Back To Chiropractic Continuing Education Seminars

Case Law for Chiropractors

~ 2 Hours

Revised 06/5/2025

This course is a 2 Hour mandatory requirement for QMEs for the California Department of Industrial Relations, Division of Worker's Compensation (DWC).

This course also counts as a 2 Hour CE Elective for the Board of Chiropractic Examiners for the state of California.

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Qualified Medical Evaluator

Disclaimer

- The following course material contains the opinions of the author and does not reflect the opinions of the Division of Workers' Compensation, or associated entities. This course is intended to be used as a reference tool in assisting QMEs, and is not to be relied on as legal advice.

Purpose of the Q.M.E.

- Qualified medical evaluators (QMEs) are qualified physicians who are certified by the Division of Workers' Compensation - Medical Unit to examine injured workers to evaluate disability and write medical-legal reports.

- These Med-Legal reports are used to determine an injured worker's eligibility for workers' compensation benefits.

- QMEs include medical doctors, doctors of osteopathy, doctors of chiropractic, dentists, optometrists, podiatrists, psychologists and acupuncturists.

Definitions

- **Q.M.E.:** Qualified Medical Evaluator
- **P.Q.M.E.:** Panel Qualified Medical Evaluator; selected via a panel list of three QMEs based on residential zip code.
- **A.M.E.:** Agreed Medical Evaluator; Selected by agreement between the defense attorney/claims administrator & the applicant attorney, and may or may not be a QME.
- **I.D.E.:** Industrial Disability Evaluator; previous pre-requisite certification in report writing to become a Q.M.E. Consisted of a 44 hour Med-Legal/WC report writing course.

Definitions

- **Apportionment:** Must be based on Substantial Evidence. 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.

- **Substantial Evidence:** Consists of the following essential elements within the Med-Legal report;
- 1. Opinion must be based on "reasonable medical probability."
- 2. The report must contain a legally compliant apportionment discussion pursuant to LC 4663.
- 3. A medical report cannot be "predicated on incorrect legal theory."

- **Proximate Cause:** Proximate Cause is the event that causes subsequent related events that result in injury. Proximate cause is referred to as the "cause and effect" of the industrial injury. Without a cause/action, there would not be a resulting injury.

- **Overlap:** Overlap refers to similar findings pertaining to the prior permanent disability and the current one. Defendants have the burden of proving overlap between the prior award and the new rating.

- **Duplication:** The determination if some or all factors of disability are the same or different. If the disability is the same, then duplication exists. If the factors of disability are different, then duplication does not exist. Duplication is relevant in situations where multiple body parts render similar disabilities (i.e. knee & back). The physician needs to explain why and how the disabilities are different. If not, the factors of disability will be found to be duplicative.

Definitions

- **Medical Probability:** Reasonable medical probability refers to at least a 51% probability that something is true.
- **Section 4663:** Medical Apportionment. The employer should only be responsible for the injured worker's disability related to the industrial injury.
- **Section 4664:** Legal Apportionment. The employer shall only be liable for the percentage of permanent disability directly caused by the injury arising out of and in the course of employment.
- **Labor Code 4750:** Repealed in 2004. Previously, apportionment could be obtained under Labor Code section 4750 for a pre-existing permanent disability or physical impairment.
- **Labor Code 4750.5:** Allowed defendants to obtain apportionment to subsequent *non-compensable* injuries (i.e. multiple employers).

Definitions

- **California Evidence Code Section 140:** "Evidence" means testimony, writings, material objects, or other things presented to the senses that are offered to prove the existence or nonexistence of a fact.
- **SB 899:** Major workers' compensation reform in 2004
- **SB 863:** Major workers' compensation reform in 2013
- **Cumulative Trauma:** CT or Repetitive Stress Injuries (RSI) deal with micro trauma over an extended duration of time. CT/RSI cases often times require apportionment as the injured worker sustained the injury across multiple employers where overlap may have occurred.
- **Permanent Disability vs. Impairment:** For DOIs > 01/01/2005 use AMA Guides 5th edition for impairment ratings. For DOIs < 01/01/2005 use PDRS (Permanent Disability Rating Schedule).

Case Law

- **Escobedo v. Marshalls; CNA Insurance (2005):**

- The en banc panel decision of the WCAB determined that changes made to LC 4663, per SB 899 allows apportionment of a pre-existing asymptomatic arthritic pathologic condition to an accepted industrial injury.

- Background:
- Applicant sustained injury to her left knee on October 28, 2002, when she fell at her job as a sales associate with Marshalls, a retail clothing store. As a compensable consequence of that injury, she also developed right knee problems.

Case Law

- **Escobedo v. Marshalls; CNA Insurance (2005):**

- Applicant testified that, prior to her fall, she had never had any knee problems or limitations, and she had never consulted a doctor about her knees. Although her treating physician, Dr. Cronin, had diagnosed her as having arthritis about ten years earlier, he did not impose any work restrictions as a consequence of her arthritis.

- Applicant's Side:
- Applicant was treated for her industrial injury by Daniel Woods, M.D., who performed arthroscopic surgery on February 12, 2003, to repair the medial meniscus in the left knee. On June 5, 2003, Dr. Woods prepared a report declaring applicant to be permanent and stationary with bilateral knee disability resulting in a limitation to semi-sedentary work. He noted that applicant's job duties at Marshalls had required her to be on her feet, standing or walking, six to eight hours per day, and to kneel or squat up to three hours per day. He had attempted to have her return to work four hours per day, but she was unable to tolerate it because of right knee pain. With regard to the issue of apportionment, Dr. Woods noted that applicant had no history of any previous problems with her left knee, and thus he concluded that all of her disability was attributable to her industrial injury.

Case Law

- **Escobedo v. Marshalls; CNA Insurance (2005):**

- Applicant's Side:
- Applicant was treated for her industrial injury by Daniel Woods, M.D., who performed arthroscopic surgery on February 12, 2003, to repair the medial meniscus in the left knee. On June 5, 2003, Dr. Woods prepared a report declaring applicant to be permanent and stationary with bilateral knee disability resulting in a limitation to semi-sedentary work. He noted that applicant's job duties at Marshalls had required her to be on her feet, standing or walking, six to eight hours per day, and to kneel or squat up to three hours per day. He had attempted to have her return to work four hours per day, but she was unable to tolerate it because of right knee pain. With regard to the issue of apportionment, Dr. Woods noted that applicant had no history of any previous problems with her left knee, and thus he concluded that all of her disability was attributable to her industrial injury.

