psychiatric nonindustrial apportionment was based on applicant’s nonindustrial vision loss and the effect of his family’s relocation to the Philippines. With respect to applicant’s orthopedic disability, the Panel QME in orthopedics concluded that applicant’s lumbar spine injury and related disability was not subject to apportionment. However, with respect to the applicant’s cervical spine disability, the orthopedic QME determined that 80% was industrial and 20% related to the applicant’s prior industrial injury to his upper extremities. The WCJ found that the report and opinions of both physicians constituted substantial medical evidence.

However, notwithstanding the fact the medical reports from the AME in psychiatry and the orthopedic QME constituted substantial medical evidence, the WCJ rejected the physician’s permanent disability ratings including apportionment. In essence, the WCJ concluded applicant had rebutted the scheduled rating found by both reporting physicians and applicant’s admitted cumulative trauma injury caused permanent total disability in “accordance with the fact pursuant to Labor Code §4662(b).”

With respect to apportionment, the WCJ indicated applicant’s 100% permanent disability was subject to apportionment, but rather than applying the apportionment determinations of the respective reporting physicians, the judge without citation to any authority, concluded he had the authority to apportion according to the “range of evidence.”

The WCJ’s apportionment determination was based on a split between the apportionment determinations made by the two physicians, which resulted in 75% of applicant’s permanent disability being industrial related to the cumulative trauma and 25% nonindustrial related to preexisting factors.
Applicant’s counsel filed a Petition for Reconsideration contending the medical and vocational evidence supported a finding of 100% permanent total disability without apportionment. Applicant’s counsel also alleged defendant failed to prove up apportionment pursuant to either Labor Code §§4663 or 4664. The WCAB granted reconsideration and rescinded the Findings of Fact and Award and returned the matter to the trial level to correct the record both procedurally and substantively.

In rescinding the WCJ’s award of 75% industrial and 25% nonindustrial, the Board stated as follows:

The WCJ does not cite to the source of his authority to apportion based upon a “range of evidence” that supersedes the findings of the AME and QME. Labor Code section 4663 requires that an apportionment determination be made by the reporting physicians, not a WCJ, and it is the responsibility of each medical evaluator to parcel out apportionment for the body parts within his area of expertise.

The WCAB noted that each of the reporting physicians in their respective specialties had considered different nonindustrial contributing causal factors of the permanent disability in their respective specialty fields. The Board also noted that, “It is incongruous to find the basis for apportionment of the psyche disability to be readily compared to the basis for apportionment of the neck disability especially where there is no connection between the non-industrial and pre-existing factors of disability. The “range of evidence” cannot be used to determine apportionment between reports addressing different body parts.”

In remanding the case back to the trial level the Board indicated that the best approach would be for the WCJ to prepare formal rating instructions and obtain an expert rating from the DEU for a formal rating consistent with the medical reporting of the respective reporting physicians. The WCAB also noted that contrary to applicant’s attorney’s contention and argument the judge did not apply apportionment pursuant to Labor Code §4664 related to a prior award. Apportionment was only based on Labor Code §4663.
Discovery


Issues: Pursuant to Labor Code §4663(d), must an employee who claims an industrial injury disclose all previous permanent disabilities or physical impairments upon request by defendant without the necessity of formal discovery by way of a deposition.

Holding: The WCAB on removal reversed the WCJ and held the express language of Labor Code §4663(d) requires an employee who claims an industrial injury shall disclose all previous permanent disabilities or physical impairments upon request of the defendant without the necessity of formal discovery by way of a deposition. The WCAB noted there is no requirement for a defendant to formally depose an applicant if a defendant wishes to obtain information about applicant’s prior disabilities or impairments. The WCAB indicated it made little sense that the disclosures required under Labor Code §4663(d) be accomplished via the more costly and time consuming method of taking applicant’s deposition.

Factual Overview and Discussion: On March 18, 2015, applicant, a nurse, submitted a DWC-1 claim form to defendant employer alleging a right shoulder injury that occurred on November 11, 2014. Shortly thereafter on March 30, 2015, the defendant sent a letter to the applicant which stated, “Pursuant to Labor Code §4663(d), we hereby request disclosure of ALL permanent disabilities or physical impairments that existed prior to the injury.” Defendant sent a second letter on the same day requesting the applicant list all medical treatments applicant had received during the last ten years and that the applicant sign the enclosed medical release form and return the form and medical releases to defendant within ten days. Applicant was unrepresented at the time the letters were mailed and received and did not respond.

