



## California Workers' Compensation Institute

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February 1, 2019

Chief Justice Tani Cantil-Sakauye and Associate Justices  
Supreme Court of California  
350 McAllister Street  
San Francisco, CA 94102

Re: *City of Petaluma v. Workers' Compensation Appeals Board (Lindh)*  
**Supreme Court Case No. S253601**  
**Court of Appeal Case No. A153811**

Dear Chief Justice and Associate Justices:

On behalf of amicus curiae below, the membership of the California Workers' Compensation Institute ("CWCI") and the California Association of Joint Powers Authorities ("CAJPA"), we submit this letter pursuant to Rule 8.500(g) to urge this Court to DENY the pending Petition for Review.

CWCI is a private non-profit research, information, and educational organization dedicated to improving the California workers' compensation system. Institute members include insurers writing 81% of California's workers' compensation premium, and self-insured employers with \$69.8B of annual payroll (31.5% of the state's total annual self-insured payroll). CWCI further serves as a liaison for employer, labor, medical, regulatory, and legal communities within the workers' compensation system, and frequently provides written and oral input at legislative and regulatory hearings. Based upon its recognized expertise in workers' compensation, CWCI has been judicially permitted to join in multiple cases as *amicus curiae* before the California Supreme Court and Courts of Appeal.<sup>1</sup>

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<sup>1</sup> CWCI has been granted amicus status in the cases of *Christian v. WCAB* (1997); *SCIF v. WCAB (Stuart)* (1998); *Avalon Bay Foods v. WCAB* (1998); *Rosales v. Depuy Ace Medical Company* (2000); *Lockheed Martin v. WCAB (McCullough)* (2002); *Wal-Mart v. WCAB (Garcia)* (2003); *Honeywell v. WCAB (Wagner)* (2005); *Green v. WCAB* (2005); *Rio Linda School District v. WCAB (Scheftner)* (2005); *Nabors v. WCAB* (2006); *Yeager Construction v. WCAB (Gatten)* (2006); *Chang v. WCAB* (2007); *Vaira v. WCAB* (2007); *Brodie v. WCAB* (2007); *Babbitt v. Ow Jing* (2007); *Pendergrass v. Duggan Plumbing* (2007); *Tanimura & Antle v. WCAB (Lopez)* (2007); *Palm Medical Group v. State Compensation Insurance Fund* (2007); *Smith & Amar v. WCAB* (2007); *Facundo-Guerrero v. WCAB* (2008); *Smith & Amar v. WCAB* (2009); *Benson v. WCAB* (2009); *Boughner v. WCAB* (2009); *Aguilar v. WCAB* (2009); *El Aguila Food Products v. WCAB (Cervantes)* (2010); *Almaraz & Guzman v. WCAB* (2011); *Baker v. WCAB (X.S.)* (2011); *Ogilvie v. WCAB* (2011); *Valdez v. WCAB* (2012); *Pacific Compensation v. WCAB (Nilsen)* (2013); *Southern California Edison v. WCAB (Martinez)* (2013); *Stevens v. Outspoken Enterprises* (2014); *CIGA v. WCAB (Elite Surgery Centers)* (2014); *South Coast Framing v. WCAB (Clark)* (2014); *Angelotti Chiropractic v. Baker* (2014); *Contra Costa County v. WCAB (Dahl)* (2015); *State Compensation Ins. Fund v. WCAB (Margaris)* (2016); *Ramirez v. WCAB* (2017); *Zuniga v. WCAB* (2018); *SCIF v. WCAB (Guzman)* (2018); *Co. of San Diego v. WCAB (Pike)* (2018); *King v. CompPartners* (2018); *Black v. CorVel* (2018); and *City of Petaluma v. WCAB (Lindh)* (2018).

CAJPA represents 86 joint powers authorities (“JPAs”) providing group self-insurance and risk management services to a vast majority of the public entities in California, including counties, cities, school districts, and special districts. JPA members providing workers’ compensation coverage will be greatly affected by the decision in this case regarding apportionment. Apportionment is a means to limit the costs incurred by the employer because of the employment, and enables JPA members to provide workers’ compensation coverage to public entities at a more reasonable cost. This, in turn, enables the public entities to use that money for the public service for which the funds were intended.

