WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

DIANNE BENSON, ***Applicant,*** **vs.** **THE PERMANENTE MEDICAL GROUP, Permissibly Self-Insured; ATHENS ADMINISTRATORS (Adjusting Agent),** ***Defendant(s).***	**Case Nos. OAK 0297895** **OAK 0326228** **OPINION AND DECISION AFTER RECONSIDERATION (EN BANC)**

On April 13, 2007, the Appeals Board granted defendant's petition for reconsideration of the Findings and Award issued on January 22, 2007, wherein the workers' compensation administrative law judge (WCJ) found that applicant sustained industrial injuries to her neck on June 3, 2003 and cumulatively through June 3, 2003, that the two injuries both became permanent and stationary on September 25, 2005, and that the two injuries combined to cause 62% permanent disability. Defendant sought reconsideration, contending that, due to the changes wrought by Senate Bill (SB) 899 (Stats. 2004, ch. 34), there must be separate awards of permanent disability for each injury and that the WCJ erred in issuing a combined award of permanent disability.

The Appeals Board granted reconsideration in this matter to allow time to study the record and applicable law. Because of the important legal issue presented as to the meaning and application of SB 899 with regard to the continued viability of long-standing legal principles of apportionment established by *Wilkinson v. Workers' Comp. Appeals Bd.* (1977) 19 Cal.3d 491 [42 Cal.Comp.Cases 406] (*Wilkinson*), and in order to secure uniformity of decision in the future, the Chairman of the Appeals Board, upon a majority vote of its members, assigned this case to the

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Appeals Board as a whole for an en banc decision. (Lab. Code, § 115.)[1]

The issue presented in this case is whether the rule in *Wilkinson* is still viable in view of the significant changes effected by SB 899, which adopted a "new regime of apportionment based on causation." (*Brodie v. Workers' Comp. Appeals Bd.* (2007) 40 Cal.4th 1313, 1327 [72 Cal.Comp.Cases 565, 576] (*Brodie*).) The rule announced in *Wilkinson* provides that an injured worker, while employed by the same employer, who sustains two separate injuries to the same part of the body, which become permanent and stationary at the same time, is entitled to receive a combined award of permanent disability. *Wilkinson* arose in response to the mandate of former Labor Code section 4750[2] that each injury be considered by itself and not in relation to any previous disability, and that benefits be determined based upon the single injury "as though no prior disability or impairment existed." In enacting SB 899, the Legislature repealed former section 4750, thereby removing the statutory basis underlying *Wilkinson*, and added the requirements that "[a]pportionment of permanent disability shall be based on causation" (Lab. Code, § 4663, subd. (a)), that apportionment of permanent disability must be assessed in terms of "what approximate percentage of the permanent disability was caused by the direct result of injury … and what approximate percentage of the permanent disability was caused by other factors" (Lab.

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[1] The Appeals Board's en banc decisions are binding precedent on all Appeals Board panels and WCJs. (Cal. Code Regs., tit. 8, § 10341; *Gee v. Workers' Comp. Appeals Bd.* (2002) 96 Cal.App.4th 1418, 1425, fn. 6 [67 Cal.Comp.Cases 236, 239, fn. 6]; see also Govt. Code, § 11425.60(b).)

[2] All further statutory references are to the Labor Code.

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Code, § 4663, subd. (c)), and that an employer "shall only be liable for the percentage of permanent disability directly caused by the injury." (Lab. Code, § 4664, subd. (a).)[3]

We hold that the rule in *Wilkinson* is not consistent with the new requirement that apportionment be based on causation and, therefore, *Wilkinson* is no longer generally applicable. Rather, we now must determine and apportion to the cause of disability for each industrial injury. Therefore, all potential causes of disability – whether from a current industrial injury, a prior or subsequent industrial injury, or a prior or subsequent non-industrial injury or condition – must be taken into consideration. We observe, however, that there may be limited circumstances, not present here, where the evaluating physicians cannot parcel out, with reasonable medical probability, the approximate percentages to which each successive injury causally contributed to the employee's overall permanent disability. Under these limited circumstances, a combined

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[3] Labor Code sections 4663 and 4664 provide, in relevant part, as follows:

> **Labor Code section 4663:**
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> "(a) Apportionment of permanent disability shall be based on causation.
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> "(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.
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> "(c) In order for a physician's report to be considered complete on the issue of permanent disability, the report must include an apportionment determination. 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."
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> **Labor Code section 4664:**
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> "(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."

award of permanent disability may still be justified.

BACKGROUND

The facts in this case are not in dispute. Applicant, Dianne Benson, began working as a file clerk for The Permanente Medical Group in April 1992. The job essentially required her to stand all day, except for some brief periods of sitting, and it involved repetitive neck and upper extremity motion. On June 3, 2003, she was reaching up over her head, pulling out a plastic bin to file a chart, when she felt a pain in her neck. The next day, she went to work, but her neck hurt even more. She was initially diagnosed to have a neck strain and was put on light duty. On July 15, 2003, however, she was placed on temporary total disability and she did not return to work thereafter. In November 2003, she filed an application for adjudication of claim alleging a June 3, 2003 specific injury. On October 19, 2004, she underwent a three-level fusion of the cervical spine.

The parties selected Joseph Izzo, M.D., as an Agreed Medical Examiner (AME). In his report of October 4, 2005, Dr. Izzo concluded that applicant actually sustained two separate injuries to her neck, the claimed specific injury on June 3, 2003, and a cumulative trauma injury through June 3, 2003. Dr. Izzo concluded that applicant's injuries became permanent and stationary as of the date of his evaluation on September 26, 2005. Applicant subsequently filed a claim for the cumulative trauma injury, as found by Dr. Izzo.

Dr. Izzo concluded that as a consequence of her injuries, applicant has a limitation to semi-sedentary work. As to the issue of apportionment, Dr. Izzo concluded that applicant's disability was equally caused by the specific injury of June 3, 2003 and by the cumulative injury through June 3, 2003:

> "In my opinion, 50 percent of the current permanent partial disability is apportioned to cumulative trauma through June 3, 2003. 50 percent is apportioned to the specific injury of June 3, 2003.
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> "The reason for the cumulative trauma injury is the fact that the degenerative changes in her neck that created the spinal stenosis would obviously have to come about over time. There is nothing

> that I saw that constituted a disc herniation. The diagnosis, per Dr. Smith, was degenerative disc disease.
> "The description of her job duties, with the extreme amount of repetitive motion of her neck, certainly would account for the development over the years of the degenerative changes and the bone spur formation and subsequent spinal stenosis.
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> "I see nothing presented in the records that invokes a basis for apportionment to nonindustrial factors or preexistent quiescent medical conditions not related to her job activities."

It is undisputed that applicant's combined permanent disability is 62%, after adjustment for age and occupation. However, at trial, defendant contended that the apportionment provisions in SB 899 abrogated the *Wilkinson* rule and mandated that applicant receive two separate awards of 31% permanent disability. The WCJ concluded that the *Wilkinson* rule is still viable under the facts of this case and that separate awards of permanent disability are not required. Accordingly, the WCJ issued a single award based on the combined permanent disability of 62%. Defendant then timely sought reconsideration.[4]

DISCUSSION

I.

