

No. H047148 and No. H047154

***IN THE
SIXTH DISTRICT COURT OF APPEAL
FOR THE STATE OF CALIFORNIA***

**APPLIED MATERIALS et al.,
Petitioners,
v.
WORKERS' COMPENSATION APPEALS BOARD
and DEBBIE CHADBURN,
Respondents.**

WCAB Case Numbers ADJ1351389 / ADJ7168611 / ADJ7183596
Hon. David Lauerman

**AMICUS CURIAE BRIEF OF
CALIFORNIA WORKERS' COMPENSATION INSTITUTE and
CALIFORNIA CHAMBER OF COMMERCE
IN SUPPORT OF PETITIONERS
ARROWHEAD INDEMNITY and XL SPECIALTY INSURANCE**

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I. CERTIFICATE OF INTERESTED ENTITIES OR PERSONS

California Rule of Court 8.208

Name of Interested Entity or Person	Nature of Interest
Applied Materials	Petitioner – Employer
Arrowood Indemnity	Petitioner – Carrier
XL Specialty	Petitioner – Carrier
Corvel	Petitioner – Third Party Administrator
Workers’ Compensation Appeals Board	Respondent – Court
Debbie Chadburn	Respondent – Injured Worker
California Workers’ Compensation Institute	Amicus Curiae
California Chamber of Commerce	Amicus Curiae

Respectfully submitted,

October 19, 2020

/s/ Ellen Sims Langille

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II. CERTIFICATION OF COMPLIANCE

I, Ellen Sims Langille, swear that I have read the within Amicus Curiae Brief and know the contents thereof; that the within brief contains 5,311 words exclusive of tables, signature blocks, and this certificate, based on the automated word count of the computer word-processing program; that I am informed and believe that the facts stated therein are true and on the ground allege that such matters are true; that I make such verification as an officer of the California Workers' Compensation Institute; and that I make such verification on behalf of the California Chamber of Commerce because the officers of the California Chamber of Commerce are absent from the County where my office is located and are unable to verify the application, and because as counsel, I am more familiar with the facts of this case than are the officers of the California Chamber of Commerce.

Respectfully submitted,

October 19, 2020

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V. INTRODUCTION

Despite the rather dramatic factual background of this case, the primary fact is not in serious dispute: The scheduled rating in this case is either 68% or 70%, depending on the date of injury.¹ Furthermore, the questions of law presented are quite simple. There were two questions that the Workers' Compensation Appeals Board had to address in its decision:

- Has the scheduled rating been rebutted?
- Is there a valid basis for apportionment?

In its decision below, the WCAB provided legally incorrect answers to both questions.

At issue in this case is the Appeals Board's interpretation of the law. When a workers' compensation decision rests on the Board's erroneous interpretation or application of the law, the reviewing court will annul the decision.² The Board's conclusions on questions of law are reviewed de novo.³

¹ Both defendants and the amicus for Respondent agree that the rating is either 68% or 70%. In her supplemental brief, the applicant side-stepped the Court's direct question on this point.

² *Matea v. Workers' Comp. Appeals Bd.* (2006) 144 Cal. App. 4th 1335, 1444; *Boehm & Associates v. Workers' Comp. Appeals Bd.* (1999) 76 Cal. App. 4th 513, 515-516.

³ *Benson v. Workers' Comp. Appeals Bd.* (2009) 170 Cal. App. 4th 1535, 1542-1543.

VI. LEGAL ARGUMENT

A. The QME Failed To Provide Substantial Medical Evidence To Support An Award Of Total Permanent Disability.

It is evident from the Court's questions that this Court already recognizes that the QME in this case has failed to provide an adequate basis to support the 100% Award. Amici curiae are in support of the supplemental briefing filed by Petitioners in this case. We reject the position taken by applicant, which appears to be that ordinary rules of rating and rebuttal do not apply provided that the proposed rating is 100%. This is simply not what the law requires.

