Continuing Saga of Apportionment

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Recent Case Law and Future Trends

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Three Areas of Analysis

1. "Causation"
    a. Evidence
2. Application of SB 899 apportionment to pre-SB 899 cases
3. Formula C

Plan: review the cases that have issued thus far within the realm of this three tiered analytic structure, and draw some meaningful conclusions as to where we can anticipate the law going.

2 Types of Apportionment

1. 4663 = apportionment to medical causation
2. 4664 = apportionment to prior award.
    - Both 4663 and 4664 deal with **causation**. **Causation** is now the new legal standard for apportionment.
        - 4553: "Apportionment of permanent disability shall be based on causation."
        - 4664: "The employer shall only be liable for the percentage of permanent disability directly caused by the injury"

- **<u>Pasquotto v. Hayward Lumber</u>**, No. GRO 0028123, 02/27/2006 (WCAB En Banc)
    - 1) an order approving a compromise and release settlement is not a prior award of permanent disability,
    - 2.) where there is no prior award of disability, medical reports and other evidence related to a prior injury settled by compromise and release can be admitted to determine whether a permanent disability was caused by other factors, and
    - 3.) the concept of medical rehabilitation from a prior industrial disability remains viable under section 4663.
    - Concurring opinion of Comm'r Brass – a C&R can never be an "award" within the meaning of 4664: "As a practical matter, if the parties wish to truly stipulate to a level of permanent disability, there is a mechanism by which they can easily do that: the stipulated Findings and Award."

Evidence

Though the rules of apportionment have changed, the rules of evidence have not:
Medical opinion must not be based on conjecture, speculation or surmise.

- Does the medical evidence can satisfy this requirement?

- Evidence and Causation are intrinsically intertwined - quality of the evidence will determine whether an opinion on causation passes judicial muster, or just conjecture, speculation or surmise.
- Waiting for the appellate case to define what, under the new 4663, is speculative relative to causation.
  - DePaolo's prediction: this area of concern simply will not change, and that the early defense prognostications that 4663 allows apportionment to pathology is just plain wrong because it can not be sustained on an evidentiary analysis. I predict that eventually we will see an appellate or Supreme Court case that specifically states apportionment to pathology is not permitted because there is no evidence of **direct causation** to disability.

Pathology vs. Causation

- LC 4663(a): "Apportionment of permanent disability shall be based on causation."
- LC 4663 (c): requires the physician to "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".
  - Focus is on "caused"
  - I argue there must be a demonstrable cause and effect that can be validated with medical certainty.
  - *Gay vs. WCAB, Guarantee Collection Service*, (1979) 96 CA 3d 555, 44 CCC 817. The *Gay* court wrote that apportionment to pathology was not "legal apportionment", and that the physician must demonstrate "adequate familiarity with the preexisting disability. That is, the physician must describe in detail the exact nature of the preexisting disability and the basis for such an opinion in order for the Board to be able to determine that the physician properly apportioned under correct legal principles."
  - "But for the industrial injury, would the injured worker have this disability at this time?" Unless one can answer in the affirmative, there is no apportionment. – cause and effect
- **Escobedo vs. Marshalls 70 CCC 604 (WCAB En Banc - 2005)**
  - Apportionment "may include disability that formerly could not have been apportioned (e.g., pathology, asymptomatic prior conditions, and retroactive prophylactic work preclusions), *provided there is substantial medical evidence establishing that these other factors have **caused** permanent **disability***."

- **Barbara Sherman vs. Los Angeles Unified School District (VNO 0418888, 89 Opinion and Decision After Reconsideration – 10/28/05)**
  - *Cause of Disability, not cause of injury*

- Applicant was found to have sustained injury AOE/COE on 4/3/98, that ultimately resulted in an award by the WCJ of 98% permanent partial disability. On reconsideration, Defendant argued that the WCJ erred because he failed to find apportionment under LC 4663 due to rheumatoid arthritis.
  - The WCJ's findings were based on AME reports. The AME report of the internist, Dr. Levine, opined that applicant's rheumatoid arthritis was lit up by the injury.
  - "We are not persuaded that the new law of apportionment under section 4663 destroyed the principle that a compensable injury and disability may result from the 'lighting up' of an underlying disease. (Citation.) Under such circumstances, it is necessary for the Appeals Board to consider what disability was directly caused by the injury and by other factors. **This analysis requires separating the cause of injury from the cause of disability**"
  - "[Dr. Levine] clearly stated that although the employment trauma did not cause the rheumatoid arthritis, it lit the disease up, **that the applicant had no illness recognizable as rheumatoid arthritis and no disability in her joints before the employment trauma**, that the work restrictions offered by him were caused by the rheumatoid arthritis, and that apportionment is 'entirely industrial'. Under these circumstances, we conclude that Dr. Levine's medical opinion, as expressed in his report of May 7, 2004, establishes that it is medically reasonably probable, although not scientifically certain, that the permanent disability attributable to applicant's rheumatoid arthritis is not subject to apportionment under section 4663."
- Board recognizes that CAUSATION is the relevant inquiry, not pathology.