In construing a statute, the Appeals Board's fundamental purpose is to determine and effectuate the Legislature's intent. (*DuBois v. Workers' Comp. Appeals Bd*. (1993) 5 Cal.4th 382, 387 [58 Cal.Comp.Cases 286, 289]; *Nickelsberg v. Workers' Comp. Appeals Bd*. (1991) 54 Cal.3d 288, 294 [56 Cal.Comp.Cases 476, 480]; *Moyer v. Workmen's Comp. Appeals Bd*. (1973) 10 Cal.3d 222, 230 [38 Cal.Comp.Cases 652, 657].) Thus, the WCAB's first task is to look to the

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[4] In *Hamilton v. Lockheed Corp*. (2001) 66 Cal.Comp.Cases 473 (Appeals Board en banc), we emphasized the importance of having "a proper trial record." In this regard, the mere filing of a document does not signify its receipt in evidence and only documents that are received in evidence (or marked for identification, but not received) are properly part of the WCAB's record of proceedings. (Cal. Code Regs., tit. 8, §§ 10600, 10750.)

Here, during the course of the proceedings before her, the WCJ did not admit any medical reports or other documents in evidence. However, at the April 3, 2006 mandatory settlement conference (MSC), both parties listed Dr. Izzo's October 4, 2005 AME report as a proposed exhibit. Further, both parties' trial briefs – as well as defendant's petition for reconsideration and applicant's answer – refer to the October 4, 2005 report. Finally, the WCJ clearly relied on Dr. Izzo's October 4, 2005 AME report and, on reconsideration, neither party is objecting to the WCJ's consideration of that report. Therefore, we will issue an order admitting Dr. Izzo's October 4, 2005 report in evidence. (Although the parties also filed reports of Dr. Izzo dated November 27 and November 30, 2005, as well as various progress reports of the treating physician, Jason Smith, M.D., these reports are not discussed in the parties' briefs on reconsideration and they do not appear to be relevant to the *Wilkinson* issue before us.)

language of the statute itself. (Ibid.) The best indicator of legislative intent is the clear, unambiguous, and plain meaning of the statutory language. (*DuBois v. Workers' Comp. Appeals Bd*., *supra*, 5 Cal.4th at pp. 387-388 [58 Cal.Comp.Cases at p. 289]; *Gaytan v. Workers' Comp. Appeals Bd*. (2003) 109 Cal.App.4th 200, 214 [68 Cal.Comp.Cases 693, 702]; *Boehm & Associates v. Workers' Comp. Appeals Bd*. (*Lopez*) (1999) 76 Cal.App.4th 513, 516 [64 Cal.Comp.Cases 1350, 1351].) When the statutory language is clear and unambiguous, there is no room for interpretation and the WCAB must simply enforce the statute according to its plain terms. (*DuBois v. Workers' Comp. Appeals Bd*., *supra*, 5 Cal.4th at p. 387 [58 Cal.Comp.Cases at p. 289]; *Atlantic Richfield Co*. *v. Workers' Comp. Appeals Bd*. (*Arvizu*) (1982) 31 Cal.3d 715, 726 [47 Cal.Comp.Cases 500, 508].)

II.

Under the rule set forth in *Wilkinson*, an injured worker could receive a single combined award of permanent disability in circumstances of multiple injuries to the same part of the body that become permanent and stationary at the same time. This doctrine arose in response to the requirement, set forth in former section 4750, that an employer could only be held liable for compensation to an injured worker, who suffered from a previous permanent disability or physical impairment, for the disability arising out of the immediate industrial injury. Section 4750 had provided that an injured worker in such circumstances "shall not receive from the employer compensation for the later injury in excess of the compensation allowed for such injury when considered by itself and not in conjunction with or in relation to the previous disability or impairment. [¶] The employer shall not be liable for compensation to such an employee for the combined disability, but only for that portion due to the later injury as though no prior disability or impairment existed."

Thus, under former section 4750, the previous permanent disability or impairment would be calculated and apportioned, and an employer would be held liable only for the increase in permanent disability attributable to the new industrial injury.

In *Wilkinson*, the injured worker sustained two successive industrial injuries to his knees in

falls at work, which occurred two months apart. The WCJ concluded the injuries became permanent and stationary at the same time. After apportionment to a pre-existing condition, he was found to have sustained a combined 30.5% permanent disability. The WCJ applied former section 4750 and apportioned the disability equally between the two injuries, rating each at 15.25% and then applied the formula established by *Fuentes v. Workers' Comp. Appeals Bd*. (1976) 16 Cal.3d 1 [41 Cal.Comp.Cases 42] (*Fuentes*) for the calculation of benefits in multiple injury cases, awarding $3,587.50 for each injury accordingly.

On appeal, the Supreme Court held in *Wilkinson* that the policy established in the Appeals Board's en banc decision in *Bauer v. County of Los Angeles* (1969) 34 Cal.Comp.Cases 594, was applicable. In *Bauer*, the Appeals Board had held that section 4750 did not compel two separate awards of compensation where two injuries to the same part of the body became permanent and stationary simultaneously. The Supreme Court stated:

> "The *Bauer* doctrine is consistent with the language of section 4750, which requires apportionment only when the employee 'is suffering from a *previous* permanent disability or physical impairment.' Thus the section does not require apportionment in all cases of successive injuries, but only in cases of successive permanent disabilities. If the worker incurs successive injuries which become permanent *at the same time*, neither permanent disability is 'previous' to the other, and section 4750 hence does not require apportionment."
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> (*Wilkinson*, 19 Cal.3d at p. 497 [42 Cal.Comp.Cases at p. 409] (emphasis in original).)

It should be noted that both *Wilkinson* and *Bauer* involved issues of the *apportionment* of permanent disability in cases of successive industrial injuries involving the same body part that become permanent and stationary at the same time. Neither *Wilkinson* nor *Bauer* was concerned with the *calculation* of permanent disability benefits and thus neither case involved the application of the formulas for calculating permanent disability discussed in *Fuentes.* (See, generally, *Wilkinson*, 19 Cal.3d at pp. 499-501 [42 Cal.Comp.Cases at pp. 411-412].)

The Court further relied upon the fact that apportionment under section 4750 between prior and subsequent injuries could not be applied in the absence of substantial evidence that either:

(1) the prior industrial injury would have caused permanent disability even without the added trauma of the subsequent industrial injury; or (2) the subsequent industrial injury would have caused disability even without the weakness caused by the first industrial injury. If there was no substantial medical evidence to justify separately assigning a percentage of permanent disability to either injury, apportionment was not permitted. As noted in *Wilkinson*, 19 Cal.3d at p. 499 [42 Cal.Comp.Cases at pp. 410-411]:

> "As we have stated, this absence of substantial evidence to support apportionment is typical of *Bauer* injuries. When as here the physicians do not see the worker until after the second injury, any attempt on their part to allocate the combined disability between the two injuries is likely to be no more than speculation and guesswork. But even in cases in which the worker has been examined by a physician between the two injuries, the interaction between the injuries may make apportionment of disability impossible or inequitable. The second injury may prevent the first from healing properly, converting that which would have been a temporary disability into a permanent disability; the first injury may render the injured part of the body unusually weak or sensitive and thus contribute to the damage caused by the second. Consequently, awards for each injury as if the other had not occurred would necessarily be based upon hypothetical disabilities which, added together, total to far less than the actual disability suffered by the worker and observed by the reporting physicians."

Thus, under *Wilkinson*, former section 4750 could not be applied in the absence of substantial medical evidence either that there was pre-existing permanent disability or that each successive injury resulted in an identifiable level of disability. To do so would result in an award which did not fairly reflect the actual disability existing at the time the injured worker became permanent and stationary.