Applicant became represented on or about May 7, 2015, and filed an Application for Adjudication alleging injuries to her bilateral shoulders and lower extremities. Almost two years after applicant became represented, defendant on February 3, 2017, sent applicant’s counsel what appeared to be an identical version of the second letter sent to the applicant on March 30, 2015, requesting a list of all of her prior medical treatment and medical releases. Defendant then resent the same letter to applicant’s counsel on March 16, 2017. Applicant’s counsel did not respond. On April 18, 2017, defendant filed a Motion to Compel applicant to respond to both the initial March 30, 2015, request for disclosure of permanent disabilities or permanent impairments and also the request for information on medical treatment received during the last ten years, sent in 2015 and twice in 2017.

On April 26, 2017, the WCJ denied defendant’s Motion to Compel. The basis for the denial by the WCJ was that, “Defendants have other avenues of discovery available short of an Order Compelling.” Defendant then filed a Petition for Removal, which was granted by the WCAB,
holding that disclosure of the applicant’s prior permanent disabilities or physical impairments should be ordered pursuant to Labor Code §4663(d).

**The WCAB’s Decision:** The WCAB noted the express language of Labor Code §4663(d), which states: “An employee who claims an industrial injury shall, upon request, disclose all previous permanent disabilities or physical impairments.”

The WCAB was careful to distinguish the two letters that were sent to applicant and later to applicant’s counsel. The initial letter to the applicant on March 30, 2015, essentially tracked the requirements of Labor Code §4663(d). However, the March 30, 2015, letters re-sent twice in 2017, did not fall under Labor Code §4663(d) or any other statute and sought past medical treatment received by the applicant over the previous ten years. In that regard, the Board stated, “We observe that these requests for disclosure of past medical treatment were not pursuant to Labor Code §4663(d).

Focusing solely on the express language of Labor Code §4663(d), the Board indicated that, “...to the extent that the Motion to Compel seeks disclosure of previous permanent disabilities or physical impairments..., we believe the WCJ erred in denying the motion.” The WCAB rejected the WCJ’s reasoning and rationale in the Report on Reconsideration that suggested defendant should be required to depose the applicant if defendant wished to obtain information about applicant’s prior disability.

The Board held there is no support for this contention of a required deposition in the language of §4663(d). The WCAB noted that §4663(d), “…states clearly and unequivocally that applicant “shall” disclose such information “upon request.” Moreover, the WCAB indicated if the Legislature intended that information related to the applicant’s prior permanent disabilities and permanent impairments was only discoverable at a deposition it would not have worded the statute in the manner that it did.

The WCAB did note there were some essential defects in defendant’s Petition to Compel based on the fact it did not include a specific timeframe for response nor did it mandate any particular method of response. Therefore, the Board remanded the case back to the trial level for further proceedings.

**Editor’s Comment:** In terms of suggested litigation and practice pointers with respect to this issue, there appears to be three primary issues.

First, as the WCAB noted, there was no statute or regulation cited by defendant related to their request for the applicant to informally disclose without a deposition the medical treatment she had received during the ten years preceding the date she filed her DWC-1 claim form and later Application for Adjudication.

Second, there was an issue not addressed by the WCAB which no doubt will be the focus of future litigation related to §4663(d); that being the applicant’s duty to disclose prior permanent disabilities or impairments versus medical privacy. The wording of Labor Code §4663(d) does not limit applicant’s duty to disclose prior permanent disabilities or prior permanent impairments to just the body parts and conditions at issue as set forth in either a DWC-1 claim form or
Application for Adjudication. The literal and express wording of §4663(d) would appear to mandate disclosure over all permanent disabilities or permanent impairments related to any and all body parts and conditions, not just those related to the body parts and conditions the applicant has put at issue in the case. This sets up a direct conflict with statutes and case law related to medical privacy, which suggests that appropriate discovery in workers’ compensation cases is limited to body parts and conditions placed at issue by the employee when filing a claim. (Britt v. Superior Court (1978) 20 Cal.3d 844, 15 Cal.Rptr. 90; and Allison v. Workers’ Comp. Appeals Bd. (1999) 72 Cal.App.4th 654, 64 Cal.Comp.Cases 624).

Third, with respect to a defendant’s request by letter or petition or Motion to Compel under Labor Code §4663(d) that applicant disclose all prior permanent disabilities and physical impairments, defendant should specify an exact timeframe for applicant to respond and also specify the method of response, i.e. in writing, etc. The defendant in Nadey failed to do this, which required the remand from the WCAB.