

April 1, 2011

The Honorable Jose Solorio
Chair, Assembly Insurance Committee
State Capitol, 3146
Sacramento, CA 95814

**RE: AB 1155 (Alejo) – Workers' Compensation: Apportionment
OPPOSE**

Dear Assemblyman Solorio:

The California Coalition on Workers' Compensation (CCWC) is an association of California's public and private sector employers that advocates for a balanced workers' compensation system that provides injured workers with fair benefits, while keeping costs low for employers. Our members include not only businesses of every size, but also cities, counties and other public entities.

The California Coalition on Workers' Compensation is OPPOSED to AB 1155 (Alejo), which undermines the concept of apportionment. This legal concept holds that an employer should only be liable for the amount of permanent disability that was caused by an industrial injury or illness that occurred in the course and scope of employment. Prior to SB 899 apportionment was virtually impossible for employers to obtain even when there was significant evidence to show that the injured worker had previous disability or impairment.

The Concept of Apportionment

Apportionment is a long-standing concept that is intended to protect employers from being forced to pay for disability that is not directly caused by an industrial injury. In the years prior to SB 899 the concept of apportionment was weakened through a number of court interpretations. In many cases employers would provide direct evidence of a prior industrial injury, such as settlement documents, and apportionment would still not be awarded by the Workers' Compensation Appeals Board. When the workers' compensation system was reformed, changes to the apportionment laws in California were considered to be an issue of fundamental fairness. Employers were being forced to pay for disability that was not the result of an industrial injury and SB 899 provided relief from this situation and put the system back in balance.

Post-SB899 apportionment laws have been the subject of a great deal of controversy despite their relatively simple purpose – to protect employers from paying benefits that are not owed. Attorneys for injured workers appealed several apportionment cases all the way to the California Supreme Court and lost on the merits. Amending the apportionment statute as proposed in AB 1155 will allow attorneys with a demonstrated hostility toward apportionment to take one more shot at engineering case law to undermine fairness in the workers' compensation system.

Apportionment Law in California

Claims that apportionment allows for discrimination in current California workers' compensation law are simply false. It is important to clarify what the law actually says. There are two Labor Code Sections that dictate the rules for apportionment in California, Labor Code Sections 4663 and 4664.

Labor Code Section 4663 creates a system of apportionment that is dependent on causation. The intent of this law is to protect employers from paying for disability that is not the result of an industrial injury. It states in 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."

Labor Code Section 4663 gives clear orders to physicians who are evaluating the permanent disability of injured workers. It requires the physician to determine what portion of the permanent disability is the "direct result" of the industrial injury and what portion of the permanent disability was caused by "other factors". Labor Code Section 4663 does not allow for "discrimination" in any way. In fact, Labor Code Section 4663 simply states that apportionment shall be based on causation, and then requires doctors to determine the causes of permanent disability.

Labor Code Section 4664 is the other section that governs apportionment in California. This section focuses on an employer's liability for permanent disability. It states in part:

"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."

Labor Code Sections 4663 and 4664 create a two-step process. First, a physician identifies the causes of disability. Second, a judge requires an employer to pay for the portion of disability caused by an industrial injury for which they are liable. There is nothing in either Labor Code section that allows for the discrimination based on protected classes. In order for discrimination to take place, it would have to occur outside of the four corners of the current labor code sections that allow for apportionment, and would therefore be illegal under the current statutory construct.

Vaira v. WCAB

Although there is no citable case law on the topic of apportionment as discrimination, there is one case that has been the subject of much debate and discussion. In *Vaira v. WCAB* the court was asked to determine if apportionment amounted to *per se* discrimination. In this case the injured worker had a portion of her permanent disability award apportioned to preexisting osteoporosis. The injured worker argued that the condition was related to her age and therefore amounted to *per se* discrimination. The court held that apportionment that was based solely on the basis of age or gender was not permissible under current law, but did not agree that apportionment to a medical condition *related to or caused by* age amounted to discrimination.

"Reducing permanent disability benefits based on a preexisting condition that is a contributing factor of disability is not discrimination. When the WCAB determines a preexisting condition contributes to a given disability, and apportions accordingly, this is merely a recognition that a portion of the disability exists independent of the industrial injury. The injured worker is being compensated only for the disability caused by the industrial injury. To this extent, the injured worker is being treated no differently than an injured worker who does not suffer from the preexisting condition. Both would be compensated for the amount of disability caused by the industrial injury. This is no different than if the WCAB apportioned disability to a prior industrial injury."

Although *Vaira v. WCAB* is not citable case law, it does give us a clear interpretation of the law as it relates to discrimination and apportionment. The law does not allow for apportionment based on age, gender, or any other protected class. The law allows for apportionment to a condition or disability that is not caused by the industrial injury. This means

that current law is completely consistent with both the long held concept of apportionment, and the intent of the reforms contained in SB 899.

What is most important to consider from this case is the court's opinion that the focus of apportionment is to assure that employees are only compensated for the amount of disability caused by the industrial injury. Turning that on its head and arguing that apportionment is a type of proactive discrimination is simply not accurate. To the extent that the source or cause of non-industrial disability is identified by physicians, it is done to provide evidence that it is indeed non-industrial. The source or cause of the nonindustrial disability is immaterial except to prove that apportionment is indeed warranted based on the medical evidence.

Step in the Wrong Direction

AB 1155 will allow applicant attorneys to game the workers' compensation system and overturn findings of reasonable apportionment. Injured workers should indeed be protected from discrimination based on protected classes such as age and gender. Despite this firmly held belief, we do not believe that injured workers are being discriminated against through the apportionment process, and proponents of AB 1155 have failed to provide any evidence to the contrary. The Labor Code is very clear — apportionment is the process of protecting employers from paying for disability that is not a result of the industrial injury suffered at their place of employment. The courts have also been very clear — discrimination based on protected classes is not allowed under current law.

Workers' Compensation Costs Increasing

AB 1155 will not provide any greater protection to injured workers. Instead, AB 1155 will serve to muddy the waters on apportionment law and create an opening for applicant attorneys to challenge reasonable apportionment to preexisting conditions and disability. The reforms contained in SB 899 have been very effective in returning balance to the California workers' compensation system and that they should be allowed to continue in place. The Workers' Compensation Insurance Rating Bureau has repeatedly called for increases to the Pure Premium Advisory Rate, most recently calling for a 29.6% increase to employer premiums beginning on January 1, 2011. With California's unemployment rate sitting at 12.3% this is not the time to begin driving up the cost of employing out-of-work Californians.

Despite the fact that the workers' compensation system in California is currently maintaining balance, we are a only few bad choices away from the skyrocketing premiums that were driving jobs out of California between 2000 and 2004.

For these reasons and more, the California Coalition on Workers' Compensation respectfully opposes AB 1155 and respectfully requests that you vote "no" when it comes before the Assembly Insurance Committee.

Sincerely,

Jason Schmelzer
Legislative Advocate