Case Law

- **Escobedo v. Marshalls; CNA Insurance (2005):**

- Defendant's Side:

- Defendant's qualified medical evaluator ("QME"), Daniel Ovadia, M.D., evaluated applicant on March 15, 2004 and prepared a report on that date. He noted that a pre-surgical MRI of applicant's left knee revealed degenerative changes, in addition to the medial meniscus tear, and that post-surgical x-rays showed osteoarthritis in both knees. Dr. Ovadia concluded, based on applicant's bilateral knee condition: that she was limited to four hours of weight bearing in an eight-hour day; that she should avoid very heavy work; that she should avoid more than occasional kneeling, squatting, or walking on uneven ground; that she should avoid stair, incline and ladder climbing; and that she is totally precluded from running or jumping. With regard to apportionment, Dr. Ovadia stated: "Ms. Escobedo's left knee residuals are directly related to the October 28, 2002 injury. The Applicant developed right knee problems as a derivative of the left knee and not as a result of any subsequent cumulative trauma. In my opinion, there is a medically reasonable basis for apportionment given the trivial nature of the injury that occurred on October 28, 2002 and the almost immediate onset of right knee symptoms that occurred shortly after the left knee injury.

Case Law

- **<u>Escobedo v. Marshalls; CNA Insurance (2005)</u>:**

- The Applicant has obvious, significant degenerative arthritis in both knees and essentially worked in a fairly congenial environment. Although denying any prior problems with her knees, it is medically probable that she would have had fifty percent of her current level of knee disability at the time of today's evaluation even in the absence of her employment at Marshalls. Dr. Woods did not take this into account when he discussed the issue of apportionment. Furthermore, when he saw the Applicant, he thought she had a lateral meniscus tear which was clearly not the case based on his operative findings (leading edge tears are of no clinical significance and would not have accounted for the Applicant's pathology and disability which relate to the medial and patellofemoral compartments)."

- Dr. Woods responded to Dr. Ovadia's conclusions on May 22, 2004, after he re-examined applicant. Dr. Woods found no basis for apportionment, stating:

- "The patient prior to her industrial injury of October 28, 2003, was not suffering from any disability relative to her knees. She indicates that she was able to walk in unlimited fashion and had been able to work. She clearly has disability at this time which I have, in the absence of previously documented disability, attributed to her industrial injury."

Case Law

- **<u>Escobedo v. Marshalls; CNA Insurance (2005)</u>:**

- Dr. Woods responded to Dr. Ovadia's conclusions on May 22, 2004, after he re-examined applicant. Dr. Woods found no basis for apportionment, stating:

- "The patient prior to her industrial injury of October 28, 2003, was not suffering from any disability relative to her knees. She indicates that she was able to walk in unlimited fashion and had been able to work. She clearly has disability at this time which I have, in the absence of previously documented disability, attributed to her industrial injury."

- The **WCJ determined** that, overall, applicant's bilateral knee disability rated 53%, based on the factors of disability outlined in Dr. Ovadia's March 14, 2004 report. The WCJ, however, also apportioned 50% of applicant's permanent disability to non-industrial causation under section 4663, relying on Dr. Ovadia's opinion that one-half of the disability was caused by her preexisting degenerative arthritis.

Case Law

- **<u>Escobedo v. Marshalls; CNA Insurance (2005)</u>:**

- DISCUSSION

- Address applicant's contention that new section 4663 does not apply to injuries sustained before the April 19, 2004 effective date of SB 899. This issue has been resolved by **Kleemann v. Workers' Comp. Appeals. Bd. (2005)** 127 Cal.App.4th 274 [70 Cal.Comp.Cases133], which held that the procedural and substantive aspects of new section 4663 **apply to all cases** that were pending as of the date of SB 899's enactment on April 19, 2004.

Case Law

- **Escobedo v. Marshalls; CNA Insurance (2005):**

- Section 4663 as amended by SB 899 provides:

- "(a) **Apportionment** of permanent disability shall be **based on causation**.
- "(b) Any physician who prepares a report addressing the issue of permanent disability due to a claimed industrial injury **shall** in that report **address the issue of causation** of the permanent disability.
- "(c) In order for a physician's report **to be considered complete** on the issue of permanent disability, it **must include an apportionment determination**.

Case Law

- **<u>Escobedo v. Marshalls; CNA Insurance (2005)</u>:**

- A physician shall make an apportionment determination by finding what **approximate percentage of the permanent disability was caused by the direct result of injury** arising out of and occurring in the course of employment **and what approximate percentage of the permanent disability was caused by other factors both before and subsequent to the industrial injury, including prior industrial injuries.**
- **If the physician is unable** to include an apportionment determination in his or her report, the physician **shall state the specific reasons why** the physician could not make a determination of the effect of that prior condition on the permanent disability arising from the injury. The physician **shall then consult with other physicians or refer** the employee to another physician from whom the employee is authorized to seek treatment or evaluation in accordance with this division **in order to make the final determination**.
- "(d) An employee who claims an industrial injury shall, upon request, **disclose all previous permanent disabilities or physical impairments.**"

Case Law

- **Escobedo v. Marshalls; CNA Insurance (2005):**

- Section 4664(a) states:

- "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."

- **Summary:**
- The WCAB en banc panel affirmed the F&A, and as a result went against the previous precedent case law forbidding the apportionment of preexisting non-industrial asymptomatic pathology to an industrial injury.

- The Escobedo decision does not support the position that an employer takes the employee as he finds him at the time of injury. An employer takes the employee as he finds him and must compensate him, but the permanent disability may still be apportioned if some portion would have resulted even despite the subsequent industrial injury because of natural progression of the pre-existing disease.

Case Law

- **Escobedo v. Marshalls; CNA Insurance (2005):**

- **Summary:**
- "Other factors" include pathology, asymptomatic prior conditions, and retroactive prophylactic work preclusions, but there must be documented substantial medical evidence demonstrating the other factors resulted in permanent disability.

Case Law

- **Key v. WCAB (2004):**
- Applicant sustained injuries in 1993 to his low back and right knee, and injuries in 1996 to his neck and back.
- In 1996, stipulations entered that the 1993 injury had resulted in 42.3% permanent partial disability, and entitled to other benefits.
- In 2003, applicant was found to be 100% disabled following the 1996 injury, and that 57.1% disability was apportionable to the 1996 injury.
- Both parties sought reconsideration, and both petitions were denied in 2004. Applicant sought review, contending that the first injury was not labor disabling at the time of the second injury.

Case Law

- **<u>Key v. WCAB (2004)</u>:**

- The Court found that **prior to April 19, 2004**, **apportionment** under Labor Code Section 4750 **was allowed for a pre-existing disability which was actually labor disabling at the time of the subsequent injury.**

- In this case the parties' agreed medical examiner (AME) had opined that the **prior disability from the 1993 injury remained at the time of the 1996 injury**. It noted evidence that applicant at the time of the 1996 injury was receiving treatment, using a leg brace, and using medical leave time due to the effects of the 1993 injury.