1. THE PRIMARY METHOD TO REBUT A SCHEDULED RATING IS THROUGH THE INTRODUCTION OF VOCATIONAL EVIDENCE.

Permanent total disability "in accordance with the fact" under §4662(b) does not mean that a 100% Award can simply be based on the "fact" that a doctor has provided an opinion that applicant is unable to work. ***It requires evidence.***

*Ogilvie v. Workers' Comp. Appeals Bd.*⁴ expressly set forth the rule that rebuttal of a scheduled rating must follow one of three methodologies.⁵ Nearly all of the reported cases seeking to rebut a scheduled rating have used the methodology commonly referred to as the *LeBoeuf* method in reference to the Supreme Court case that serves as its basis.⁶ In order prove a rebuttal under the *LeBoeuf/Ogilvie* methodology, an injured worker must demonstrate that a work-related injury precludes them from taking advantage of vocational rehabilitation and participating in the labor force. In the years since *Ogilvie*, the WCAB has repeatedly held that the

⁴ *Ogilvie v. Workers' Comp. Appeals Bd.* (2011) 197 Cal. App. 4th 1262 (scheduled rating is not rebutted by evidence that employee's loss of future earnings was greater, due to nonindustrial factors, than earning capacity adjustment under scheduled rating).

⁵ The injured worker must establish either a factual error in the calculation of a factor in the rating formula or its application; the omission of medical complications aggravating the employee's disability in preparation of the rating schedule; or the employee is not amenable to rehabilitation due to industrial injury, and therefore has suffered a greater loss of future earning capacity than reflected in the scheduled rating. *Ogilvie, supra*, 197 Cal. App. 4th at 1277; see also *Contra Costa County v. Workers' Comp. Appeals Bd. (Dahl)* (2015) 240 Cal.App.4th 746, 751.

⁶ *LeBoeuf v. WCAB* (1983) 34 Cal. 3rd 234.

determination of whether an injured worker can be retrained requires evidence from a vocational expert.⁷

The scheduled rating is rebuttable and the injured worker has every opportunity to present evidence supporting a 100% permanent disability rating when the scheduled rating is less -- but applicant did not do so in this case. She did not present any evidence regarding her vocational feasibility (*i.e.*, that she was not amenable to rehabilitation and has suffered a greater loss of earning capacity than reflected in the scheduled rating) in compliance with *LeBoeuf* or *Ogilvie*.

⁷ See e.g., *Musgrove v. Astro Business Products* (2019) 2019 Cal. Wrk. Comp. P.D. LEXIS 339 (AME is medical expert, not vocational expert, and where AME testified in general terms that applicant's overall condition precluded him from labor market, AME opinion is not substantial evidence of total disability); *Gutierrez v. American Career College* (2015) 2015 Cal. Wrk. Comp. P.D. LEXIS 433 (AME report did not constitute substantial evidence of permanent total disability where conclusory medical opinion was premised on area well outside of medical expertise); *Gomez v. County of Los Angeles* (2014) 2014 Cal. Wrk. Comp. P.D. LEXIS 119 (medical opinion that applicant is unable to compete in open labor market did not constitute substantial evidence to support permanent total disability because vocational expert opinion is needed to make finding on employability issue); *Ecoffey v. Workers' Comp. Appeals Bd.* (2014) 79 Cal. Comp. Cases 469 (writ denied) (medical opinion of permanent total disability insufficient to rebut scheduled rating in absence of vocational expert opinion); *Morris v. Workers' Comp. Appeals Bd.* (2014) 79 Cal. Comp. Cases 1348 (writ denied) (medical evidence that applicant was unable to compete in open labor market could not rebut scheduled rating without evidence from vocational expert); *Brown v. Southern California Permanente Medical Group* (2012) 2012 Cal. Wrk. Comp. P.D. LEXIS 557 (consideration of whether employee is amenable to rehabilitation requires specialized knowledge of potential for vocational rehabilitation and type of employment available in labor market).

Applicant might have presented a cogent argument, based on expert vocational evidence, that her total loss of earning capacity entitled her to an award of 100% permanent disability.⁸ But instead, applicant placed her entire reliance on an unsupported medical opinion that she “cannot work.” And like a contestant on *Chopped!*, she simply raised her hands up in the air, stepped back, and declared victory.