- **Fred Steinkamp vs. City of Concord (OAK 0316754, WCK 0028639, 0031066, 0050335 Opinion and Order Granting Reconsideration and Decision After Reconsideration – 3/30/06)**
  - *Evidence of pre-existing disability, not pre-existing pathology*
  - Applicant had several injuries, including one to his right knee that ultimately required knee replacement surgery. After trial, the WCJ awarded 56.25% *after apportionment* to pathology that pre-existed the knee injuries.
  - The Board cited *Escobedo* and reminded the WCJ and the parties that a medical opinion must still meet the substantial evidence test, and that without evidence of **disability** pre-existing the industrial injury, there can not be apportionment: "Here, ... Dr. Isono reported that applicant's need for right knee replacement surgery was caused by various factors, including industrial and non-industrial factors. However, medical treatment is not apportionable. (Citation.) Moreover, despite the various causes for the knee replacement surgery, applicant's work limitation to

semi-sedentary work, according to Dr. Isono, is due to the knee replacement and the symptoms related to the prosthesis."

- **Penny Aguilar vs. Breidenbach, Buckley, Huchting & Hamblet (MON 0246279, 2/21/06)**
  - *Apportionment requires substantial medical evidence*
  - Though included in the case law review, in my opinion, not a good discussion, and thus not a good example, of evidentiary quality relative to apportionment on causation, because the medical reporting made a sudden, unexplained, opinion change – an obvious medical evidence faux paus.
  - Applicant sustained injury to bi-lateral ankles and feet 10/3/98. The WCJ apportioned 33 percent of the residual permanent disability to obesity based on the defense medical report. Defense reporting started prior to SB 899, and did not apportion to applicant's obesity. Then, in 3/2/05 the defense reporter seemed convinced that SB 899 changed the evidentiary rules: "with the new labor code we certainly can apportion disability and medical causation to include this obesity."
  - The Board reversed because there was no evidence of disability due to obesity prior to the industrial injury: "It can not be assumed that because a person is obese he or she is disabled. Dr. Sander's report on apportionment does not provide sound reasoning in support of its conclusion and is, in part, incomprehensible."

- **Reed Larsen vs. Hitachi Global (SJO 249335, 3/13/06)**
  - *Substantial medical evidence must show contributing cause of PD*
  - Applicant sustained an admitted industrial injury to his back due to repetitive trauma 8/1/03. He had a previous non-industrial low back surgery to repair a herniated disc. The AME, Dr. Rasco, "opined that there was 50% apportionment to applicant's previous back surgery after which applicant was asymptomatic and continued working in his usual and customary occupation and 50% to this present CT injury. In his deposition, Dr. Rasco admitted that his apportionment figures were 'pretty much drawn out of thin air.'
  - "Dr. Rasco does not explain in his reports or deposition how the prior back surgery from which the applicant completely recovered and was asymptomatic prior to applicant's CT injury herein is a contributing cause to applicant's present disability.
  - "Under SB 899 any previous injury, condition or pathology **must be a contributing cause of present disability** based upon believable, non speculative and non conjecture medical opinion and not just numbers picked out of thin air. The doctors have to explain how a prior non disabling condition, pathology, or injury is all of a sudden causing disability in conjunction with a subsequent injury."

- **<u>Donald Ekparian vs. Chick's Frame & Wheel Service, Inc. (FRE 0208752, 53 9/06/05)</u>**
  - *4663 requires a causal connection; "actually caused' the disability*
  - Applicant worked for 30 years as a front end and brake mechanic for the employer. On May 17, 2001 he was moving a heavy wheel from a forklift when he experienced a "pop" in his back. A number of reports were considered by the Board relative to defendant's claim of apportionment. Most of the reports were authored prior to SB 899 and consequently did not meet SB 899's requirements for discussing and proving, if any, apportionment.
  - "There must be evidence of a causal connection between the pre-existing condition and the permanent disability. Apportionment only applies when a pre-existing condition has **actually caused** a portion of the permanent disability."

Application of SB 899 Apportionment to Pre-899 Cases

- **Rio Linda Union School Dist. v. WCAB (Scheftner)** 131 Cal.App.4th 517 (2005)
  - *SB 899 apportionment applies to any outstanding case*
  - Left us with the general rule: "Thus, we hold the repeal of former section 4663 was effective immediately on enactment of SB 899 on April 19, 2004, and new section 4663 and section 4664 are applicable to any case still pending, except those cases that are finally concluded subject only to the WCAB's continuing jurisdiction under sections 5803 and 5804."