Case Law

- **<u>Key v. WCAB (2004)</u>:**

- Further, "Effective April 19, 2004, '**regardless of the date of injury**,' The legislature enacted a new, directly relevant conclusive presumption applicable to **apportioning [disability from] prior injuries**.

- Section 4664, subdivision (b) now provides: '**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.'

- Even if the record lacked substantial evidence to support [the finding that] Key was actually labor disabled at the time of his second injury, the WCAB would be bound to apportion."

Case Law

- **<u>Key v. WCAB (2004)</u>:**

- <u>Summary:</u>

- Section 4664, subdivision (b) now provides: '**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.'

- Even if the record lacked substantial evidence to support [the finding that] Key was actually labor disabled at the time of his second injury, the **WCAB would be bound to apportion**."

Case Law

- **<u>Pasquotto v. Hayward Lumber:</u>**

- Issue of apportionment under Labor Code sections 4663 and 4664,as enacted by Senate Bill 899 in situations where an employee suffers an industrial injury causing permanent disability and where there has been **a prior industrial injury that was settled by an approved compromise and release (C&R) agreement**.

- BACKGROUND

- This matter involves three industrial injuries sustained by (applicant)
- Applicant's first injury was settled by an approved compromise and release (C&R).
- His two subsequent injuries - involving a different employer with the parties disputing the issue of apportionment.

Case Law

- **Pasquotto v. Hayward Lumber:**

- A. The First Injury

- On May 9, 1998, applicant sustained an industrial injury to his low back while employed as a carpet layer , who was insured by State Compensation Insurance Fund (SCIF). Applicant received initial treatment for this injury from various physicians.
- An MRI of June 8, 1998 reflected that he had a disc herniation at L5-S1, as well as a disc protrusion at L4-5.
- In a July 1998 report, one physician suggested that applicant might benefit from an L5-S1 discectomy.
- On July 27, 1998, applicant was admitted to the hospital with severe back pain. There, he was treated with pain medications and kept on bed rest. He was discharged on July 30, 1998.

Case Law

- **Pasquotto v. Hayward Lumber:**

- A. The First Injury

- On July 31, 1998 (the next day), he was again admitted to the hospital, this time with pulmonary emboli. He was treated with anti-coagulants and discharged on August 4, 1998.
- On August 21, 1998, applicant started treatment for his back with an orthopedic surgeon. Diagnosed: moderate degenerative disc changes/disc desiccation at L4-5 and L5-S1; a moderate disc herniation at L5-S1, appearing to just touch the left S1 nerve root; a smaller herniation at L4-5; and a herniation at L3-4, which may contact the left L4 nerve root.
- On October 21, 1998, applicant had a CT scan of the lumbar spine. It showed disc bulges at all scanned levels (L2-S1), most prominent at L3-4 on the left . . . , but also prominent and calcified in the midline at L5-S1."
- A lumbar myelogram performed the same day indicated disc bulges at L3-4, L4-5, and L5-S1."

Case Law

- **Pasquotto v. Hayward Lumber:**
- A. The First Injury
- On October 29, 1998, applicant was seen by an agreed medical evaluator (AME) in internal medicine. A December 1, 1998 report opined that applicant's earlier pulmonary emboli were industrial, due to his July 1998 immobilization in the hospital because of his back injury. He opined that applicant had no residual respiratory problems, but he should be restricted from any work that would immobilize his lower extremities, preventing movement for greater than four hours.
- He said there was no basis for apportionment of this disability.

Case Law

- **Pasquotto v. Hayward Lumber:**

- A. The First Injury

- On December 17, 1998, applicant had a left lateral microdiscectomy at L3-4.
- On May 10, 1999, a report was issued finding applicant to be permanent and stationary.
- He said that applicant had slight sacroiliac pain that increases to moderate with heavy lifting and repetitive bending. He also said that applicant was precluded from heavy work and should not lift more than 30 pounds. He found no basis for apportionment.
- On approximately June 14, 1999, applicant commenced vocational rehabilitation, apparently with the goal of becoming a truck driver.

Case Law

- **Pasquotto v. Hayward Lumber:**
- B. The Current Injuries
- On October 8, 1999, applicant was seen for a pre-employment physical examination for the truck driving job with Hayward Lumber. In an October 15, 1999 report on that examination, it revealed a history from applicant: that he had "low back surgery done in 1997;" that he had been released in 1998 "to do heavy work;" that "he has had no recent low back pain whatsoever;" and that he has been working out at the YMCA lifting weights five times a week with no pain or symptoms." The doctor concluded that applicant was medically qualified to perform the job of truck driver "without restrictions."

Case Law

- **Pasquotto v. Hayward Lumber:**

- B. The Current Injuries

- On or about October 19, 1999, applicant was hired as a driver by Hayward Lumber. There, he had to unload doors, windows, molding and specialty lumber by hand.
- In December 2001, applicant sustained an admitted industrial injury while delivering a prefabricated 10'x 4' "strong wall," which was "very, very, very heavy."
- He and a co-worker were carrying it, but the co-worker tripped and the strong wall fell onto applicant, causing a back injury.
- On August 2, 2002, applicant sustained another admitted injury when, while he was bending to move some lumber, he reaggravated his back.
- Eventually, applicant had a left L5-S1 microdiscectomy.

Case Law

- **Pasquotto v. Hayward Lumber:**
- B. The Current Injuries
- Defendant had applicant evaluated by Daniel N. Ovadia, M.D., as its qualified medical evaluator (QME) in orthopedic surgery.
- In a September 15, 2003 report Dr. Ovadia concluded that applicant was permanent and stationary, with intermittent slight lumbar spine pain and with a preclusion from heavy work.

Case Law

- **Pasquotto v. Hayward Lumber:**
- B. The Current Injuries
- With respect to **apportionment**, Dr. Ovadia stated:
- "It is my feeling that there is a reasonable basis for apportionment given that Mr. Pasquotto has been diagnosed with an L5-S1 disc herniation following an injury that he sustained in 1998. The Applicant also had disc herniation at L3-4 for which surgery was undertaken. Permanent work restrictions were imposed on the Applicant who received an award.