Dr. Sidle is not a vocational expert, and his conclusory medical opinion of applicant’s employability is well outside of his medical expertise. Dr. Sidle’s reports are not sufficient to rebut the scheduled rating in this case.⁹

⁸ *City of Irvine v. Workers’ Comp. Appeals Bd. (Hansen)* (2011) 76 Cal. Comp. Cases 366 (writ denied) (vocational evaluation of employability concluded that applicant’s lack of stamina rendered him with no jobs that he could perform). Even vocational rebuttal of a scheduled rating is restricted to instances where employability is limited solely by industrial factors. See *Binstock v. Workers’ Comp. Appeals Bd.* (2012) 77 Cal. Comp. Cases 365 (writ denied) (vocational evaluator’s opinion that applicant was unable to compete in open labor market was not sufficient to support finding of permanent total disability, when opinion was based on both industrial and non-industrial vocational factors); *Damian v. Co. of San Mateo* (2018) 2018 Cal. Wrk. Comp. P.D. LEXIS 500 (applicant may rebut scheduled rating under *Ogilvie*, but only in cases where diminished future earnings are directly attributable to injury and not to non-industrial factors); and *Ogilvie, supra*, 197 Cal. App. 4th at 1277 (scheduled rating is not rebutted by evidence that employee’s loss of future earnings was greater, due to nonindustrial factors, than earning capacity adjustment under scheduled rating).

⁹ *Brown v. So. Calif. Perm. Med. Group* (2012) 2012 Cal. Wrk. Comp. P.D. LEXIS 557 (consideration of amenability to rehabilitation requires specialized knowledge of injured worker’s potential for vocational rehabilitation and type of employment available in labor market).

2. APPLICANT’S CONTENTION THAT PERMANENT TOTAL
DISABILITY IS NOT SUBJECT TO ORDINARY RULES OF
RATING AND REBUTTAL IS CONTRARY TO LAW.

In her Answer and more explicitly in her Supplemental Brief, applicant has argued that the WCAB’s finding of 100% permanent total disability means that there was no need for rebuttal evidence.¹⁰ On the contrary, even the case she cites in support of her fantastical theory of exceptionalism holds that the determination of permanent disability starts with a scheduled rating followed by evidence in rebuttal.

Applicant’s argument on this point is completely circular in nature. The determination of permanent disability necessarily begins with the permanent disability rating schedule, which is *prima facie* evidence of the percentage of permanent disability to be attributed to an employee’s work-related injury.¹¹ Applicant would have the analysis start at the end, with her medical evaluator’s unsubstantiated opinion that she cannot work, and go no further. Quite simply, that is not how it works. Only after the scheduled rating has been determined can attention be turned to whether the scheduled rating has been rebutted. An employee may challenge the presumptive scheduled rating by showing, *inter alia*, that due to

¹⁰ See, e.g., Applicant’s Supplemental Response, dated 10/9/2020, at p. 3 (“The need for ‘rebuttal’ is a ‘fiction’ invented by the defendants”).

¹¹ *Ogilvie, supra*, 197 Cal. App. 4th at 1266.

the industrial injury she is not amenable to rehabilitation and therefore has suffered a greater loss of future earning capacity than is reflected in the scheduled rating.¹²

In the solitary case cited by applicant, *Qualcomm Inc. v. Workers' Comp. Appeals Bd. (Brown)*,¹³ the medical evidence went much further in its analysis of permanent disability than the QME has in this case. In *Qualcomm*, the AME found GAF score of 35 but then engaged in an *Almaraz/Guzman* analysis¹⁴ leading to a determination that the scheduled rating did not accurately reflect the severity of applicant's disability. From that point, the AME opined that the injured worker was precluded from gainful employment and from participation in vocational rehabilitation, leading to a finding of permanent total disability on a psychiatric basis. The QME in this case skipped most of these steps.

As evidenced above, the *Qualcomm* case stands quite alone in its approval of a "medical-only" basis supporting a *LeBoeuf/Ogilvie* methodology. And notably absent from applicant's analysis of *Qualcomm* is the fact that, in awarding 100%

¹² *Ogilvie, supra*, 197 Cal. App. 4th at 1277.

