



New Case Brief
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Marsh v. WCAB
(2005) 130 Cal.App.4th 906, 70 CCC 787 [Court of Appeal]

A WCAB opinion is "final" for considering **apportionment** under SB 899 only when the appellate process has been exhausted.

Petitioner Marsh sustained industrial injury to his back in August 1999. Settlement was accomplished by way of Stipulations to 46% level of permanent disability. A timely Petition to Reopen was filed alleging new and further disability. A hearing was held and the WCJ found 70% disability, plus a life pension, based on an AME report. The AME found the increase in disability due to the original injury and also a non-industrial condition, osteopenia, and apportioned such. At the time of the decision, 4/9/04, former Labor Code Sections 4750.5 and 4663 were operative. The WCJ felt the AME's opinion on apportionment was not legally sufficient and did not apportion to the non-industrial condition.

SB 899 was thereafter enacted and specifically new Labor Code Sections 4663 and 4664 became operative on 4/19/04. Defendant petitioned the WCAB to remand the case back to the trial level to consider whether SB 899 should be applied to the apportionment issue. Applicant then directly sought review from the appellate courts to review the effective dates of SB 899 and whether the matter could be remanded back on those grounds.

After a careful and meticulous analysis of SB 899, the legislative intent and existing case law - recent and not so recent - the Court concluded that the intent of the legislature was to hold the employer liable only for that portion of the disability directly caused by the injury. Therefore, since defendant appealed the decision, the 70% finding was not "final" and the WCAB panel could remand the matter back for the trial judge to consider apportionment under the new rules. As causation must be based on substantial evidence, the Court also concluded that there are some instances where discovery may need to be reopened in order for new Labor Code Sections 4663 and 4664 to be recognized, according to the Court. Therefore, application of new Labor Code Sections 4663 and 4664 is appropriate where no "final" decision has been made and the parties have not exhausted their appellate rights.