

## **THE HAND THAT GIVETH VS. THE HAND THAT TAKETH AWAY THE HYPOCRISY OF APPORTIONMENT IN WORKERS' COMPENSATION**

by Mark A. Vickness

With the California Supreme Court having recently handed down a major decision regarding the calculation of apportionment in workers' compensation (Brodie vs. WCAB, S146979) and with Governor Schwarzenegger having recently proclaimed the reforms to the system enacted three years ago a resounding success, it is worth examining how apportionment is actually determined in practice. This article focuses on apportionment based upon preexisting or subsequent disability (Labor Code §4663) as opposed to the formula for calculating apportionment where there has been a prior award of permanent disability (Labor Code §4664) – the subject of the Brodie decision.

California's much maligned workers' compensation system underwent a dramatic change three years ago when Governor Schwarzenegger signed SB899 into law. One element of the system that was radically revised is the law governing apportionment of permanent disability benefits.

Permanent disability is awarded to those injured workers with permanent residual effects from an industrial injury. Prior to SB899, permanent disability was expressed as a percentage reflecting an injured workers diminished capacity to compete for a job in the open labor market. In a typical case, a physician would render an opinion regarding objective and subjective factors of disability, loss of pre-injury capacity for certain activities as well as any applicable work restrictions. The opinions of the evaluating physicians were then used to calculate permanent disability factoring in the injured worker's age and occupation. The percentage of permanent disability generates a dollar value which is normally paid out to the injured worker in bi-weekly payments until the full value has been paid out.

SB899 changed both the standard and the means of calculating permanent disability. Ability to compete in the open labor market was replaced by a system which attempts to calculate an injured worker's diminished future earning capacity.

Permanent disability, under SB899, is calculated based upon the American Medical Association Guides to the Evaluation of Permanent Impairment (AME Guides). Although there is disagreement in the workers' compensation community as to the severity of the reduction in permanent disability benefits to injured workers as a result of this change, there is no serious dispute that the new system has resulted in a substantial reduction of permanent disability benefits.

Once permanent disability is established, under either system, apportionment may be applied to reduce the permanent disability awarded. If permanent disability is thought of as the hand that giveth, apportionment is the hand that taketh away.

The law of apportionment is based upon the sound public policy that an employer ought only be responsible for that portion of permanent disability that was caused by the industrial injury sustained while working for that employer. In concept, the law encourages employers to hire disabled workers without fear of being responsible for permanent disability caused either before or after the industrial injury. Apportionment was routinely applied prior to SB899 in cases in which there was evidence of disability caused by something other than the industrial injury.

SB899 professed to objectify key elements of workers' compensation. "Guidelines," "evidence" and "science" are woven into the statute in such a way as to require practitioners to spend unhealthy amounts of time reading large green books filled with complex charts and graphs. Medical treatment, for example, the essential benefit, would now be governed by the American College of Occupational and Environmental Medicine (ACOEM) Guidelines which are presumed correct as to what treatment should be rendered to injured workers (LC §4604.5). If a particular injury is not covered by these guidelines, "authorized treatment shall be in accordance with other evidence based medical treatment guidelines generally recognized by the national medical community and that are scientifically based (LC §4604.5(e))." LC §4660 governing permanent disability requires the administrative director to "formulate the adjusted rating schedule based on empirical data . . ." "The schedule shall promote consistency, uniformity, and objectivity." LC §4660(d)

With all this emphasis upon science and data in the calculation of industrially caused permanent disability, one is taken aback by LC §4663 – the apportionment statute – which evidences a complete lack of concern for such lofty principles. There is no hint of evidence, data, science or objectivity here. Rather, the statute mandates that a physician “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.” Remarkably, whatever approximate percentage of permanent disability that may have been caused by these “other factors” need not be determined by reference to the AMA Guides or any particular type of measurement, evidence or data whatsoever.

It is generally accepted among practitioners in this area that Labor Code §4663 has led to a great deal of mischief resulting in an even greater deal of misery for injured workers. A few examples from my own practice: a highly respected agreed upon medical examiner gives a high level of permanent disability to a client with a severely disabling bilateral upper extremity repetitive stress injury. He then apportions a percentage of that permanent disability to ‘other factors’ including piano playing, fishing, vacuuming, cooking and doing laundry. At deposition, the following exchange occurs:

Q. Of those activities, for any of them, do you have any specific facts as to the frequency with which Ms. X engages in any of those activities?

A. I do not.

Q. Okay. Therefore, is your opinion regarding the contribution of those non-industrial activities taken as a whole speculative?

A. Yes, if we define speculative as a guess. Yes.

In another case, the agreed medical examiner, an orthopedic surgeon with over twenty years experience in workers’ compensation, testified:

4663 is stupid. Okay? I mean, I’ll just tell you – I’ll get it on the record – I think it’s a ridiculous thing, and you guys are asking me to assign percentages, so I

assign percentages based on my knowledge of what I understand 4663 is, and how I go about that I decide for most – for all these kinds of things – it drives me crazy. There’s no way – it’s all speculative.

One final example. Another agreed medical examiner testified that the way he determines the apportionable percentage of permanent disability is to apply a ‘quartile system.’ Here is the testimony:

Q. You have applied this quartile reasoning to apportionment, is that right?

A. Yes.

Q. Is there some authority that you are aware of that indicates to you that that is appropriate?

A. No.

Q. So you have done this on your own in thinking about apportionment?

A. Yes.

Q. Okay. And am I then correct that when you are trying to determine a percentage of apportionment, your thinking tends to go to zero, 25 percent, 50 percent, 75 percent and 100 percent?

A. Yes.

These are but a few examples of the absurdities the workers’ compensation bar deals with on a daily basis. They are not the worst examples. Apportionment opinions have been based upon race, gender and genetic predisposition.

The glaring reality of apportionment determinations post-SB899 is that not only is there no requirement that the apportioned percentage of permanent disability be established by reference to some evidence or scientific methodology – which is required to establish the permanent disability caused by the industrial injury – in actuality, physicians are creating apportionment out of whole cloth. The hand that giveth applies the cudgel of science to do so grudgingly. The hand that taketh away does so greedily using neither science nor reason.

Mark A. Vickness