¹³ *Qualcomm, Inc. v. Workers' Comp. Appeals Bd. (Brown)* (2019) 84 Cal. Comp. Cases 531 (writ denied).

¹⁴ "*Almaraz/Guzman*" is common shorthand for doctrine that the AMA Guides compliant rating may be rebutted by showing that it does not accurately represent the disability of the injured worker, pursuant to the holding in *Almaraz v. Environmental Recovery Services/Guzman v. Milpitas Unified School District* (2009) 74 Cal. Comp. Cases 1084 (en banc), aff'd sub nom. *Milpitas Unified School Dist. v. Workers' Comp. Appeals Bd. (Guzman)* (2010) 187 Cal. App. 4th 808.

disability, the WCJ in *Qualcomm* justified her decision by noting that “the AMA Guides compliant rating may be rebutted by showing that it does not adequately represent the disability of the injured worker.”¹⁵ ***In other words, even the case relied upon by applicant started with a scheduled rating and only then was attention turned to whether that rating had been rebutted.***¹⁶

Presumably in hopes of avoiding appellate review on this point, applicant has cast her contentions here in terms of a “finding of fact” by the WCJ. But upon close examination, the analysis that applicant has provided in support of her argument ultimately highlights the circularity of her *legal* position. There cannot be a valid finding of fact when there is no substantial evidence to support that finding. Where, as demonstrated above, the WCJ’s “finding of fact” of total disability is itself premised upon an inadequate record, that finding cannot stand because it actually is a legal error. A decision that rests on the Board’s erroneous interpretation or application of the law is subject to reversal by the reviewing court.¹⁷

¹⁵ *Qualcomm, supra*, 84 Cal. Comp. Cases at 533.

¹⁶ *Qualcomm, supra*, 84 Cal. Comp. Cases at 534 (according to the WCJ’s report, “the doctor first did an AMA Guide Compliant rating, i.e. GAF of 35, and then went [on] to describe the effects of the psychiatric injury more accurately by stating that the applicant was unable to engage in gainful employment or participate in a vocational rehabilitation program.”).

¹⁷ *Matea v. Workers’ Comp. Appeals Bd.* (2006) 144 Cal. App. 4th 1335, 1444; *Boehm & Associates v. Workers’ Comp. Appeals Bd.* (1999) 76 Cal. App. 4th 513, 515-516.

As outlined above, Dr. Sidle’s opinion that applicant is unable to work was not supported by any expert vocational opinion. Moreover, his opinion was not even supported on a medical basis -- Dr. Sidle did not provide an *Almaraz/Guzman* analysis.

An award of permanent total disability – particularly one “based on the fact” – is no different than any other finding of permanent disability: It must be based on substantial evidence. Applicant failed to produce vocational evidence of employability or amenability to rehabilitation, and failed to properly rebut the scheduled rating. Without such evidence, Dr. Sidle’s unsubstantiated opinion outside of his medical expertise does not qualify as substantial evidence sufficient to support the award.

**B. The QME Failed To Provide Substantial Medical Evidence
On The Issue of Apportionment.**

In the medical evidence upon which the WCJ relied in issuing the award of permanent total disability, the QME has revealed his misunderstanding of the basic legal requirements of apportionment. Although the new apportionment regime has been in existence for more than 15 years, some practitioners (and perhaps most regrettably, the WCAB itself) have failed to appreciate the dramatic shift in legislative intent on the question of apportionment. When Dr. Sidle refused to apply

apportionment to what he references as “risk factors,”¹⁸ he necessarily disqualified his own reporting as substantial evidence sufficient to support an award. The simple truth is that apportionment to risk factors is a perfectly valid application of current law, provided that those risk factors are presently causing disability.