Case Law

- **Pasquotto v. Hayward Lumber:**
- B. The Current Injuries
- Based on this information, I would apportionment fifty percent (50%) of Mr. Pasquotto's lumbar spine residuals to factors predating his employment with Hayward Lumber and the specific injuries that he sustained in December of 2001 and August of 2002. Furthermore, I believe the combined effects of the applicant' previous injury in 1998 that resulted in disc herniations at L5-S1 and at L3-4 (the latter requiring surgery) combined with the injuries at Hayward Lumber led to the need for Mr. Pasquotto's recent lumbar spine surgery.
- As such, I believe Mr. Pasquotto would have had fifty percent of his current level of lumbar spine disability even in the absence of his employment at Hayward Lumber. The remaining fifty percent of lumbar spine disability is directly related to the Applicant's employment and injuries at Hayward Lumber."

Case Law

- **Pasquotto v. Hayward Lumber:**

- On May 17, 2004 (i.e., about a month after SB 899), Dr. Kahmann examined applicant and issued a report. The report declared him to be permanent and stationary (P&S), with subjective disability of frequent slight low back pain increasing to moderate with heavy lifting and repetitive bending. Dr. Kahmann also stated that applicant was precluded from heavy work, that he has a 30-pound lifting limitation, and that he should avoid repetitive bending.

- Under the heading "**Apportionment**," Dr. Kahmann said:
- "Not indicated. He did have **previous surgery at the L3-4 level, recovered** from that surgery and **was back to work full-time in a very heavy work capacity without symptoms**. On a 1998 CT scan/myelogram, it was noted that he had a disc herniation on the left at L5-S1. This herniated disc was **completely asymptomatic** and **did not become symptomatic until his present injury**.
- Therefore, in my opinion this is a **pre-existing asymptomatic abnormality** that did not cause any disability whatsoever until the industrial injury. Therefore, in my opinion, there are **no grounds for apportionment to pre-existing industrial or non-industrial factors**."

Case Law

- **Pasquotto v. Hayward Lumber:**
- On October 6, 2004, the WCJ issued rating instructions for applicant's **December 2001** and **August 2002** back injuries with Hayward Lumber.
- The WCJ asked the disability evaluation specialist (rater) to consider that these two injuries resulted in a preclusion from heavy work, a thirty-pound lifting limitation, and a need to avoid repetitive bending.
- The WCJ further asked the rater to "consider apportionment where applicant had a prior low back disability [from the **May 1998** injury] precluding heavy work (Category E); should not lift greater than thirty pounds."
- The **rater found** that applicant's December 2001 and August 2, 2002 injuries caused **0% (zero percent) permanent disability, after apportionment** –
- i.e., the rater concluded that both applicant's current back disability and his prior back disability rated 30% standard (and 36% after adjustment for age and occupation), resulting in a **net 0% rating**.

Case Law

- **Pasquotto v. Hayward Lumber:**

- The WCJ determined that "applicant is not entitled to a permanent disability award" for his December 2001 and August 2, 2002 back injuries because "there is a legal basis for apportionment under Labor Code § 4663 ."

- In the accompanying Opinion on Decision, the WCJ stated that he "does not believe [section] 4663 is relevant." The WCJ further said, "the crux of this case revolves around Labor Code § 4664 and more specifically subparagraph (b)." His Opinion then indicated, in essence, that **he found a legal basis for apportionment because defendant had established the existence of a "prior award of permanent disability**" within the meaning of section 4664(b) - i.e., the OACR for the May 9, 1998 injury - and that, under section 4664(b), this "prior award is conclusively presumed to [still] exist."

Case Law

- **<u>Pasquotto v. Hayward Lumber:</u>**
- DISCUSSION
- Section 4664(b) provides: "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." (Emphasis added.)
- The fact that **an approved compromise and release agreement generally constitutes an "award" does not mean that it is an "award of permanent disability"** under section 4664(b), even if the compromise and release agreement resolved the issue of permanent disability.
- The 1999 compromise and release (C&R) agreement did not stipulate to or otherwise specify the percentage of permanent disability – or the factors of disability - attributable to applicant's May 9, 1998 back injury.

Case Law

- **Pasquotto v. Hayward Lumber:**
- DISCUSSION
- The compromise and release agreement contained neither any stipulation regarding applicant's percentage of permanent disability nor any language specifying the nature of his back disability. Moreover, while it might be fair to assume that some of the $35,000 in settlement money was for applicant's back, there is no way to determine - at least on this record - how much of this consideration was for his back permanent disability - particularly given:
- (1) the compromise and release specified there was an "issue" regarding the "nature and extent of permanent disability," which implies there was a dispute regarding applicant's back permanent disability;
- (2) we do not know whether, absent the settlement, either party would have obtained supplemental medical reports on the issue of applicant's back permanent disability; and
- (3) we cannot determine how much of the settlement money was in consideration for releasing issues other than applicant's back permanent disability.
- This last point is of no small significance, given that applicant had a post-surgical back; yet, he settled his right to any further medical treatment. Moreover, in addition to applicant's back, there apparently also were issues regarding pulmonary disability and/or treatment.

Case Law

- **Pasquotto v. Hayward Lumber:**
- Summary
- Labor Code §4664 is 1 of 2 of California's two apportionment statutes:
- "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."
- Pasquotto raises issue if an Order Approving a Compromise and Release (OACR) is the same as a "prior award of permanent disability." The WCAB unanimously held that it is not, "without more."
- The WCAB was hesitant to apply Labor Code §4664, because it would be speculative for the WCJ to determine how much, if any, permanent disability paid in the prior C&R pertained to various body parts that were currently an issue in determining current apportionment and rating.
- Despite employers potential preclusion from Labor Code §4664 apportionment in such scenarios, the use of Labor Code **§4663 remains**. That statute requires that a physician determine the "**approximate percentage**" of permanent disability due to the industrial injury and the "**approximate percentage**" of permanent disability to apportion based on other factors.

Case Law

- **Sanchez v. County of LA (2005):**
- Summary:
- Apportionment under **Labor Code section 4664** as enacted by SB 899 in situations where an employee suffers an industrial injury causing permanent disability, and where there has been a prior industrial injury resulting in an award of Permanent Disability relating to the SAME body region.
- The defendant has the burden of proving the existence of any PRIOR permanent disability award(s) relating to the SAME body region.
- The PD underlying any such award(s) is conclusively presumed to STILL EXIST (i.e. the applicant is not permitted to show medical rehabilitation from disabling effects of earlier industrial injuries)

Case Law

- **Sanchez v. County of LA (2005):**
- When the defendant has established the existence of any prior PD award(s) relating to the SAME BODY region, the percentage (%) of PD from PRIOR AWARD(S) will be SUBTRACTED from the current overall percentage of PD…
- …UNLESS the applicant disproves overlap (i.e. the applicant demonstrates that the prior PD and the current PD affect different abilities to compete and earn, either in whole or in part.
- The issue of whether the prior PD for the SAME region of the body overlaps the current disability is determined using substantially the same principles that were applied prior to section 4664
- The **SUM of PD awards for any one body region** **CANNOT exceed 100%**, even where the PD caused by the applicant's new injury does not overlap the PD underlying the prior award(s)