Petitioner to this Court (respondent below) (hereafter, “applicant”) continues to miss the point that the rules on apportionment changed back in 2004 -- some 15 years ago. Under the new rules, a correct apportionment analysis must consider and parcel out the factors of nonindustrial apportionment. As this Court instructed in *Brodie*, “the new approach to apportionment is to look at the current disability and parcel out its causative sources -- nonindustrial, prior industrial, current industrial -- and decide the amount directly caused by the current industrial source.”<sup>2</sup> The *Brodie* court further found that the “clear intent” of the Legislature was “to charge employers only with that percentage of permanent disability directly caused by the current industrial injury.”<sup>3</sup>

This Court in *Brodie* emphasized that the effect of the 2004 reform legislation was to reverse case law that had barred apportionment if, “but for” the industrial injury, the nonindustrial cause would not alone have given rise to a disability.<sup>4</sup>

In its decision below, the Court of Appeal has provided an extensive discussion and analysis of the subsequent case law applying the amended apportionment statutes (*Escobedo*, *Brodie*, *Yeager*, *Acme Steel*, and *City of Jackson*). The Court of Appeal found that each of applicant’s arguments was merely echoing the contentions made and rejected in those cases.

For example, applicant continues to argue that apportionment requires evidence that an asymptomatic pre-existing condition will, in and of itself, naturally progress to disability. But the Court of Appeal correctly opined that this argument reflects the law *prior* to 2004. Similarly, the Court below found “no merit” to applicant’s claim that there can be no apportionment to a condition that did not cause disability prior to the date of injury. “By definition, an asymptomatic pre-existing condition has not manifested itself and, thus, by definition has not caused prior disability.” If prior disability were still a prerequisite to apportionment, there would have been no purpose in changing the law.

Another example of applicant’s fundamental misunderstanding is manifested in the legal question posed in the Petition for Review to this Court<sup>5</sup> -- whether a medical examiner may apportion permanent disability to an asymptomatic pre-existing risk factor that is not directly causing any definable permanent disability. Plainly the answer is No, and no one has argued to the contrary. The Court of Appeal decision does not find that applicant’s underlying disease process merely made him more susceptible to blindness; under those circumstances, no

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<sup>2</sup> *Brodie v. Workers’ Comp. Appeals Bd.* (2007) 40 Cal.4<sup>th</sup> 1313, 1328.

<sup>3</sup> *Brodie*, *supra*, 40 Cal.4<sup>th</sup> at 1332.

<sup>4</sup> *Brodie*, *supra*, 40 Cal. 4<sup>th</sup> at 1326.

<sup>5</sup> Petition for Review, p. 5.

apportionment would be permitted. Instead, the point of the decision below is that apportionment is valid in this case *because* the medical evidence explained “how and why” applicant’s underlying disease process had combined with his industrial injury to cause his left eye blindness.<sup>6</sup>

Indeed, the QME in this case identified specific, non-industrial factors particular to this individual employee, explained his rationale as to why those factors were currently causing impairment in this individual employee, and supported his findings on apportionment with reference to diagnostic testing. The Court below correctly concluded that the medical evidence showed that applicant’s pre-existing pathology represented an actual, current, and contributing cause of his permanent disability following the injury.

Where, as here, an evaluating physician determines that a pre-existing condition and/or an inherited disease process are causative factors of a percentage of a current disability, and apportions accordingly, he is simply following the new apportionment regime outlined in *Brodie*. In awarding such apportionment, the Court of Appeal was in full compliance with the law in limiting an award of permanent disability to only that amount directly caused by the industrial injury.<sup>7</sup>

In summary, it is indisputable that the employer is no longer liable for any portion of the employee’s permanent disability caused by nonindustrial factors. Apportionment is proper in cases such as this one, where the medical evidence shows that the work injury combined with the pre-existing condition to cause the employee’s current disability. As such, we urge this Court to DENY the Petition for Review. Thank you for your consideration of this request.

Very truly yours,

*Ellen Sims Langille*

Ellen Sims Langille, General Counsel  
California Workers’ Compensation Institute  
Counsel for *Amici Curiae* CWCI / CAJPA

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<sup>6</sup> In this case, the medical evidence showed that the migraine headaches were actually a symptom of the underlying condition, and not just a risk factor.

<sup>7</sup> Lab. C. § 4664.