1. THE OLD LAWS OF APPORTIONMENT WERE
COMPLETELY REVAMPED BY SB 899.

In 2004, the Legislature enacted a major workers’ compensation reform package (Senate Bill 899). This reform bill completely overhauled the rules on apportionment, rewriting Labor Code section 4663 to mandate that apportionment of permanent disability must be based on causation.¹⁹ Section 4663 further requires an evaluating physician to make a determination of apportionment by finding the approximate percentage of the permanent disability caused as a direct result of the injury, and the approximate percentage of permanent disability caused by other factors both before and subsequent to the industrial injury.²⁰

Senate Bill 899 also added Labor Code section 4664, which definitively outlines the limitations of the employer’s liability: “The employer shall only be liable

¹⁸ Deposition of Dr. Sidle, dated 10/19/2016, at 18:11-13 (“[I]t’s my understanding that we’re not supposed to apportion to risk factors.”) [Pet. Ex. 39 p. 493].

¹⁹ Lab. C. §4663(a): “Apportionment of permanent disability shall be based on causation.”

²⁰ Lab. C. §4663(c).

for the percentage of permanent disability directly caused by the injury arising out of and occurring in the course of employment.”²¹

After SB 899, evaluating physicians, the WCJ, and the Appeals Board are required to “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.”²²

The employer is liable to compensate the injured employee only for the former, and not the latter.²³

2. THE EN BANC WCAB DECISION IN *ESCOBEDO* HELD THAT THE SCOPE OF APPORTIONMENT HAS BEEN EXPANDED BY THE LEGISLATURE.

Shortly after SB 899 was first implemented, the Workers’ Compensation Appeals Board issued an en banc decision in *Escobedo v. Marshalls*.²⁴ The decision addressed the new requirement that apportionment be based on causation, outlined

²¹ Lab. C. §4664 (emphasis added).

²² Lab. C. §4663(c); *see also Benson, supra*, 170 Cal. App. 4th at 1550 fn. 13.

²³ It should be emphasized that the new apportionment rules apply only to causation of permanent disability. An injured worker’s unfettered rights to temporary disability and medical treatment in any compensable claim remain unaltered by the new rules.

²⁴ *Escobedo v. Marshalls* (2005) 70 Cal. Comp. Cases 604 (en banc).

factors to be considered in making apportionment, and reaffirmed what constitutes substantial medical evidence of apportionment.

The Appeals Board in *Escobedo* found that “[t]here is no doubt that [by enacting SB 899], the Legislature intended to significantly change the laws relating to apportionment of permanent disability.”²⁵ The Appeals Board concluded that “the Legislature intended to expand rather than narrow the scope of legally permissible apportionment.”²⁶

Under *Escobedo*, where there is substantial medical evidence establishing that factors other than the industrial injury have caused a portion of the employee’s permanent disability, the QME, the WCJ, and the Appeals Board are required to apportion to those factors.²⁷

²⁵ *Escobedo, supra*, 70 Cal. Comp. Cases at 616.

²⁶ *Escobedo, supra*, 70 Cal. Comp. Cases at 616 [emphasis added].

²⁷ *Benson, supra*, 170 Cal. App. 4th at 1560 (apportionment excused only under extremely “limited circumstances,...when the evaluating physician cannot parcel out, with reasonable medical probability, the approximate percentages to which each distinct industrial injury causally contributed to the employee’s overall permanent disability....”); see also *State Comp. Ins. Fund v. Workers’ Comp. Appeals Bd. (Dorsett)* (2011) 201 Cal. App. 4th 443 (same).

3. THE NEW LAWS OF APPORTIONMENT WERE DEFINITELY ADDRESSED BY THE SUPREME COURT IN *BRODIE*, AND FURTHER REFINED IN RECENT APPELLATE RULINGS.

The prior rule that the employer takes the employee as it find him or her, with no apportionment for asymptomatic, preexisting, or non-disabling conditions, has now been replaced by SB 899 with new apportionment rules. The Supreme Court, writing in *Brodie v. Workers' Comp. Appeals Bd.*,²⁸ has conclusively defined this new apportionment regime²⁹ with its requirement for apportionment to causation:

[T]he 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.³⁰

Under the new apportionment regime, employers are required to compensate injured workers only for that portion of their permanent disability attributable to a current industrial injury, and not for that portion attributable to previous injuries or to nonindustrial factors.³¹ “Apportionment is the process employed...to segregate the

²⁸ *Brodie v. Workers' Comp. Appeals Bd.* (2007) 40 Cal. 4th 1313.