Case Law

- **Sanchez v. County of LA (2005):**
- Background:
- Sanchez (applicant) sustained an industrial injury to her left foot in 2002 while employed as a deputy sheriff.
- Parties stipulated her left foot injury resulted in PD of 7%
- The 7% PD was based on an orthopedic AME 2004 report by J. Greenfield, MD
- Previously the applicant received a stipulated 22% PD award for a 1997 B/L knee injury, sustained also as a deputy sheriff

Case Law

- **Sanchez v. County of LA (2005):**
- Background:
- In 2004 the WCJ issued a decision that the 2002 left foot injury resulted in 7% PD without apportionment.
- The defendant filed petition for reconsideration and **contended that apportionment is required** and that no new PD should have been awarded because:
- (1) the factors of disability resulting from applicant's left foot injury are **completely overlapped** by the factors of disability from her prior bilateral knee injury for which she received a 22% PD award.
- (2) section 4664(b) enacted by SB 899 provides that if the applicant has received a prior award of PD, it shall be conclusively presumed that the prior PD exists at the time of any subsequent industrial injury.

Case Law

- **Sanchez v. County of LA (2005):**
- Background:
- Applicant filed an answer to the petition for reconsideration.
- The WCJ issued a Report and Recommendation on Petition for Reconsideration, recommending that the petition be denied because there is no overlap between applicant's current left foot disability, which is based solely on subjective complaints, **and** her prior bilateral knee disability, which was based solely on work restrictions.

Case Law

- **Sanchez v. County of LA (2005):**
- Discussion:
- *Does section 4664 as enacted by SB 899 require apportionment of OVERLAPPING disability when an employee suffers an industrial injury causing PD to one region of the body, but there has been a PRIOR PD award for the SAME body region?*
- **The original Workmen's Compensation Safety Act of 1917 stated:**
- "The percentage of permanent disability caused by any injury shall be so computed as to cover the permanent disability caused by that particular injury without reference to any injury previously suffered or any permanent disability caused thereby."

Case Law

- **Sanchez v. County of LA (2005):**
- Discussion: Former section 4750
- If all of the factors of permanent disability attributable to the subsequent industrial injury already existed as a result of the prior injury or condition, then there was "**total**" overlap, and the employee was not entitled to any additional permanent disability;
- If the subsequent industrial injury caused some new factors of permanent disability that were not pre-existing, then there was "**partial**" overlap, and the employee was entitled to permanent disability to the extent the subsequent industrial injury further restricted his or her earning capacity or ability to compete. (i.e. Back vs. Heart PD)

Case Law

- **Sanchez v. County of LA (2005):**
- Discussion:
- It was not the part of the body involved in the subsequent industrial injury that was important; rather, it was the nature of the disability resulting from the new injury in relation to the pre-existing disability that was determinative.
- The fact that the pre-existing disability and the new disability involved two different anatomical parts of the body, while relevant, did not in itself preclude apportionment.
- The **issue of apportionment** would be resolved by determining the percentage of combined disability after the new injury, and **then subtracting** the percentage of disability due to the prior injury which overlapped – either partially or totally – the disability resulting from the new injury.
- If, however, successive injuries produced separate and independent disabilities – i.e., if the disabilities did not fully or partially overlap because they did not affect the same abilities to compete and earn – then each was rated separately.

Case Law

- **Sanchez v. County of LA (2005):**
- The Determination Of Overlapping Disabilities After SB 899
- SB 899 repealed former section 4750 (Stats. 2004, ch. 34, §37) and, as relevant here, added current section 4664. (Stats. 2004, ch. 34, §35.)

Case Law

- **Sanchez v. County of LA (2005):**
- New section 4664 provides:
- "(a) The **employer shall only be liable for the percentage of permanent disability directly caused by the injury** arising out of and occurring in the course of employment.
- "(b) If the applicant has **received a prior award** of permanent disability, it shall be conclusively **presumed that the prior permanent disability exists at the time of any subsequent industrial injury.** This presumption is a presumption affecting the burden of proof.
- "(c)(1) The **accumulation of all permanent disability awards** issued with respect to any one region of the body in favor of one individual employee **shall not exceed 100 percent over the employee's lifetime** unless the employee's injury or illness is conclusively presumed to be total in character pursuant to Section 4662.

Case Law

- **Sanchez v. County of LA (2005):**

- New section 4664 provides:
- As used in this section, the regions of the body are the following:
- (A) Hearing.
- (B) Vision.
- (C) Mental and behavioral disorders.
- (D) The spine.
- (E) The upper extremities, including the shoulders.
- (F) The lower extremities, including the hip joints.
- (G) The head, face, cardiovascular system, respiratory system, and all other systems or regions of the body not listed in subparagraphs (A) to (F), inclusive.

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

Case Law

- **Sanchez v. County of LA (2005):**

- Section 4664(a) states:
- "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."

- Lab. Code, §4663:
- The employer is liable only for "the **permanent disability … caused by the direct result of the injury**" and it is not liable for "the permanent disability … caused by other factors both before and subsequent to the industrial injury, including prior industrial injuries"

- Thus, we conclude that, as was true before the repeal of former section 4750 and continuing with the enactment of new section 4664, **an employee is not entitled to be compensated for permanent disability resulting from a new industrial injury to the extent that this permanent disability is overlapped by prior permanent disability involving the same region of the body.**

Case Law

- **Sanchez v. County of LA (2005):**
- If an employee is entitled to receive compensation for any **new non-overlapping** permanent disability caused by the new industrial injury, then it is possible that the sum of the employee's successive permanent disability can reach a total of 100%, but the **employee will not be compensated twice for the same disability**.
- Section 4664(b) **states only that any prior permanent disability shall be conclusively presumed to "exist" at the time of the subsequent injury. It does not require that the prior permanent disability be subtracted, but also it does not preclude subtraction.**
- The language of section 4664(b) also supports that a determination must be made regarding the consequences of the previously "existing" permanent disability
- – i.e., if the pre-existing permanent disability and the current permanent disability **overlap**, **there will be subtraction** to the extent of that overlap, **but, otherwise if no overlap, then there will be no subtraction.**

Case Law

- **Sanchez v. County of LA (2005):**
- **The Defendant Has The Burden Of Proving The Existence Of Any Prior Permanent Disability Award(s) Relating To The Same Region Of The Body**
- It is the defendant's burden to prove that applicant had a prior permanent disability award relating to the same region of the body.
- Placing this burden on defendant is also consistent with the longstanding principle that, because **it is the defendant that benefits from a finding of apportionment**, it bears the burden of demonstrating that apportionment is appropriate.