Wilkinson involved two specific injuries while employed by the same employer. However, the rule in *Wilkinson* was subsequently extended to allow a combined award for multiple injuries to the same body part that become permanent and stationary at the same time in other situations, including where there is not an identity of employers at the times of the successive injuries (*Rumbaugh v. Workers' Comp. Appeals Bd.* (1978) 87 Cal.App.3d 907 [43 Cal.Comp.Cases 1399]) or where there is a combination of specific and cumulative trauma injuries (*Nuelle v. Workers'*

Comp. Appeals Bd. (1979) 92 Cal.App.3d 239 [44 Cal.Comp.Cases 439]).

III.

Under the reforms enacted by SB 899, the previous statutory bases for apportionment, including section 4750, were repealed (Stats. 2004, ch. 34, § 37) and sections 4663 and 4664 were adopted. (Stats. 2004, ch. 34, §§ 34, 35). These changes represented a major shift in the rules of apportionment. Specifically, new section 4663 provided that "[a]pportionment of permanent disability shall be based on causation" (§ 4663, subd. (a)) and that apportionment of permanent disability must be determined based on "what approximate percentage of the permanent disability was caused by the direct result of injury … and what approximate percentage of the permanent disability was caused by other factors." (§ 4663, subd. (c).) Also, new section 4664 provided that an employer is now only "liable for the percentage of permanent disability directly caused by the injury arising out of and occurring in the course of employment." (§ 4664, subd. (a).)

In *Brodie*, the Supreme Court addressed this fundamental change in the law of apportionment. The Court began by observing that "[t]he plain language of new sections 4663 and 4664 demonstrates they were intended to reverse [certain] features of former sections 4663 and 4750" (*Brodie*, 40 Cal.4th at p. 1326 [72 Cal.Comp.Cases at p. 576]) and that, in enacting SB 899, the Legislature created a new "causation regime," requiring that all potential causes of permanent disability be separately addressed and considered when apportioning disability pursuant to newly revised Labor Code section 4663. (*Brodie*, 40 Cal.4th at pp. 1327-1328 [72 Cal.Comp.Cases at pp. 576-577].) More specifically, the Supreme Court stated:

> "This explains the Legislature's purpose in adopting a revised section 4663 and a new section 4664. Further, one can see why it was necessary to repeal former sections 4663 and 4750. These provisions, as interpreted by the courts, were *inconsistent with the new regime of apportionment based on causation*, as well as the conclusive presumption that previous permanent disability still existed for apportionment purposes. (footnote omitted) (§§ 4663, subd. (a), 4664, subds. (a), (b).) Former section 4750 required consideration of the new injury 'by itself and not in conjunction with or in relation to the previous disability or impairment' and further called for compensation for the later injury to be determined 'as though no prior disability or impairment had

> existed.' But under Senate Bill No. 899 (2003-2004 Reg. Sess.), *the new approach to apportionment is to look at the current disability and parcel out its causative sources--nonindustrial, prior industrial, current industrial--and decide the amount directly caused by the current industrial source. This approach requires thorough consideration of past injuries, not disregard of them. Thus, repeal of section 4750 was necessary to effect the Legislature's purposes in adopting a causation regime*."
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> (*Brodie*, 40 Cal.4th at pp. 1327-1328 [72 Cal.Comp.Cases at pp. 576-577] (emphasis added).)

Based on *Brodie* and the language of new sections 4663 and 4664, we conclude that the rule in *Wilkinson* is antithetical to the adoption of the new "causation regime" in the law of apportionment. Apportionment based upon causation is generally not consistent with combined awards of permanent disability, where such awards are based solely upon the fact that the injuries became permanent and stationary at the same time. In enacting SB 899, the Legislature mandated that each potential cause of disability be considered for each claim of injury. As recognized in *Brodie,* apportionment is based upon a determination of the causative sources of disability – including the current injury and any prior or subsequent industrial or non-industrial injuries or conditions. Thus, each separate injury requires a separate analysis of the medical evidence to determine the causative sources of disability.

We recognize that, in *Brodie*, the Supreme Court considered the question of whether the repeal of section 4750 and the adoption of the new method of apportionment required the rejection of the formula in *Fuentes* for the calculation of permanent disability benefits in cases of multiple injuries. Noting that there is no presumption of Legislative intent to " 'overthrow long-established principles of law unless such intention is clearly expressed or necessarily implied' " (*Brodie*, 40 Cal.4th at p. 1325 [72 Cal.Comp.Cases at p. 574]), quoting *People v. Superior Court* (*Zamudio*) (2000) 23 Cal.4th 183, 199), and finding that there was only legislative "silence" on the question (*Brodie*, 40 Cal.4th at p. 1329 [72 Cal.Comp.Cases at pp. 577-578]), the Court found no such intent. On the issue of apportionment to causation, however, the Legislature has not been silent. It has expressly stated: (1) that "[a]pportionment of permanent disability shall be based on causation"

(Lab. Code, § 4663, subd. (a)); (2) that apportionment of permanent disability must be determined based on "what approximate percentage of the permanent disability was caused by the direct result of injury … and what approximate percentage of the permanent disability was caused by other factors" (Lab. Code, § 4663, subd. (c)); and (3) that an employer "shall only be liable for the percentage of permanent disability directly caused by the injury." (Lab. Code, § 4664, subd. (a).) Thus, the plain language of the sections expresses – or, at least, necessarily implies – a legislative intent to abrogate the rule in *Wilkinson* due to the new causation regime created by SB 899.

The dissent cites to *Brodie*'s discussion of whether SB 899 intended to overturn the "formula A" method (for calculating permanent disability indemnity after apportionment) that had been adopted by the Supreme Court's 1976 decision in *Fuentes*. (*Brodie*, 40 Cal.4th at pp. 1328-1329 [72 Cal.Comp.Cases at pp. 577-578].) Analogizing to this discussion in *Brodie*, the dissent suggests that had the Legislature intended a departure from *Wilkinson*, then "one would expect to find some trace of this intent in the legislative history" and that "[s]uch a change, if intended, would likely have been remarked upon." Therefore, the dissent asserts, the absence of any express references in the legislative history to overturning *Wilkinson* means the Legislature did not intend to change the *Wilkinson* rule. However, basic principles of statutory construction belie the dissent's analysis. If the language of a statute is not ambiguous, then "the plain meaning controls and resort to extrinsic sources to determine the Legislature's intent is unnecessary." (*In re Jennings* (2004) 34 Cal.4th 254, 263 (internal quotations omitted); see also *Diamond Multimedia Systems, Inc. v. Superior Court* (1999) 19 Cal.4th 1036, 1055 ("Only when the language of a statute is susceptible to more than one reasonable construction is it appropriate to turn to extrinsic aids, including the legislative history of the measure, to ascertain its meaning."); *DuBois v. Workers' Comp. Appeals Bd.*, *supra*, 5 Cal.4th at pp. 387-388 [58 Cal.Comp.Cases at p. 289] ("[w]hen the language is clear and there is no uncertainty as to the legislative intent, we look no further and simply enforce the statute according to its terms").) Here, the actual language of sections 4663 and 4664, subdivision (b), is not reasonably susceptible to more than one interpretation. The language unambiguously mandates apportionment to causation of disability in

all cases, including successive industrial injuries to the same body part that become permanent and stationary at the same time. Because the statutory language is not ambiguous, we must presume the Legislature meant what it said – that, as stated by *Brodie*, it was establishing "new regime of apportionment based on causation." Therefore, it is inappropriate to turn to extrinsic sources, including legislative history.