²⁹ The Supreme Court declared that the changes wrought by SB 899 established a “new regime of apportionment based on causation.” *Brodie, supra*, 40 Cal. 4th at 1327.

³⁰ *Brodie, supra*, 40 Cal. 4th at 1328.

³¹ Citing *Escobedo*, the Supreme Court stated that SB 899 had “eliminate[d] the bar against apportionment based on pathology and asymptomatic causes.” *Brodie, supra*, 40 Cal. 4th at 1327.

residuals of an industrial injury from those attributable to other industrial injuries, or to nonindustrial factors, in order to fairly allocate the legal responsibility.”³² The Supreme Court emphasized that the effect of SB 899 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.³³

In this case, applicant has persisted in relying upon a “but for” analysis of permanent disability, despite the fact that the “but for” standard of causation has been expressly rejected by the Legislature as well as the Supreme Court. Instead, causation is correctly determined by evaluating what percentage of her current disability is directly caused by her industrial injury and what percentage is caused by other factors.³⁴

³² *Brodie, supra*, 40 Cal. 4th at 1321 (emphasis added) (citation omitted).

³³ *Brodie, supra*, 40 Cal. 4th at 1326.

³⁴ *Kos v. Workers’ Comp. Appeals Bd.* (2008) 73 Cal. Comp. Cases 529 (writ denied) (fact that applicant might not now have disability but for her industrial injury is no longer a proper test for the valid apportionment).

4. UNDER THE NEW APPORTIONMENT REGIME, “RISK FACTORS” MAY CONSTITUTE A VALID BASIS OF CAUSATION.

In *City of Petaluma v. Workers’ Comp. Appeals Bd. (Lindh)*,³⁵ the Court of Appeal set forth the plain rule that where the combination of the industrial and non-industrial factors has caused applicant’s disability, apportionment must be applied:

[T]he salient question is whether the disability resulted from both non-industrial and industrial causes, and if so, apportionment is **required**.³⁶

As relevant to this case, the rule from *Lindh* is that if the residual disability has been caused by both industrial and non-factors, then apportionment must be applied.

Most recently, this Sixth District Court of Appeal has confirmed in *Co. of Santa Clara v. Workers’ Comp. Appeals Bd. (Justice)*³⁷ that all permanent disability, including disability flowing directly from industrial medical treatment, is subject to apportionment.³⁸

In light of the foregoing historical context of SB 899, and particularly the interpretation and application of apportionment as defined by *Escobedo, Brodie*,

³⁵ *City of Petaluma v. Workers’ Comp. Appeals Bd. (Lindh)* (2019) 29 Cal. App. 5th 1175.

³⁶ *Lindh, supra*, 29 Cal. App. 5th at 1193 (emphasis added).

³⁷ *Co. of Santa Clara v. Workers’ Comp. Appeals Bd. (Justice)* (2020) 49 Cal. App. 5th 605.

³⁸ See also *Benson, supra*, 170 Cal. App. 4th at 1549, 1560 (all disability is apportionable, and to hold otherwise would be inconsistent with law requiring apportionment based on causation).

Lindh and *Justice*, it must be recognized that if the permanent disability in this case was not caused entirely by industrial medical treatment, then sections 4663 and 4664 plainly require that the permanent disability be apportioned if substantial medical evidence supports it. Thus, if applicant’s “risk factors” of childhood trauma, etc., have combined to cause any portion of her PTSD, then apportionment to those risk factors is appropriate.³⁹

But Dr. Sidle did not provide a proper apportionment analysis because he demonstrably misunderstood apportionment law. Because Dr. Sidle grounded his determinations upon an incorrect legal theory, his opinions do not constitute substantial evidence on the question.