- **Richview, Inc. v. WCAB**, No. B181241, 08/19/2005 (not certified for publication)
  - In 1985, Gonzalez was awarded 31% permanent disability and future medical treatment in relation to a heart injury. In 1993, a joint compromise and release settled Gonzalez's two back injury claims. In 1996, Gonzalez filed another claim, "alleging cumulative trauma injury to his back, cardiovascular and internal systems from December 24, 1968, to January 12, 1996."
  - The court noted that all pending workers' compensation cases are subject to the provisions of SB 899 regardless of the date of injury. Based on an analysis of legislative intent by the seventh division of the Second District Court of Appeal, the court concluded that injuries occurring before the effective date of the amendments are subject to SB 899 if no final judgment has been entered in the case.

- **Filco Folsom v. WCAB** *(Butler)*, No. C049270, 10/17/2005 (not certified for publication)
  - Butler, a Filco Folsom (Filco) employee, was injured in 1994 and 1995, and filed workers' compensation claims for his leg and bicep injuries. Regarding his 1994 claim, Butler alleged that his lungs and heart were also injured as a

result of improper treatment of the vascular problems in his leg. A mandatory settlement conference was held on 03/18/2004 and a hearing was set for 04/27/2004. At a settlement conference on 09/02/2004, Filco finally submitted evidence of causation, stating "that zero percent of Mr. Butler's current disability is a result of his injury that occurred in 1994[;] 100% of his current disability is the result of his preexisting deep vein thrombosis which originated in the mid 1980s."
    - The WCJ awarded Butler permanent disability benefits based on the apportionment provisions in effect prior to SB 899. The Third District annulled and remanded stating that the Board needed to apply SB 899 apportionment standards.
    - NOTE –It is not indicated whether there was any challenge to the evidence as being substantial.

  - **National Staff Network vs. WCAB** (D046084, 11/30/05) (not certified for publication)
    - Claimant Evelyn Mann-Harrison was born with congenital abnormalities in her neck and left shoulder blade. In 1984 Mann-Harrison began working for National as a surgical technician and licensed vocational nurse. She began experiencing pain and numbness in her left arm, shoulder and neck in 1991. When she sought medical treatment in early 1992, the examining physician attributed the symptoms to her pre-existing disease process.
    - After going through the gauntlet of conflicting medical experts (defense stating problems totally non-industrial, applicant stating work aggravated pre-existing condition) and getting treatment on an industrial basis, parties proceeded to trial, and in November 2003 the WCJ said the medical evidence was insufficient to issue an award. He further noted the Kleppel- Feil syndrome and Sprengel's deformity were pathological conditions and therefore could not be the basis of apportionment.
    - SB 899 became law during the interim, defendant sought apportionment under the new 4663, denied reconsideration, which was reversed by the Fourth District: "The examiner's opinion directly addressed the causation of Mann-Harrison's disability and concluded as much as 85 percent of her disability was caused by her congenital abnormalities. The medical report thus provided grounds to reconsider the original finding of no apportionment. Because SB 899 was applicable, the administrative law judge's December 2004 decision not to reconsider the apportionment of Mann-Harrison's disability was contrary to existing law and unsupported by substantial evidence."
    - NOTE –It is not indicated whether there was any challenge to the evidence as being substantial.

- **Aldworth Company vs. WCAB (Lawrence)** , F047486 (1/20/06) (not certified for publication)
    - Truck driver has stroke. WCJ relies on applicant report finding industrial causation and 70% disability, no apportionment. The WCAB affirmed, but also opined that SB 899's new apportionment provisions were inapplicable to Lawrence's claim because discovery had closed at the time of the mandatory

settlement conference on April 15, 2004, four days before the adoption of Sen. Bill 899 (relying on Scheftner).
    - Reversed on appeal – WCAB must apply SB 899 apportionment to injury predating amendments where medical evidence indicates non-industrial causes to disability.
- **Vargas v. Atascadero State Hosp.**, WCAB No. GRO 0016640, 04/11/2006 (WCAB En Banc)
    - (1) Any *increased* permanent disability alleged in any petition to reopen that was pending at the time of the legislative enactment on April 19, 2004, regardless of date of injury, will be subject to SB 899 apportionment;
      (2) Consistent with Section 47 of SB 899, the new apportionment statutes cannot be used to revisit or recalculate the level of permanent disability, or the presence or absence of apportionment, determined under a final order, decision, or award issued before April 19, 2004; and
      (3) In applying the new apportionment provisions to the issue of *increased* permanent disability, the issue must be determined without reference to how, or if, apportionment was determined in the original award.