Even assuming, however, that resort to legislative history might be appropriate, the Legislature very clearly stated its intent in enacting SB 899. Section 49 of that enactment provides:

> "This act is an urgency statute necessary for the immediate preservation of the public peace, health, or safety within the meaning of Article IV of the Constitution and shall go into immediate effect. The facts constituting the necessity are: [¶] *In order to provide relief to the state from the effects of the current workers' compensation crisis* at the earliest possible time, it is necessary for this act to take effect immediately." (Stats. 2004, ch. 34, § 49 (emphasis added).)

The "crisis" to which SB 899 referred was "skyrocketing workers' compensation costs." (*Brodie*, 40 Cal.4th at p. 1329 [72 Cal.Comp.Cases at p. 578]; see also, *Costco Wholesale Corp. v. Workers' Comp. Appeals Bd*. (*Chavez*) (2007) 151 Cal.App.4th 148 [72 Cal.Comp.Cases 582, 587] ("the workers' compensation … reforms [of SB 899] were enacted as urgency legislation to drastically reduce the cost of workers' compensation insurance"); *Green v. Workers' Comp. Appeals Bd*. (2005) 127 Cal. App. 4th 1426, 1441 [70 Cal.Comp.Cases 294, 306] ("the policy actually expressed by the Legislature [in section 49] shows its concern with immediately changing the workers' compensation system").) In successive injury cases, a single combined award of permanent disability is dramatically more costly than two separate smaller awards.[5] Accordingly,

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[5] This is because the permanent disability compensation schedule is progressive in that the number of weeks of indemnity payments increases "exponentially" in proportion to the percentage of the disability. (Lab. Code, § 4658; *Fuentes, supra,* 16 Cal.3d at p. 4 [41 Cal.Comp.Cases at p. 42.) Further, the maximum weekly rate (dollar amount) of payments now also increases with higher levels of permanent disability. (Lab. Code, § 4453(b).) The net effect of the increased weeks and increased rate of payments means that a single non-apportioned award of permanent disability indemnity is always higher and, sometimes, considerably higher than two separate apportioned awards. This is particularly true if the single non-apportioned award is 70% or greater, thereby also resulting in a life pension. (Lab. Code, § 4659(c).)

Here, for example, although applicant's weekly rate of permanent disability payments is the same whether she receives a single 62% permanent disability award or two 31% permanent disability awards (because, under both

the apportionment to causation provisions further the goal of SB 899 to "provide relief" from the workers' compensation "crisis" and to reduce workers' compensation costs.

The dissent also goes on to assert that the language of section 4663, subdivision (c), carries forward the *Wilkinson* rule because that subdivision did not provide for apportionment to causation where the employee's "other factors" of disability are concurrent with the disability caused by the industrial injury. However, in pertinent part, section 4663, subdivision (c), provides: "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*." (Emphasis added.) Thus, in successive industrial injury cases, section 4663, subdivision (c), specifically requires a physician to determine what percentage of disability *was caused by each industrial injury*, regardless of whether any particular industrial injury occurred before or after any other particular industrial injury or injuries. Moreover, if the dissent's interpretation were adopted, then section 4663, subdivision (c), would preclude the apportionment of disability to causation by "other factors" where those factors are concurrent with the disability caused by the industrial injury, even if those "other factors" are entirely non-industrial. Certainly, this is not what is contemplated by the Legislature's "new regime of apportionment based on causation … [which requires physicians and the WCAB] to look at the current disability and parcel out its causative sources-nonindustrial, prior industrial, current industrial-and decide the amount directly caused by the current industrial source." (*Brodie*, 40 Cal.4th at pp. 1327-1328 [72 Cal.Comp.Cases at pp. 576-577].)

IV.

A secondary rationale for the rule in *Wilkinson* was the difficult evidentiary burden to

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circumstances, applicant's permanent disability is less than 70%), the overall amount of permanent disability payments she would receive are significantly different. That is, a single unapportioned award of indemnity for 62% permanent disability would total $67,016.25, payable at $185.00 per week for 362.25 weeks. However, two separate unapportioned awards of 31% permanent disability, with each award payable at $185.00 per week for 133 weeks, would total $49,210.00 in permanent disability indemnity (i.e., two awards of $24,605.00).

justify apportionment of disability among successive injuries which became permanent and stationary at the same time. It was noted that any attempt by a physician to allocate the combined disability between multiple injuries may be "impossible or inequitable" and "is likely to be no more than speculation and guesswork." Further, the Court was concerned that the interaction between successive injuries – that is, "[t]he second injury may prevent the first from healing properly, converting that which would have been a temporary disability into a permanent disability" or "the first injury may render the injured part of the body unusually weak or sensitive and thus contribute to the damage caused by the second" – may prevent a calculated determination of the respective effect each injury alone had on the extent of permanent disability. "Consequently, awards for each injury as if the other had not occurred would necessarily be based upon hypothetical disabilities which, added together, total to far less than the actual disability suffered by the worker and observed by the reporting physicians." (*Wilkinson*, 19 Cal.3d at p. 499 [42 Cal.Comp.Cases at pp. 410-411].)

However, in all workers' compensation claims, including those involving successive industrial injuries, section 4663 now specifically requires that a reporting physician "shall … address the issue of causation of the permanent disability." (Lab. Code, § 4663, subd. (b).) In fact, "[i]n order for a physician's report to be considered complete on the issue of permanent disability, the report must include an apportionment determination." (Lab. Code, § 4663, subd. (c).) An apportionment determination is made "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*." (Lab. Code, § 4663, subd. (c) (emphasis added).) Moreover, "[i]f 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" and "[t]he physician shall then consult with other physicians or refer the employee to another physician … in order to make the final determination." (Ibid.)

Thus, in cases of successive injuries, section 4663 now expressly requires the opposite determination that former section 4750 had previously mandated. Rather than make a determination in each case "as if the other had not occurred" (*Wilkinson*, 19 Cal.3d at p. 499 [42 Cal.Comp.Cases at p. 411]), a reporting physician is required to determine all of the causative sources of the employee's permanent disability, giving consideration not only to the current industrial injury, but also to any prior or subsequent industrial injuries, as well as any prior or subsequent non-industrial injuries or conditions. If the physician is unable to make an apportionment determination, he or she must give reasons why such a determination cannot be made after an evaluation by or consultation with at least one other physician.

Though the basis for apportionment has changed, the difficult practical issues facing physicians addressing cases of successive injuries have not. In considering each separate injury, a physician must still rely upon his or her best medical judgment to make an apportionment determination, and prepare a report which constitutes substantial medical evidence by setting forth a sufficient basis for the report's conclusion by detailing the medical history and evidence in support thereof, as well as "how and why" any specific condition is causing permanent disability. (See *Andersen v. Workers' Comp. Appeals Bd.* (2007) 149 Cal.App.4th 1369 [72 Cal.Comp.Cases 389]; *E.L. Yeager v. Workers' Comp. Appeals Bd.* (*Gatten*) (2006) 145 Cal.App.4th 922 [71 Cal.Comp.Cases 1687]; *Escobedo v. Marshalls* (2005) 70 Cal.Comp.Cases 604, 611 (Appeals Board en banc).)