³⁹ See *Jensen v. County of Santa Barbara* (2018) 2018 Cal. Wrk. Comp. P.D. LEXIS 185 (apportionment to family history and obesity upheld where these risk factors were shown to be causative of current disability); *Foxworthy v. Dept. of Parks and Rec.* (2016) 2016 Cal. Wrk. Comp. P.D. LEXIS 634 (apportionment to obesity and sleep apnea upheld where AME explained how and why these risk factors had contributed to applicant's disability).

5. A FINDING OF TOTAL DISABILITY “IN ACCORDANCE
WITH THE FACT” DOES NOT PRECLUDE
APPORTIONMENT.

The opportunity for applicant to prove permanent total disability under Labor Code section 4662(b) does not preclude application of ordinary apportionment law. Even where an applicant has shown by way of expert vocational evidence to be precluded from competing in the open labor market, the applicant may be found 100% permanently disabled only if the labor disabling condition is completely industrially caused and unapportionable.⁴⁰

The Supreme Court has held that apportionment requires looking at the current disability and parceling out its causation sources – nonindustrial, prior industrial, current industrial and deciding the amount directly caused by the current industrial source. Thus, even where an applicant is unable to compete in the open labor

⁴⁰ *Nooner v. Workers’ Comp. Appeals Bd.* (2009) 74 Cal. Comp. Cases 300, 302 (writ denied) (application of principles enunciated in *LeBoeuf* do not preclude apportionment under Labor Code §§ 4663 and 4664); see also *Wilson-Marshall v. Workers’ Comp. Appeals Bd.* (2007) 72 Cal. Comp. Cases 1431 (writ denied) (apportionment applies to 100% cases so long as it constitutes substantial medical evidence).

market, apportionment to nonindustrial factors and other injuries must be applied and may preclude a finding of 100% permanent disability.⁴¹

⁴¹ *Morris, supra*, 79 Cal. Comp. Cases at 1351 (apportionment may preclude award of 100% permanent disability even when applicant is unable to compete in open labor market); *Wilkinson v. Ontario Neon Co.* (2011) 2011 Cal. Wrk. Comp. P.D. LEXIS 194 (where 100% award is based on medical and vocational evidence of total loss of earning capacity, apportionment may still apply to reduce the award). See also *Fraire v. Calif. Dept. of Corrections* (2020) 2020 Cal. Wrk. Comp. P.D. LEXIS 60 (apportionment of permanent disability, whether permanent total or permanent partial, “shall” be based on causation, and does not exempt total permanent disability); *Brown v. So. Calif. Perm. Med. Group* (2012) 2012 Cal. Wrk. Comp. P.D. LEXIS 557 (even where evidence supports finding of permanent total disability under *LeBoeuf* analysis, AME report supported apportionment of applicant’s permanent disability).

Although not directly relevant herein, developing case law on apportionment is becoming clear as it relates to a finding of permanent total disability under the conclusive presumption in Labor Code §4662(a). In *Fraire v. Calif. Dept. of Corrections* (2020) 2020 Cal. Wrk. Comp. P.D. LEXIS 60, the WCAB held that permanent disabilities that are conclusively presumed to be total under §4662(a) are nonetheless subject to apportionment to causation. The fact that specified permanent disabilities “shall be presumed to be total *in character*” does not mean that these disabilities cannot also have other characteristics – such as being caused in part by non-industrial factors. Based on Legislative intent for statutory scheme, apportionment to causation applies. See also *Alvarez v. AIG* (2017) 2017 Cal. Wrk. Comp. P.D. LEXIS 209 (fundamentally unfair to award 100% under §4662(a) without apportionment where 95% causation is due to nonindustrial factors); cf. *Kloeckner v. Workers’ Comp. Appeals Bd.* (2019) 84 Cal. Comp. Cases 1020 (writ denied) (where injury is conclusively presumed total under §4662(a), apportionment to nonindustrial factors is not applicable to reduce award).

**C. This Court Should Consider The Question Of Whether
There Is A Compensable Consequence Injury In The First
Place.**

Amici curiae are deeply concerned at what appears to be the Court's focus on whether the scheduled rating has been properly rebutted. While clearly a legitimate line of inquiry, there is a risk that if this Court's decision is exclusively or even primarily concentrated on the question of substantial evidence it could be interpreted as a tacit confirmation that the intentional misconduct on the part of the PTP has led to a compensable industrial injury.