Nabors / Dykes and Formula C

- 2 courts of different jurisdictions now opine that apportionment by addition, rather than subtraction is what is meant by LC 4644
    - "section 4664 contemplates accumulating multiple disability awards rather than subtracting percentage levels of disability." (**Dykes**, as quoted by **Nabors**)
    - Formula C is the "percentage method"

- **E.J. Gallo v. WCAB (Dykes)** (denied Supreme Court review on 12/20/05)
    - Fifth Appellate District affirms the use of Formula C
    - Restricted to the facts of the case (i.e. single employer)

- **Nabors**
    - **Dykes** apportionment rationale applies regardless of whether it is the same employer, or multiple employers
    - "Under present law, taking his prior level of disability into account, as required by section 4664, subdivision (a), the 'percentage of permanent disability directly caused by' the current industrial injury is the **additional percentage** of disability that takes him from 20.5 percent to 73 percent disabled. Dykes was therefore entitled to an award reflecting the difference between a 20.5 percent disability and a 73 percent disability on the permanent disability table **applicable to the subsequent injury**."
    - The effect of this analysis is to first place the injured worker in to the present day level of disability indemnity compensation, including life pension if applicable. Next, subtract the dollar value of the prior award.

- o **Nabors** to be appealed to the Supreme Court – one question that may or may not be answered is whether Formula C is applied to both 4663 and 4664 apportionment, or just 4664 "prior award" apportionment.
  - ▪ Dicta in **Nabors** indicates the Court is siding with Commissioner Caplane's interpretation:
    - "While agreeing with Ravine that repeal of section 4750 undercut the continuing validity of the *Fuentes* court's holding, dissenting Commissioner Caplane disagreed about the effect of the new statutes, believing the express language of sections 4663 and 4664 require application of formula C: dollar value of previous award subtracted from dollar value of total current permanent disability..
    - Indeed, this language is causing some confusion because it talks of dollar amounts – let's be clear, the formula clearly calls for determining the overall percentage of disability. From that a credit in the amount of the value of the prior award, or prior disability, is taken.
  - ▪ Issue becomes, if C applicable to 4663 apportionment – and there is proof that the pre-existing disability predates any applicable indemnity adjustment, where the disability had been P&S say in 1979, then is the 1979 value of that disability used to subtract from the current disability.
  - ▪ See also language of **Vargas** – that per *Marsh, Kleemann* and *Scheftner*, the new apportionment statutes cannot be used to revisit a final order to recalculate permanent disability or determine apportionment.

Payment on Award

- ▪ Trial decision **Ronald Reyes vs. Crown Cork & Seal (SJO 0235129) Revised Findings Award and Order 6/19/06**
  - o CT injury ending 9/8/00 to left shoulder, wrist, neck and knees. On AME report, Judge Howard Levin found apportionment to concurrent disability caused by diabetes, naturally progressing degenerative changes aggravated by weight.
    - ▪ Apparently there was a prior knee injury – unclear from Opinion if this was of consequence.
  - o "Permanent disability totaling 77% ($112,585 regular payment monetary value), less the equivalent monetary value of 52% permanent disability ($47,982.50); entitling Applicant to 280.88043 weeks of disability indemnity at the rate of $230 per week, in the total net sum of $64,602.50, payable beginning 11/21/02; less credit to Defendants for all sums heretofore paid on account thereof; and less $13,615 payable to Butts & Johnson as attorney fee; plus a life pension of $65.71 per week payable to Applicant beginning 4/19/12.*fn6"
  - o FN 6 "The life pension is payable beginning 489 ½ weeks after the commencement of the regular permanent disability payments, since the

life pension for an unapportioned award of 77% permanent disability would not begin until after that period had elapsed. There will therefore be a period of more than four years during which no permanent disability indemnity will be payable under this ward, between the end of the regular payments and the beginning of the life pension."

- $112,585 is not "regular payment monetary value" – present value = $98,096.04 at 3% (489.5 weeks at $230/week); $47,982.50 is not "regular payment monetary value" – present value is $44,277.42 (282.25 weeks at $170/week); $98,096.04 - $44,277.42 = $53,818.62, or 233.994 weeks at $230/week.

CONCLUSION

1. **Nabors/Dykes apportionment will be upheld and applied to non-Award cases where disability is proven P&S on a specific date**
2. **Apportionment to pathology will be expressly disallowed**
3. **Prior prophylactic work restrictions are not apportionable because are not a *cause of disability***
4. **We will see more conservative opinions regarding substantiality of medical evidence on apportionment – the lesson, have your medicine in top shape!**
5. **Causation in both 4663 and 4664 will be interpreted to mean "but for"**
6. **There must be evidence as to prior disability P&S date, at least in pre-existing disabilities (may not be an issue if concurrent non-industrial disability), even if prior not industrial, to ascribe the appropriate value of the apportioned credit. I would argue that failing that is not substantial evidence!**
7. **BIG QUESTION: How is payment going to work? I argue you need to take in to account present value before arriving at ultimate value.**