



New Case Brief
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Escobedo v. CNA Insurance Co.
(2005) 70 CCC 604 [WCAB En Banc]

WCAB en banc held that apportionment of permanent disability caused by “other factors both before and subsequent to the industrial injury, including prior industrial injuries” may include not only disability that could have been apportioned prior to SB 899, but also may include disability that formerly could not have been apportioned (e.g., pathology, asymptomatic prior conditions, and retroactive prophylactic work preclusions), provided there is substantial medical evidence establishing that these other factors have caused permanent disability.

Applicant suffered an industrial injury to her left knee and a compensable consequence injury to her right knee. Applicant's history showed no prior knee problems, but did include a previous diagnosis of arthritis in her bilateral knees ten years prior to her date of injury. The trial judge followed the defense QME report and apportioned 50% of the applicant's permanent disability to the non-industrial pathology. Applicant appealed stating that the new Labor Code section 4663, as amended by SB 899, could not be retroactively applied to dates of injury prior to the 4/19/04 enactment of the bill, that permanent disability cannot be apportionment to pathology, and the medical report the WCJ relied on did not constitute substantial medical evidence.

The Board first held that section 4663 applies to all cases that were *pending* as of the 4/19/04 enactment of SB 899. Next, it held that apportionment under section 4663 applies to the percentage of permanent disability caused by the industrial injury; noting that the employer is only liable for the percentage of permanent disability directly caused by the industrial injury. Once a basis for apportionment is established, it is Applicant's burden to prove the percentage of the permanent disability attributable to the industrial injury. Once Applicant meets this burden of proof, it is the defendant's burden to prove the percentage of permanent disability caused by factors other than the industrial injury.

The Board points out that apportionment does not require Applicant to have a preexisting injury or disease that was symptomatic at the time of the industrial injury. Accordingly, apportionment applies to factors other

than preexisting permanent disability. Such factors are noted to include the natural progression of a non-industrial condition or disease, pathology, asymptomatic prior conditions, and retroactive prophylactic work restrictions.

Finally, the Board held that for apportionment to apply to non-industrial pathology, substantial medical evidence must demonstrate that the non-industrial pathology caused permanent disability. Substantial medical evidence requires a report that basis its conclusion for apportionment on a reasonable medical probability. The report must also be based on pertinent facts, based on an adequate examination and history of the Applicant and it must set for the reasoning for its conclusion.