Case Law

- **Sanchez v. County of LA (2005):**
- **When The Defendant Has Established The Existence Of Any Prior Permanent Disability Award(s) Relating To The Same Body Region, The Permanent Disability Underlying Any Such Award(s) Is Conclusively Presumed To Still Exist**
- i.e., The Applicant Is Not Permitted To Show Medical Rehabilitation From The Disabling Effects Of The Earlier Industrial Injury Or Injuries
- **When The Defendant Has Established The Existence Of Any Prior Permanent Disability Award(s) Relating To The Same Region Of The Body, The Percentage Of Permanent Disability From The Prior Award(s) Will Be Subtracted From The Current Overall Percentage Of Permanent Disability, Unless The Applicant Disproves Overlap**
- i.e., The Applicant Demonstrates That The Prior Permanent Disability And The Current Permanent Disability Affect *Different Abilities* To Compete And Earn, Either In Whole Or In Part

Case Law

- **Sanchez v. County of LA (2005):**
- The WCJ correctly determined that applicant's December 18, 2002 left foot injury caused 7% permanent disability, with no apportionment.
- To claim apportionment under section 4664(b), defendant had the burden of proving the existence of any prior permanent disability award(s). Defendant satisfied this burden by presenting a copy of the May 6, 2002 stipulated Findings and Award, which established that applicant's October 10, 1997 bilateral knee injury caused 22% permanent disability.
- Under section 4664(b), applicant was not entitled to assert that she had medically rehabilitated from her bilateral knee disability. She was, however, entitled to disprove apportionment by demonstrating that her conclusively existing bilateral knee disability does not overlap the permanent disability caused by her December 18, 2002 left foot injury, either in whole or in part.

Case Law

- **Sanchez v. County of LA (2005):**

- Applicant succeeded in carrying her burden of proof. The 2002 stipulated Findings and Award shows that applicant's bilateral knee disability consisted of a 35% loss of her pre-injury capacity for kneeling, squatting, climbing, heavy lifting, pushing and pulling.

- Thus, applicant's pre-existing knee disability resulted solely in a diminished capacity to perform specified work activities. This partial loss of work capacity with respect to applicant's knees **does not overlap** her current disability of intermittent slight left foot pain – becoming moderate with cold weather and rain – because the prior and current disabilities affect her abilities to compete and earn in separate and independent ways. Therefore, applicant has demonstrated that there is no overlap between her prior permanent disability, which conclusively still exists, and her current permanent disability.

- Although both applicant's current and prior injuries involved the same region of the body, i.e., the lower extremities under section 4664(c)(1)(F), the sum of her current 7% permanent disability award and her prior 22% permanent disability award does not exceed 100%.

Case Law

- **Sanchez v. County of LA (2005):**
- For purposes of section 4664(c)(1), applicant now has a total of 29% permanent disability (i.e., 22% plus 7%) for the lower extremities region.
- We affirm the WCJ's 2004 decision finding that applicant's 2002 left foot injury resulted in 7% permanent disability, without apportionment.

Case Law

- **Strong v. City and County of San Francisco (2005):**

- Reconsideration to further study the issue of apportionment under Labor Code section 4664, as enacted by Senate Bill 899 (SB 899), in situations where an employee suffers an industrial injury causing permanent disability to one region of the body, and where there has been a prior industrial injury resulting in an award of permanent disability involving and/or including different regions of the body.

- Applicant sustained a series of industrial injuries while employed as a stationary engineer by the City and County of San Francisco (defendant).

- Applicant initially sustained a 1995 injury to his left knee. On December 8, 1999, a stipulated award issued, which found that this left knee injury caused permanent disability of 34-½%.

- That report found that applicant "has a disability corresponding to Category C of the Guidelines for Work Capacity," i.e., a preclusion from heavy lifting. The report also found that applicant had objective and subjective disability.

Case Law

- **Strong v. City and County of San Francisco (2005):**

- Applicant had another industrial injury on February 12, 1999, to his left shoulder, left knee, left ankle, and right wrist.

- A stipulated award issued on March 28, 2003, finding that this injury caused permanent disability of 42%.

- Based on the summary rating determination admitted in evidence at trial, this 42% rating was based on a limitation to light work, after apportionment to applicant's prior preclusion from heavy lifting. Both the light work limitation and the apportionment to the prior no heavy lifting restriction were consistent with the June 6, 2001, February 28, 2001, December 13, 2001, and May 9, 2002 reports. Those reports also set forth various objective and subjective factors of disability, as well as some additional work restrictions.

Case Law

- **Strong v. City and County of San Francisco (2005):**
- The back injury in the case now before us occurred on May 8, 2002.
- The parties also stipulated that applicant's overall permanent disability is 70%, after adjustment for age and occupation. The parties raised the issue of the application of section 4664 and the issue of apportionment (overlap) for determination.
- The WCJ issued rating instructions to the Disability Evaluation Unit (DEU), as follows:
- "Please consider whether there is overlap between the following disabilities:
- "Applicant has an overall disability of 70% after adjustment of for age and occupation based on a limitation to semi-sedentary work because of a back injury of 5/08/02 and previous injuries to the left shoulder, left knee, left ankle and right wrist.
- "Prior to the 5/08/02 injury, applicant was limited to light work for an injury to the left shoulder, left knee, left ankle and right wrist limiting the applicant to light work."

Case Law

- **Strong v. City and County of San Francisco (2005):**

- On March 29, 2005, a disability evaluation specialist (rater) of the DEU issued a 10% recommended permanent disability rating opining:

- (1) that applicant's pre-existing light work limitation rated 60%, after adjustment for his current occupation; and
- (2) that applicant's May 8, 2002 caused 10% permanent disability, after apportionment (**i.e., the stipulated 70% overall disability minus the 60% pre-existing disability**).

- On May 31, 2005, the WCJ issued a Findings and Award determining that applicant's May 8, 2002 back injury caused 10% permanent disability.

- Thereafter, applicant filed a timely petition for reconsideration.

Case Law

- **Strong v. City and County of San Francisco (2005):**
- The petition contends:
- (1) that, under section 4664(a), the **employer is liable for the "percentage of permanent disability directly caused by the injury**" and, here, applicant's May 8, 2002 back **injury has directly caused permanent disability of 70%**
- (2) that, because the 70% permanent disability caused by the May 8, 2002 **injury is all in the region of the back**, then under section 4664(c)(1) there **cannot be any apportionment to pre-existing disability in other regions of the body**; and
- (3) that, if apportionment is to apply, it is limited to **subtracting the monetary equivalent of the pre-existing disability from the monetary equivalent of the current** overall disability.

