



April 13, 2016

TO: Members, Assembly Committee on Insurance

FROM: California Chamber of Commerce
 Acclamation Insurance Management Services
 Allied Managed Care
 American Insurance Association
 Associated General Contractors
 Association of California Insurance Companies
 California Association of Joint Powers Authorities
 California Coalition on Workers' Compensation
 California Grocers Association
 California League of Food Processors
 California Manufacturers and Technology Association
 California Retailers Association
 California School Boards Association
 California Special Districts Association
 California State Association of Counties
 CAWA – Representing the Automotive Parts Industry
 CSAC Excess Insurance Authority
 League of California Cities
 National Association of Mutual Insurance Companies
 National Federation of Independent Business
 Property Casualty Insurers Association of America
 Rural County Representatives of California

**SUBJECT: AB 1643 (GONZALEZ) WORKERS' COMPENSATION: PERMANENT DISABILITY APPORTIONMENT
SCHEDULED FOR HEARING – APRIL 20, 2016
OPPOSE**

The organizations listed above must **OPPOSE AB 1643 (Gonzalez)**, as amended March 16, 2016, which would undermine objectivity in workers' compensation permanent disability ratings and require employers to pay monetary awards to injured workers for disabilities or disease that did not result from a workplace injury. Essentially, **AB 1643** is a significant departure from the consensus-driven reforms negotiated by labor and employers in SB 863 (de León, 2012).

California's workers' compensation system uses the American Medical Association (AMA) guidelines for determining impairment as the basis for establishing permanent disability awards. This is an objective, peer-reviewed, and nationally recognized methodology for measuring permanent impairment, which is the basis for a permanent disability award.

AB 1643 asks that such objectivity be disregarded and instead that two vastly different types of conditions be conflated for the purpose of awarding permanent disability. Our coalition would strongly assert that requiring breast cancer to be considered a comparable impairment to prostate cancer regardless that the level of impairment between those conditions is not analogous is a large step away from the entire objective, uniform basis for permanent disability as established by medical criteria.

Claims that California law allows for discrimination in the application of apportionment in California workers' compensation is unsubstantiated and proponents have not been able to provide clear cases where discrimination has occurred. Apportionment, under the SB 899 reforms of 2004, was deemed by the Legislature to, "look at the current disability and parcel out its causative sources – non-industrial and current industrial – and decide the amount directly caused by the current industrial source." Accordingly, apportionment is an important tool established to obtain sufficient and objective evidence when determining an injured workers' disability or impairment. Its intent is to protect employers from being forced to cover costs for a disability not directly caused by an industrial injury. In short, apportionment divides liability into an equitable fashion. Specifically:

- Labor Code §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 direction to physicians who are evaluating the impairment 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 §4663 does not allow for "discrimination" in any way – it simply instructs physicians to determine what disability was actually caused by the workplace injury.

- Labor Code Section §4664 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 aforementioned Labor Code section that allows for the discrimination based on protected classes. For discrimination to take place, it would have to occur outside of the perimeter of the current Labor Code sections that allow for apportionment, and would therefore be illegal under the current statutory construct. Further, if a physician does not believe the AMA chapter governing a certain body part is adequate when determining whole person impairment (WPI), the decision in *Milpitas Unified School District v. Workers' Comp. Appeals Bd. (Guzman) (2010) 187 Cal.App.4th 808*) allows the physician to "rate by analogy," essentially utilize any chapter, method or table within the AMA guides to accurately reflect the worker's impairment. It is important to remember that the physician only provides the WPI, which is only one part of the final permanent disability rating. The WPI is the starting point as the final permanent disability may increase after consideration of the DFEC (Diminished Future Earning Capacity), age and occupation.

Such stringent guidelines to determining an award for permanent disability makes it difficult for both opponents and proponents of this bill to find evidence that women receive lower permanent disability ratings due to their gender and, thus, discriminatory awards. However, proponents of this legislation maintain that discrimination is prevalent although the California Supreme Court has repeatedly held that the apportionment is legal. And, in cases where sufficient evidence is lacking for the adjustment, apportionment has been disallowed.

In *Welcher v. WCAB*, the Supreme Court reinforced that the employer's liability for a permanent disability must be obtained by subtracting the percentages of an employee's disability as a result of a work-related injury. This case, in addition to *Strong v. WCAB*, *Lopez v. WCAB* and *Brodie v. WCAB* all upheld the practice of apportionment.

Another example is *Vaira v. WCAB*, an unpublished decision in which the court was asked to determine if apportionment was established based on gender characteristics. 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 discrimination. The court held that apportionment based solely on the basis of age or gender was not permissible, however did not agree that apportionment to a medical condition **related** to age amounted to discrimination. 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 2004 and 2012 workers' compensation reforms.

AB 1643 will increase litigation in an effort to overturn reasonable apportionment cases and raise costs on employers who would no longer be protected from paying for a disability or impairment that was not the result of an actual industrial injury. Employers strive to provide fair benefits to injured workers and agree that those workers should be protected from discrimination; however, **AB 1643** will not provide any greater protection to those injured workers. Instead, it will create uncertainty in the area of apportionment law, spikes in costly litigation for California's employers, and will erode many of the reforms put into place by SB 863, which were intended to create objectivity and fairness in the workers' compensation system.

For these reasons, we must **OPPOSE AB 1643**.

cc: Tom Dyer, Office of the Governor
The Honorable Lorena Gonzalez
Mark Rakich, Assembly Committee on Insurance
Bill Lewis, Assembly Republican Caucus
District Offices, Members, Assembly Committee on Insurance