Of course, a physician's apportionment "determination," within the meaning of section 4663, will depend significantly on the facts presented. However, given the reporting requirements of section 4663, subdivisions (b) and (c), we anticipate that in many, if not most instances, physicians will arrive at *some* apportionment determination in successive injury cases. For example, a physician evaluating a case involving successive industrial injuries might determine that all of the resulting permanent disability is solely attributable to one of the successive injuries, resulting in a single (non-combined) award for all of the permanent disability. Alternatively, a physician may determine that it is medically reasonable to separately assign a percentage cause of

the overall disability to each injury (e.g., 50/50, 75/25, 90/10), thereby resulting in multiple (non-combined) awards for each injury's portion of the permanent disability.

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As discussed above, *Wilkinson* pointed out that there are significant apportionment issues confronting physicians who evaluate injured workers who have sustained successive industrial injuries to the same body part, which have become permanent and stationary at the same time. The Supreme Court observed that any effort to medically separate the causative effects of each discrete injury may be frustrated by the facts that "[t]he second injury may prevent the first from healing properly, converting that which would have been a temporary disability into a permanent disability" or "the first injury may render the injured part of the body unusually weak or sensitive and thus contribute to the damage caused by the second." (*Wilkinson*, 19 Cal.3d at p. 499 [42 Cal.Comp.Cases at pp. 410-411].) Under such circumstances, an allocation of the causation of the combined disability between the multiple injuries may be "impossible or inequitable" or may be "no more than speculation and guesswork." (Ibid.)

This does not necessarily mean, however, that where a physician does apportion causation of permanent disability between successive industrial injuries, the physician's opinion cannot be accepted. Medicine is not an exact science. "Of necessity every medical opinion must be in a sense speculative [but] this does not destroy the probative value of such an opinion." (*Foremost Dairies, Inc. v. Industrial Acc. Com.* (*McDannald*) (1965) 237 Cal.App.2d 560, 572 [30 Cal.Comp.Cases 320].) As the Supreme Court has stated, "Candor and intellectual integrity often compel an honest physician to state that his [opinion] does not rest upon scientific certainty." (*Travelers Insurance Co. v. Industrial Acc. Com.* (*Odello*) (1949) 33 Cal.2d 685, 687 [14 Cal.Comp.Cases 54]; see also *Santa v. Industrial Acc. Com.* (1917) 175 Cal. 235, 237 [4 I.A.C. 169] (in discussing a physician's statement that the cause of an employee's death was "guesswork," the Supreme Court said: "But a reading of his entire testimony shows that [the physician] did not, by this, mean to say that he was indulging in mere conjecture or speculation. He was giving what, on the facts before him, and in the light of medical science, appeared to be the

most probable explanation of the event.").) Thus, as two appellate courts have recently stated in discussing apportionment to causation under SB 899: (1) the mere fact "that the percentages [of causation of permanent disability that the physician] provided are approximations that are not precise and require some intuition and medical judgment … does not mean his conclusions are speculative [where the physician] stated the factual bases for his determinations based on his medical expertise" (*Andersen v. Workers' Comp. Appeals Bd., supra*, 149 Cal.App.4th at p. 1382 [72 Cal.Comp.Cases at p. 398]); and (2) a physician's opinion on apportionment "cannot be disregarded as being speculative when it was based on his expertise in evaluating the significance of the[] facts." (*E.L. Yeager Construction v. Workers' Comp. Appeals Bd.* (*Gatten*), *supra*, 145 Cal.App.4th at p. 930 [71 Cal.Comp.Cases at p. 1693].)[6] Accordingly, where a physician does apportion to causation in successive injury cases, the physician's apportionment determination may be accepted if it constitutes substantial evidence. (*Escobedo v. Marshalls*, *supra*, 70 Cal.Comp.Cases at pp. 620-621.)

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[6] We observe that apparent dicta in *Gatten* states that "the Board impermissibly substituted its judgment for that of the medical expert." (*E.L. Yeager Construction v. Workers' Comp. Appeals Bd*. (*Gatten*), *supra*, 145 Cal.App.4th at p. 930 [71 Cal.Comp.Cases at p. 1693].) However, it has long been recognized it is the WCAB, and not any particular physician, that is the ultimate trier-of-fact. (See, *Klee v. Workers' Comp. Appeals Bd.* (1989) 211 Cal.App.3d 1519, 1522 [54 Cal.Comp.Cases 251, 252] ("the WCJ, not the physician, is the trier of fact"); *Robinson v. Workers' Comp. Appeals Bd.* (1987) 194 Cal.App.3d 784, 792-793 [52 Cal.Comp.Cases 419, 425] ("the Board and not the physician is the trier of fact"); *Johns-Manville Products Corp. v. Workers' Comp. Appeals Bd.* (*Carey*) (1978) 87 Cal.App.3d 740, 753 [43 Cal.Comp.Cases 1372, 1379] ("While the appeals board must utilize expert medical opinion on many issues, it and not the physician is the trier of fact" [internal citation omitted]).) Therefore, the WCAB is not bound by the opinion of any physician (even an AME); rather, its only obligation is to give consideration to the physician's opinion. (*Western Growers Ins. Co. v. Workers' Comp. Appeals Bd.* (*Austin*) (1993) 16 Cal.App.4th 227, 241 [58 Cal.Comp.Cases 323, 332].)

This is consistent with the principles of civil law regarding expert opinion. A jury generally is *not* bound by an expert's opinion and can reject even an uncontradicted opinion, if the reasons given are unsound. (*Kastner v. Los Angeles Metropolitan Transit Auth.* (1965) 63 Cal.2d 52, 58; *Kelley v. Trunk* (1998) 66 Cal.App.4th 519, 524; see also *Howard v. Owens Corning* (1999) 72 Cal.App.4th 621, 632 (jury not bound by uncontradicted expert opinion on causation of plaintiff's asbestosis); *Abbott v. Taz Express* (1998) 67 Cal.App.4th 853, 857 (jury not bound by uncontradicted expert testimony on damages). Indeed, the Judicial Council's Civil Jury Instructions (CACI) provide, in relevant part, that a jury may be instructed as follows: "You do not have to accept an expert's opinion. As with any other witness, it is up to you to decide whether you believe the expert's testimony and choose to use it as a basis for your decision. You may believe all, part, or none of an expert's testimony ... " (See CACI 219.) Similarly, the BAJI instructions provide in pertinent part as follows: "An opinion is only as good as the facts and reasons on which it is based ... [You are not bound by an opinion. Give each opinion the weight you find it deserves.]" (See BAJI 2.40 (brackets in original).)

The reason for this, of course, is that expert testimony is intended to "assist" the trier-of-fact by providing the technical knowledge necessary for rendering an informed judgment, not to substitute for the trier-of-fact's reasoning. (See Evid. Code, § 801 ("If a witness is testifying as an expert, his testimony in the form of an opinion is limited to such an opinion as is: (a) Related to a subject that is sufficiently beyond common experience that the opinion of an expert *would assist the trier of fact* …" (emphasis added).)

Nevertheless, in a successive injury case, a physician might conclude that at least *some* of the employee's permanent disability is causally related to each of the injuries, but, as suggested by *Wilkinson*, the physician might not be able to medically parcel out the degree to which each injury is causally contributing to the employee's overall permanent disability, even after complying with the statutory mandate of consulting with another physician – or referring the employee to another physician – in order to assist with the apportionment determination. In such an instance, the physician's apportionment "determination," within the meaning of section 4663, could properly be that the approximate percentages of disability caused by each of the successive injuries cannot reasonably be determined. As a result, the employee would be entitled to an undivided (i.e., joint and several) award for the combined permanent disability, because the respective defendants would have failed in their burdens of proof on the issue of apportionment. (*Kopping v. Workers' Comp. Appeals Bd.* (2006) 142 Cal.App.4th 1099, 1115 [71 Cal.Comp.Cases 1229, 1242].)