Case Law

- **Strong v. City and County of San Francisco (2005):**
- The WCJ correctly determined that applicant's May 8, 2002 back injury caused 10% permanent disability, after apportionment.
- At trial, the parties stipulated that applicant's overall permanent disability is 70%, after adjustment for age and occupation. The parties then placed the questions of the application of section 4664 and of apportionment (overlap) in issue.
- To claim apportionment under section 4664(b), defendant had the burden of proving the existence of any prior permanent disability award(s) including or involving different regions of the body. Defendant satisfied this burden by offering in evidence:
- (1) a December 8, 1999 stipulated award finding that applicant's November 27, 1995 left knee injury caused 34-½% permanent disability; and
- (2) a March 28, 2003 stipulated award finding that applicant's February 12, 1999 left shoulder, left knee, left ankle, and right wrist injury caused 42% permanent disability.

Case Law

- **Strong v. City and County of San Francisco (2005):**

- Under section 4664(b), applicant was not entitled to assert that he had medically rehabilitated from the permanent disability caused by his two prior injuries. **However, he was entitled to disprove apportionment by demonstrating** that his conclusively existing permanent disability, upon which the December 8, 1999 and March 28, 2003 awards were based, **does not overlap** the permanent disability caused by his May 8, 2002 back injury, either in whole or in part.

- On this record, **applicant succeeded in disproving total overlap**, i.e., he established there is only partial overlap between his current disability and the disability upon which his prior permanent disability awards were based.

Case Law

- **Strong v. City and County of San Francisco (2005):**
- The evidence establishes:
- (1) that the stipulated 34-½% permanent disability rating for applicant's November 27, 1995 left knee injury was based on a preclusion from heavy lifting, in accordance with the August 13, 1998 report; and
- (2) that that the stipulated 42% permanent disability rating for applicant's February 12, 1999 left shoulder, left knee, left ankle, and right wrist injury was based on a limitation to light work, after apportionment to applicant's prior preclusion from heavy lifting, in accordance with the provider's June 6, 2001, February 28, 2001, December 13, 2001, and May 9, 2002 reports.
- Accordingly, applicant had pre-existing overall disability consisting of a limitation to light work, from which he cannot assert medical rehabilitation.

Case Law

- **Strong v. City and County of San Francisco (2005):**
- The evidence also establishes that the parties' stipulation that applicant's overall disability following his May 8, 2002 back injury is 70%, after adjustment for age and occupation, is based on an overall a limitation to semi-sedentary work, in accordance with the provider's November 3, 2002, November 30, 2002, February 17, 2003, and January 26, 2004 reports.
- Finally, these four reports state that the increase in disability from a limitation to light work to a limitation to semi-sedentary work is a result of applicant's May 8, 2002 back injury.
- The **pre-existing light work limitation only partially overlaps the current semi-sedentary work limitation.**
- Therefore, applicant is entitled to be compensated for the difference.
- This is what the WCJ did. Specifically, he found that applicant's May 8, 2002 back injury caused 10% permanent disability, after apportionment. He arrived at this 10% rating by deducting the pre-existing 60% disability (which was based on applicant's pre-existing light work limitation, as adjusted by the DEU for applicant's current age) from the stipulated 70% overall disability (which was based on applicant's current overall limitation to semi-sedentary work, as adjusted for his current age and occupation).

Case Law

- **Strong v. City and County of San Francisco (2005):**

- Accordingly, the WCJ followed the correct procedure. On this record, with the evidentiary basis for the prior permanent disability awards having been established, it would not have been appropriate for the WCJ to utilize a methodology of simply adding the percentages of permanent disability from the prior awards and then subtracting that total from the current overall percentage of permanent disability.

- Accordingly, we affirm the WCJ's May 31, 2005 decision finding that applicant's May 8, 2002 back injury caused 10% permanent disability, after apportionment.

Case Law

- **E.L Yeager Constr'n v WCAB (Gatten) :**

- Petitioner contends that the Board erred by not correctly applying the newly enacted apportionment statutes and in rejecting the independent medical examiner's (IME) opinion on apportionment.

- Applicant sustained an admitted injury to his lower back in 1996 while working for petitioner. The injury occurred when he fell from a five-and-one-half-foot wall, landing on his buttocks. At the time of the injury, he was diagnosed with a lumbar strain/sprain with a compression fracture at L2.

- Prior to this injury, applicant had occasional back pain and had received two to three chiropractic adjustments for the pain in the preceding 10-year period.
- Following his injury, applicant saw various physicians and eventually the workers' compensation administrative law judge (WCJ) appointed Dr. Akmakjian as the IME.

Case Law

- **E.L Yeager Constr'n v WCAB (Gatten) :**

- Dr. Akmakjian apportioned 20 percent of applicant's present disability to chronic degenerative disease of his lumbar spine. He testified that applicant's magnetic resonance imaging (MRI) taken in 1997 showed dehydration, indicating early degenerative change at almost every disc in his back. He noted that this is a naturally occurring process that everyone gets, but it bothers some people and others it does not.

- Although Dr. Akmakjian could not tell when this process started, he opined that the MRI taken within a year of the injury date showed the degenerative changes had already begun. "If you go back to your MRI from 1997, it says you have disc dehydration, indicating early degenerative change at almost every disc in your back, and that was within a year of your injury date, so, you know, all that stuff was there, it's bottom line. The arthritic changes, beginning degeneration, it was there."

Case Law

- **E.L Yeager Constr'n v WCAB (Gatten) :**

- When he was asked if he could find it, "medically probable that [applicant] had some back problems that you can apportion to prior to his injury of 1996," Dr. Akmakjian replied, "That, plus the MRI findings, yes."

- The WCJ found applicant's industrial back injury caused a 74 percent permanent disability with no basis for apportionment. The WCJ rejected Dr. Akmakjian's opinion regarding apportionment as not supported by substantial evidence. Petitioner now seeks review of this finding of no apportionment.

Case Law

- **E.L Yeager Constr'n v WCAB (Gatten) :**

- **Discussion**
- In 2004, the Legislature made a diametrical change in the law with respect to apportionment to an employee's preexisting injury by enacting (**Senate Bill 899**).

- Prior to their repeal by this bill, apportionment under Labor Code **former section 4663** was limited to circumstances where the apportioned disability was the result of the natural progression of a preexisting, nonindustrial condition and such nonindustrial disability would have occurred in the absence of the industrial injury.

