



April 29, 2015

TO: Members, Assembly Committee on Insurance

FROM: California Chamber of Commerce
 American Insurance Association
 Association of California Insurance Companies
 California Coalition on Workers' Compensation
 California Grocers Association
 California League of Food Processors
 California Manufacturers and Technology Association
 California Newspaper Publishers Association
 California Retailers Association
 California State Association of Counties
 CSAC Excess Insurance Authority
 Independent Insurance Agents and Brokers of California

SUBJECT: AB 305 (GONZALEZ) WORKERS' COMPENSATION: PERMANENT DISABILITY: APPORTIONMENT OPPOSE

The organizations listed above respectfully **OPPOSE AB 305 (Gonzalez)**, which is another attempt in an ongoing effort to undermine an employer's use of apportionment when determining liability for permanent disability awards.

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.

Current law strictly outlines the rules and process for apportionment. There are two Labor Code sections which dictate these rules.

- **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. This section ensures that no part of the doctor's determination of permanent disability may be speculative and the doctor must clearly explain how and why he or she arrived

at that conclusion. It is clear, then, that Labor Code § 4663 does not allow for “discrimination” in any way.

- **Labor Code § 4664** states that the employer will only be liable for the percentage of permanent disability directly caused by the injury arising out of and occurring in the course of employment.

Such stringent language 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. However, proponents of this legislation maintain that the practice of discrimination is prevalent although the reality is that the California Supreme Court has repeatedly upheld that the apportionment is legal and in cases where sufficient evidence is lacking for the adjustment, the rating is remanded.

- In the *Welcher v. WCAB* decision, the Supreme Court reinforced that the employer’s liability for a permanent disability shall 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 passed 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.

Although *Vaira* is not citable case law, it continues to be an interpretation of the law which the proponents often point to. 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 workers’ compensation reforms.

AB 305 will automatically 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 305** will not provide any greater protection to those injured workers. Instead, it will create uncertainty in the area of apportionment law and spikes in costly litigation for California’s employers. **AB 305** will erode many of the reforms put into place by SB 863 (2012) which were intended to create objectivity and fairness in the workers’ compensation system.

For these reasons, we respectfully **OPPOSE AB 305**.

cc: Tom Dyer, Office of the Governor
The Honorable Lorena Gonzalez
Mark Rakich, Assembly Committee on Insurance
Bill Lewis, Assembly Republican Caucus
Christine Baker, Director, Department of Industrial Relations
Destie Overpeck, Acting Director, Division of Workers’ Compensation
District Offices, Members, Assembly Committee on Insurance