V.

We conclude that the continued application of the rule in *Wilkinson* is not consistent with "the new regime of apportionment based on causation" under new sections 4663 and 4664. (*Brodie*, 40 Cal.4th at pp. 1327-1328 [72 Cal.Comp.Cases at pp. 576-577].) Application of *Wilkinson*, and the concomitant merging of separate injuries into a single award of disability, is contrary to the reforms set in place by SB 899, which mandate that an employer cannot be held liable for any disability other than that directly caused by the industrial injury. Section 4663 requires that for every claim of permanent disability, a reporting physician must make an apportionment determination on "the issue of causation of the permanent disability." The medical evidence must sort out the causes of the permanent disability, and apportion to the current industrial injury, a prior or subsequent industrial injury or a prior or subsequent non-industrial injury or condition. Indeed, a medical report that fails to offer an opinion on apportionment of each separate injury cannot be considered substantial medical evidence to justify an award of permanent disability. (*Escobedo v. Marshalls*, *supra*, 70 Cal.Comp.Cases at pp. 620-621.)

Here, the AME found applicant's disability was caused equally by both her specific trauma

on June 3, 2003, and her cumulative injury through June 3, 2003. He found no evidence to justify apportionment to any non-industrial factors or "preexistent quiescent medical conditions not related to her job activities." The parties stipulated that applicant's current level of permanent disability was 62%. Based upon the AME's determination that each of applicant's two injuries was equally responsible for her current level of permanent disability, she is entitled to receive a separate award of 31% permanent disability for each injury.

Accordingly, as our Decision After Reconsideration, we will rescind the WCJ's finding that applicant is entitled to a combined award of 62% permanent disability and will amend the Findings and Award to provide for separate awards of 31% permanent disability for each industrial injury. Applicant's attorney shall also be entitled to a separate award of fees in each case.

For the foregoing reasons,

IT IS ORDERED as the Decision After Reconsideration of the Workers' Compensation Appeals Board (En Banc) that the Findings and Award issued by the workers' compensation administrative law judge on January 22, 2007 is **AMENDED** such that Findings of Fact Nos. 6, 7, 8 and 9 and the Award in its entirety are **RESCINDED** and the following are **SUBSTITUTED** therefor:

FINDINGS OF FACT

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6. Applicant's injury in Case No. OAK 0297895 caused permanent disability of 31%, entitling her to 133 weeks of disability indemnity at the rate of $185.00 per week in the total sum of $24,605.00, less credit to defendant for all sums previously paid on account thereof, if any.

7. Applicant's injury in Case No. OAK 0326228 caused permanent disability of 31%, entitling applicant to 133 weeks of disability indemnity at the rate of $185.00 per week in the total sum of $24,605.00, less credit to defendant for all sums previously paid on account thereof, if any.

8 Applicant's attorney has rendered valuable services and is entitled to a fee of 15% of the permanent disability indemnity awarded in each case herein. Calculation of attorney's fees is left to the parties, with WCAB jurisdiction reserved. If the amount of the fees due cannot be expeditiously agreed upon, applicant's

counsel shall file a petition for fees with a proposed order.

9. Defendant is entitled to credit against applicant's permanent disability for overpayment of temporary disability benefits from September 26, 2005 through October 31, 2005. Calculation of said overpayment is left to the parties with Appeals Board jurisdiction reserved.

AWARD

AWARD IN CASE NO. OAK 0297895 IS MADE in favor of **DIANNE BENSON** and against **THE PERMANENTE MEDICAL GROUP**, Permissibly Self-Insured (Athens Administrators, Adjusting Agent), as follows:

a) Permanent disability indemnity as provided in Finding of Fact number 6.

b) Attorney's fees payable to Timothy Timmons, as set forth in Finding of Fact number 8.

AWARD IN CASE NO. OAK 0326228 IS MADE in favor of **DIANNE BENSON** and against **THE PERMANENTE MEDICAL GROUP**, Permissibly Self-Insured (Athens Administrators, Adjusting Agent), as follows:

a) Permanent disability indemnity as provided in Finding of Fact number 7.

b) Attorney's fees payable to Timothy Timmons, as set forth in Finding of Fact number 8.

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IT IS FURTHER ORDERED that the October 4, 2005 medical report of Joseph Izzo, M.D., the Agreed Medical Examiner (AME), is **ADMITTED IN EVIDENCE** as WCAB Exhibit X.

WORKERS' COMPENSATION APPEALS BOARD (EN BANC)

/s/ Joseph M. Miller
JOSEPH M. MILLER, Chairman

/s/ James C. Cuneo
JAMES C. CUNEO, Commissioner

/s/ Frank M. Brass
FRANK M. BRASS, Commissioner

/s/ Alfonso J. Moresi
ALFONSO J. MORESI, Commissioner

I DISSENT
(See attached Dissenting Opinion)

/s/ Ronnie G. Caplane
RONNIE G. CAPLANE, Commissioner

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA
Dec 13 2007
SERVICE BY MAIL ON SAID DATE TO ALL PARTIES AS SHOWN ON THE OFFICIAL ADDRESS RECORD

SV

DISSENTING OPINION OF COMMISSIONER CAPLANE

I dissent. For the reasons that follow, I conclude that SB 899's repeal of former Labor Code section 4750 (Stats. 2004, ch. 34, § 37) and its enactment of current sections 4663 and 4664, subdivision (a) (Stats. 2004, ch. 34, §§ 34, 35) did *not* effect any change in the longstanding principle of law established by *Wilkinson v. Workers' Comp. Appeals Bd.* (1977) 19 Cal.3d 491 [42 Cal.Comp.Cases 406] (*Wilkinson*). Therefore, when an employee sustains multiple injuries to the same part of the body that become permanent and stationary at the same time, the employee is still entitled to a single award for the combined permanent disability.

I.

There is no question that, in repealing former sections 4750 and 4663 and in enacting new sections 4663 and 4664, the Legislature intended to significantly change the law relating to apportionment of permanent disability. (*Brodie v. Workers' Comp. Appeals Bd.* (2007) 40 Cal.4th 1313, 1332 [72 Cal.Comp.Cases 565, 576] (*Brodie*). Yet, although the Legislature intended to and did in fact significantly alter the law of apportionment, there are no indications it intended to abrogate the rule of *Wilkinson*. The Legislature easily could have stated an intent to invalidate *Wilkinson*'s long-established principles, but it did not do so.

When the Legislature enacts a statute, it is presumed the Legislature has in mind existing laws and judicial decisions. (*Viking Pools, Inc. v. Maloney* (1989) 48 Cal.3d 602, 609; *Bailey v. Superior Court* (1977) 19 Cal.3d 970, 977, fn. 10; *Estate of McDill* (1975) 14 Cal.3d 831, 837, 839.) It also is presumed the Legislature does not intend "to overthrow long-established principles of law unless such an intention is clearly expressed or necessarily implied." (*Brodie*, 40 Cal.4th at p. 1325 [72 Cal.Comp.Cases at p. 574]; accord: *Fuentes v. Workers' Comp. Appeals Bd.* (1976) 16 Cal.3d 1, 7 [41 Cal.Comp.Cases 42, 45] (*Fuentes*).)