Case Law

- **E.L Yeager Constr'n v WCAB (Gatten) :**

- Apportionment based on causation was prohibited. **Thus, "[p]rior to 2004, apportionment could never be made on the basis of pathology, either in a case of preexisting disability or in a case of an aggravation of an existing condition; it had to be made on the basis of causation of permanent disability.**

- "The rule under the law prior to [Senate Bill] 899 was 'an employer takes the employee as he finds him at the time of the employment.

Case Law

- **E.L Yeager Constr'n v WCAB (Gatten) :**

- "[Senate Bill] 899 repealed former section 4663. [Senate Bill] 899 added a new section 4663 and section 4664 affirmatively requiring apportionment of permanent disability based on causation and limiting the employer's liability under certain circumstances. The new section 4663 also requires that a reporting physician address the apportionment issue in a specific manner.

Case Law

- **E.L Yeager Constr'n v WCAB (Gatten) :**

- The WCJ and the Board, in its answer to this petition, acknowledge that the new law governing apportionment applies to this case, and that, consequently, **apportionment may be based on pathology and asymptomatic prior conditions.** The Board asserts, however, that petitioner has not carried its burden of proof in establishing the percentage of disability caused by nonindustrial factors. More specifically, it contends that Dr. Akmakjian's opinion attributing 20 percent of applicant's disability to nonindustrial factors does not constitute substantial evidence on this issue.

- **In order to constitute substantial evidence, a medical opinion must be predicated on reasonable medical probability.**

Case Law

- **E.L Yeager Constr'n v WCAB (Gatten) :**

- A medical opinion is **not substantial evidence** if it is based on facts no longer germane, on inadequate medical histories or examinations, on incorrect legal theories, or on surmise, speculation, conjecture, or guess.

- Further, a medical report is **not substantial evidence** unless it sets forth the reasoning behind the physician's opinion, not merely his or her conclusions.

Case Law

- **E.L Yeager Constr'n v WCAB (Gatten) :**

- The Board has taken the position "**to be substantial evidence on the issue of the approximate percentages of permanent disability due to the direct results of the injury and the approximate percentage of permanent disability due to other factors, a medical opinion must be framed in terms of reasonable medical probability, it must not be speculative, it must be based on pertinent facts and on an adequate examination and history, and it must set forth reasoning in support of its conclusions**."

- Degenerative disease can be **asymptomatic and still apportionable** under the new law.

Case Law

- **Kleeman v. WCAB:**

- Petitioner claimed industrial injuries from work as a special agent for respondent, State of California. After his claim was tried and submitted to the workers' compensation administrative law judge (WCJ) for a decision, the Legislature enacted Senate Bill No. 899 (2003-2004 Reg. Sess.) (Bill 899) and required apportionment based on causation under new Labor Code sections 4663 and 4664.

- Petitioned Workers' Compensation Appeals Board (WCAB) for a ruling that new Labor Code sections 4663 and 4664 did not apply.

Case Law

- **Kleeman v. WCAB:**

- Kleemann contends before this court that new Labor Code sections 4663 and 4664 are inapplicable, since his injuries preceded enactment of S.B. 899 and the Legislature did not intend, and could not legally require, retroactive application of those provisions. We conclude that the Legislature intended new Labor Code sections 4663 and 4664 to apply to pending cases such as Kleemann's, prospectively from the date of enactment of S.B. 899, regardless of the date of injury. Accordingly, the decision of the WCAB is annulled and the matter is remanded for further proceedings consistent with this opinion.

Case Law

- **Kleeman v. WCAB:**
- FACTUAL AND PROCEDURAL BACKGROUND
- Kleemann, a special agent and investigator for the Department of Justice of the State of California (State), claimed injury to his cardiovascular system due to stress during employment from 1996 to April 30, 2000.
- Kleemann also claimed injuries to his right knee from work on April 14, 1999, and on August 14, 2001.
- Kleemann had previously worked as a police officer for the City of Los Angeles, and in that capacity had injured his back and right knee on May 27, 1986, for which he had received 16-1/2 percent permanent disability indemnity.

Case Law

- **Kleeman v. WCAB:**

- On March 22, 2000, Kleemann and the State entered into "Stipulations with Request for Award" (Stipulations), agreeing that the April 14, 1999, right knee injury did not result in permanent disability. On October 11, 2002, Kleemann petitioned **to reopen the April 14, 1999, right knee injury claim for new and further disability.**

- Kleemann also obtained a medical-legal report dated January 2, 2003, from Dennis Ainbinder, M.D. Dr. Ainbinder recommended work restrictions for the right knee, and **apportioned 40 percent of the right knee disability to the injury of April 14, 1999, and 60 percent to the injury of August 14, 2001.** Dr. Ainbinder further concluded that the **right knee disability was not apportioned to the 1986 right knee injury, because Kleemann's pain from that injury had "fully resolved" and "Kleemann did rehabilitate himself".**

Case Law

- **Kleeman v. WCAB:**

- Kleemann's internist reported his cardiovascular and hypertensive disease precluded heavy work and unduly stressful environments, without apportionment to nonindustrial factors.

- The State's internist reported that Kleemann had no permanent disability, and his coronary and hypertensive condition requiring treatment was caused by multiple factors, including hereditary predisposition, abnormal lipids and work stress.

- Kleemann and the State appeared at a mandatory settlement conference and documented issues and exhibits. On March 24, 2004, trial commenced and Kleemann testified regarding his industrial injuries, treatment and disability. Kleemann also testified that he did not have disability when he was hired by the State and passed a physical exam in 1996.

Case Law

- **Kleeman v. WCAB:**

- Kleemann petitioned the WCAB for removal, alleging that the WCJ's retroactive application of apportionment under new sections 4663 and 4664 would cause irreparable harm. In the report on removal, the WCJ explained that new sections 4663 and 4664 became applicable to Kleemann's case upon enactment of S.B. 899 under Section 47.3

Resources

- State of California Dept. of Insurance – *www.insurance.ca.gov*
- UR and Causation section of FAQs: *http://www.dir.ca.gov/dwc/UtilizationReview/UR_FAQ.htm*
- Division of Workers' Compensation Dept. of Industrial Relations - *http://www.dir.ca.gov/DWC*
- URAC – *www.urac.org*
- MTUS Regulations: *http://www.dir.ca.gov/dwc/DWCPropRegs/MTUS_Regulations/MTUS_Regulations.htm*.
- ACOEM-Occupational Medicine Practice Guidelines 2nd Edition 2004
- CWCI
- LexisNexis
- ICD-10 CM PMIC 2015
- CPT Plus PMIC 2012
- https://www.dir.ca.gov/t8/9795.html
- AMA Guides, 5th Edition 2005

"Luck favors the prepared."

– Edna Mode

Questions?

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