In its 1976 decision in *Fuentes*, the Supreme Court had decided, based in large part on the language of former section 4750, that "formula A" (i.e., the "subtracting percentages from percentages" formula) was the proper method for calculating permanent disability indemnity after

apportionment to either industrial or non-industrial disability. Between the 1976 issuance of *Fuentes* and the 2004 enactment of SB 899, *Fuentes* clearly remained good law and its principles were routinely applied.

In *Brodie*, the Supreme Court addressed the question of whether, when SB 899 repealed section 4750 and enacted new and different language governing apportionment, the Legislature expressly or impliedly intended to adopt a new and different formula for calculating permanent disability indemnity after apportionment. The Supreme Court said, "We conclude the answer is no and the formula we approved in *Fuentes* still applies." (*Brodie*, 40 Cal.4th at p. 1325 [72 Cal.Comp.Cases at p. 574].) The Court emphasized that "[i]f the Legislature had intended a departure from formula A, one would expect to find some trace of this intent in the legislative history" (40 Cal.4th at p. 1328 [72 Cal.Comp.Cases at p. 577]) and that "[s]uch a change, if intended, would likely have been remarked upon." (Ibid.) Then, after reviewing the legislative history of SB 899, the Supreme Court said, "[i]nstead, one hears only silence" and that "[t]his silence offers no reason to believe the Legislature intended to abandon the settled application of formula A." (40 Cal.4th at p. 1329 [72 Cal.Comp.Cases at pp. 577 & 578].)

Like the rule established by the Supreme Court's 1976 decision in *Fuentes*, the rule established by the Supreme Court's 1977 decision in *Wilkinson* is a "long-established principle[] of law." Indeed, the principles of *Wilkinson* have been repeatedly discussed and applied by the appellate courts.[1] Therefore, as with *Fuentes*, if, in repealing section 4750 and enacting new apportionment statutes, the Legislature had intended a departure from *Wilkinson* then "one would expect to find some trace of this intent in the legislative history" and that "[s]uch a change, if intended, would likely have been remarked upon." Yet, there are no references to overturning

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[1] See, e.g., *Fremont Indemnity Co. v. Workers' Comp. Appeals Bd.* (1989) 208 Cal.App.3d 914, 917-918 [54 Cal.Comp.Cases 76]; *Rielli v. Workers' Comp. Appeals Bd.* (1982) 134 Cal.App.3d 721, 724 [47 Cal.Comp.Cases 828]; *Liberty Mutual Insurance Co. v. Workers' Comp. Appeals Bd*. (*Volomino*) (1981) 118 Cal.App.3d 265, 272 [46 Cal.Comp.Cases 462]; *Norton v. Workers' Comp. Appeals Bd.* (1980) 111 Cal.App.3d 618, 625 [45 Cal.Comp.Cases 1098]; *Harold v. Workers' Comp. Appeals Bd.* (1980) 100 Cal.App.3d 772, 784-786 [45 Cal.Comp.Cases 77]; *Fullmer v. Workers' Comp. Appeals Bd.* (1979) 96 Cal.App.3d 164, 166 [44 Cal.Comp.Cases 700]; *Taylor v. Workers' Comp. Appeals Bd.* (1979) 95 Cal.App.3d 139, 146-148 [44 Cal.Comp.Cases 685]; *Nuelle v. Workers' Comp. Appeals Bd.* (1979) 92 Cal.App.3d 239, 249 [44 Cal.Comp.Cases 439]; *Rumbaugh v. Workers' Comp. Appeals Bd.* (1978) 87 Cal.App.3d 907, 914 [43 Cal.Comp.Cases 1399]; *Aten v. Workers' Comp. Appeals Bd.* (1977) 75 Cal.App.3d 113, 118 [42 Cal.Comp.Cases 951].)

Wilkinson – or to eliminating the principle of combined (non-apportioned) permanent disability awards for successive injuries to the same body part which become permanent and stationary at the same time – in any of the Senate or Assembly Floor Analyses, Senate or Assembly Committee Analyses, or in the Legislative Counsel's Digest of SB 899. Moreover, the record in this case contains no such references in any legislative committee or subcommittee reports, in any legislators' letters of intent, in any Legislative Counsel opinion, or in any other common source of legislative intent. Therefore, "[t]his silence offers no reason to believe the Legislature intended to abandon the settled application of" *Wilkinson*.

II.

In addition to the absence of any legislative history reflecting an intent to abrogate *Wilkinson*, the plain language of section 4663 is contrary to any such intent.

Section 4663, subdivision (c), states in relevant part: "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." (Emphasis added.)

Of course, the rule established by *Wilkinson* was predicated in part on the language of former section 4750, which provided for apportionment only when the employee "is suffering from a *previous* permanent disability or physical impairment." (Former Lab. Code, § 4750 (emphasis added).) Based on this language, the Supreme Court declared: "If the worker incurs successive injuries which become permanent *at the same time*, neither permanent disability is 'previous' to the other, and section 4750 hence does not require apportionment." (*Wilkinson*, 19 Cal.3d at p. 497 [42 Cal.Comp.Cases at p. 409] (emphasis in original).)

Similarly here, section 4663, subdivision (c), provides for the apportionment of disability to "other factors *both before and subsequent* to the industrial injury" (emphasis added), but it does not provide for the apportionment of disability to causation by "other factors" where those factors

are caused by successive industrial injuries and are *concurrent with* the factors of disability caused by the first industrial injury. Accordingly, the actual language of section 4663 is consistent with a legislative intent to continue the rule of *Wilkinson*. That is, to rephrase *Wilkinson:* if the worker incurs successive injuries which become permanent at the same time, none of the factors causing permanent disability is "before or subsequent" to the others, and section 4663 hence does not require apportionment.

Although it is not an issue in this case, the above interpretation of section 4663 does not preclude apportionment to non-industrial factors of disability as implied by the majority (see slp. opn., at p. 13). Those factors by their mere presence, whether or not they are disabling, pre-exist the industrial injury and fall within the apportionment mandate of section 4663.

III.

In addition to the statutory underpinning of *Wilkinson*, there was also a factual underpinning that remains as true and compelling now as when *Wilkinson* issued in 1977. The Supreme Court said:

> "[The] absence of substantial evidence to support apportionment is typical of [successive] injuries [to the same body part that become permanent and stationary at the same time]. When as here the physicians do not see the worker until after the second injury, any attempt on their part to allocate the combined disability between the two injuries *is likely to be no more than speculation and guesswork*. But even in cases in which the worker has been examined by a physician between the two injuries, *the interaction between the injuries may make apportionment of disability impossible or inequitable*. The second injury may prevent the first from healing properly, converting that which would have been a temporary disability into a permanent disability; the first injury may render the injured part of the body unusually weak or sensitive and thus contribute to the damage caused by the second. Consequently, awards for each injury as if the other had not occurred would necessarily be based upon hypothetical disabilities which, added together, total to far less than the actual disability suffered by the worker and observed by the reporting physicians." (*Wilkinson*, 19 Cal.3d at p. 499 [42 Cal.Comp.Cases at pp. 410-411] (emphasis added).)

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Now as then, when the circumstances addressed by *Wilkinson* occur – i.e., separate injuries to the same part of the body becoming simultaneously permanent and stationary – the difficult if not "impossible" evidentiary task of identifying and separating the factors causing disability remains. A physician's apportionment determination still "is likely to be no more than speculation and guesswork," even if the physician has seen the employee between the two injuries. Therefore, the *Wilkinson* rationale which permits a single combined award of permanent disability in such circumstances remains fully viable.

IV.

Further, the Appeals Board is bound by the statutory mandate that workers' compensation laws "shall be liberally construed … with the purpose of extending their benefits for the protection of persons injured in the course of their employment." (Lab. Code, §3202.) "Where provisions of [workers' compensation] laws are susceptible of an interpretation either beneficial or detrimental to injured employees or an ambiguity appears, they must be construed favorably to the employees." (*Granado v. Workmen's Compensation Appeals Bd*. (1968) 69 Cal.2d 399, 404 [33 Cal.Comp.Cases 647, 651]; accord: *Dept. of Corrections v. Workers' Comp. Appeals Bd.* (*Antrim*) (1979) 23 Cal.3d 197, 203-204 [44 Cal.Comp.Cases 114, 119].) The liberal construction mandate "provides a means for resolution of ambiguities in the statutes which affect coverage ... [and] if there are two reasonable interpretations of an ambiguous statute, one providing for coverage and one not, we must decide for coverage" (*State Farm Fire & Cas. Co. v. Workers' Comp. Appeals Bd*. (*Leonard*) (1997) 16 Cal.4th 1187, 1196 [62 Cal.Comp.Cases 1629, 1634]).

Therefore, even if – in the face of legislative silence regarding any intent to overturn *Wilkinson*, and in the face of the enduring problems of "speculation and guesswork" that will still confound any attempt to apportion causation of disability for successive injuries to the same body part that become permanent and stationary at the same time – it is assumed that the continued viability of *Wilkinson* is open to some question, then section 3202 would mandate that we resolve this question in favor of the injured employee. Of course, a single combined award of permanent

disability is more beneficial to an injured employee than two separate smaller awards.[2] Thus, section 3202 compels the continued application of *Wilkinson*.

V.

Finally, even if I were to set aside the issues of whether the Legislature intended to repeal *Wilkinson sub silentio* and whether section 4663 as amended by SB 899 permits apportionment to concurrent industrial factors of causation of disability, I would still affirm the Award in this case on the ground that there is no substantial medical evidence that there are any factors of disability caused by the cumulative trauma injury that contribute to applicant's permanent disability.

In his report dated October 4, 2005, Dr. Izzo, the AME, describes an MRI undergone by applicant on August 27, 2003: "Impression: 1. Posterior disc herniation/end plate spurring. 1a. Abutting the spinal cord at C4-5, C5-6, and C6-7. 1b. Almost abutting spinal cord at C3-4. 1c. Not abutting the spinal cord at T2-3. 2. Mild right neuroforaminal stenosis at C5-6 secondary to uncovertebral joint hypertrophy. 3. Possible muscle spasm" (pages 7-8).

Applicant underwent surgery on October 19, 2004. Dr. Izzo describes it as follows: "C4-5, C5-6[,] C6-7 posterior spinal fusion with instrumentation" and "Anterior discectomy C4-5, C5-6, C6-7 with fusion" (page 9). As a result of the three-level anterior-posterior fusion, she has severe restriction of motion of the cervical spine (page 6). Dr. Izzo does not attribute any factors of disability to the findings on the MRI, other than to note that she never had a problem with her cervical spine until her specific injury of June 3, 2003 (page 10). Dr. Izzo does not report any imaging, MRI or otherwise, after the surgery.

Dr. Izzo's description of the causation of the cumulative trauma injury is quoted above (slp. opn., at pp. 4-5). His entire discussion of apportionment between the injuries consists of two

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[2] The permanent disability compensation schedule has had a gradually progressive component since 1972, i.e., the number of weeks of indemnity payments increases "exponentially" in proportion to the percentage of the disability. (Lab. Code, § 4453(b); *Fuentes, supra,* 16 Cal.3d at p. 4 [41 Cal.Comp.Cases at p. 42.) Therefore, for example, a single 50% permanent disability award is substantially greater than two separate 25% permanent disability awards. Moreover, this difference in permanent disability awards has become even more marked in recent years. This is because – in addition to the permanent disability compensation schedule providing for an "exponentially" increasing number of weeks of payments in relation to the percentage of the permanent disability – the maximum weekly rate (dollar amount) of payments now also increases with higher levels of permanent disability. (Lab. Code, § 4658.)

short sentences: "In my opinion, 50 percent of the current permanent partial disability is apportioned to cumulative trauma through June 3, 2003. 50 percent is apportioned to the specific injury of June 3, 2003." He does not identify factors of disability caused by the cumulative trauma injury, and he does not explain how those factors, if any, cause as much disability as the results of the three-level anterior-posterior fusion.

In *Escobedo v. Marshalls* (2005) 70 Cal.Comp.Cases 604 (Appeals Board en banc), we held that "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." (70 Cal.Comp.Cases at p. 621.)

Here, Dr. Izzo does not identify pertinent facts or set forth reasoning in support of his conclusion. He does not explain "how and why" the factors of disability, if any, caused by the cumulative trauma injury are responsible for 50 percent of applicant's permanent disability. Therefore, I find that his report does not constitute substantial medical evidence on the issue of apportionment to factors of disability caused by the cumulative trauma injury.

The majority correctly notes that the employer has the burden of proof on the issue of apportionment (*Kopping, supra*; *Escobedo, supra,* 70 Cal.Comp.Cases at p. 613). The employer has failed to sustain its burden of proving that 50 percent, or any approximate percentage, of applicant's permanent disability was caused by the cumulative trauma injury. Therefore, I would affirm the unapportioned award, irrespective of the *Wilkinson* principles.

V.

In summary, there is no evidence of express or implied legislative intent to change the long-standing and well-established method of combining permanent disability awards under the narrow factual circumstances presented in *Wilkinson.* The creation of a new apportionment regime is not manifestly antagonistic to the continuation of the rule in *Wilkinson*, limited as it is to

successive injuries to the same part of the body that become permanent and stationary at the same time. Moreover, although section 4663, subdivision (c), provides for the apportionment of disability to "other factors *both before and subsequent* to the industrial injury" (emphasis added), it does not provide for the apportionment of disability to "other factors" of disability caused by successive industrial injuries to the same part of the body where those disabilities are *concurrent with* the disability caused by the initial industrial injury. Additionally, nothing in the apportionment to causation provisions of sections 4663 and 4664, subdivision (a), resolves the inherent problems of speculation and guesswork in attempting to untangle the causative factors of disability when the employee has sustained successive industrial injuries to the same body part, which have become permanent and stationary at the same time. Finally, if there is any question of whether the apportionment to causation provisions of sections 4663 and 4664, subdivision (a), somehow superseded the principles enunciated in *Wilkinson*, then section 3202 mandates that this question be resolved in favor of finding the continued viability of *Wilkinson*.

Accordingly, I would find that the principles of apportionment established by *Wilkinson* remain in full force and effect, and I would affirm the WCJ's single award for the combined permanent disability resulting from applicant's two industrial injuries to the same body part, which became permanent and stationary at the same time. Alternatively, I would find that defendant failed to sustain its burden of proving apportionment and that all of applicant's permanent disability was caused by her specific injury and affirm the WCJ's award on that ground.

/s/ Ronnie G. Caplane
RONNIE G. CAPLANE, Commissioner

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA
Dec 13 2007
SERVICE BY MAIL ON SAID DATE TO ALL PARTIES AS SHOWN ON THE OFFICIAL ADDRESS RECORD

SV