As raised by both Petitioners, there is a serious underlying question of the compensability of applicant's PTSD injury in the first instance. A long line of cases has confirmed the compensability of negligence in the provision of industrial medical treatment. But the allegations of sexual misconduct by the PTP cannot reasonably be said to constitute negligence. Certainly, Dr. Massey did not accidentally engage in sexual relations with the applicant.

It appears that there is no appellate case law directly on point.⁴² While we can all be relieved that this particularly distasteful set of facts has not previously faced appellate review, it is necessary for this Court to now address the very real question

⁴² "I have not been able to find any binding precedent precisely on point, nor have any of the parties been able to bring any such to my attention." WCJ's Report and Recommendation on Reconsideration, p. 7. Independent research by amici curiae CWCI and CalChamber has met with similar results.

of whether such sexual misconduct is within the scope of the risks encompassed by the compensation bargain.

Petitioners in both cases (particularly in H047154) have well-examined the question of whether the sexual relationship between applicant and her PTP constitutes an industrial injury. The WCJ's reasoning, adopted by the WCAB, was simply that the PTP's misconduct was a breach of the duty of care and thus constituted negligence.⁴³ This extraordinary leap of logic cannot withstand judicial scrutiny.

Medical negligence in treatment for an industrial injury will ordinarily result in a compensable consequence injury.⁴⁴ Indeed, workers' compensation benefits may be awarded for negligent medical treatment of an industrial injury,⁴⁵ even though an action for damages may still lie against the treatment provider.⁴⁶ Negligence, as ordinarily understood in these circumstances, encompasses such errors as a

⁴³ WCJ's Report and Recommendation on Reconsideration, pp. 7-8.

⁴⁴ 1 HANNA CA LAW OF EMPLOYEE INJURIES & WORKERS' COMPENSATION §4.66[3][a] (new injury resulting from improper treatment of original industrial injury is compensable); see also *Heaton v. Kerlan* (1946) 27 Cal.2d 716, 720 (well settled that aggravation of industrial injury by doctor's negligence is within scope of risk, as employer is liable for all legitimate consequences including intervening negligence or carelessness of physician).

⁴⁵ *Fitzpatrick v. Fidelity Cas. Co.* (1936) 7 Cal.2d 230, 234.

⁴⁶ 1 HANNA CA LAW OF EMPLOYEE INJURIES & WORKERS' COMPENSATION §4.66[3][a]. Presumably, the applicant here has the right to maintain an action for damages against her former PTP.

misdiagnosis or perhaps a botched surgery. It cannot reasonably include a deliberate act.

As a backup to relying on a “negligence” standard, the WCAB also considered whether Dr. Massey’s actions constituted an intentional tort. Because it found “no real evidence” that Dr. Massey had acted out of “personal animus” toward applicant, the WCAB rejected third-party intent as a basis to break the chain of causation. Amici curiae submit that if Dr. Massey “medicated, groomed, and seduced”⁴⁷ applicant, a more purely personal animus can hardly be imagined. In any event, the role of employment is inconsequential if it merely provides a place for a personally motivated assault.⁴⁸

The psychiatric injury in this case was not sustained as the result of medical treatment⁴⁹ and certainly not as the result of negligence. The PTP did not engage in a sexual relationship with his patient by mistake. For workers’ compensation purposes, the question presented is whether that sexual relationship was reasonably anticipated – whether it constitutes a risk that is within the scope of the compensation bargain. If the intervening misconduct is to be anticipated, then the risk of it is

⁴⁷ Applicant’s Answer to Petition for Writ of Review, p. 9.

⁴⁸ *Transactron, Inc. v. Workers’ Comp. Appeals Bd.* (1977) 68 Cal. App. 3d 233.

⁴⁹ WCJ’s Report and Recommendation on Reconsideration, p. 7 (“No-one claims that the improper relations between Applicant and Dr. Massey were ever believed to be a part of Applicant’s treatment for the industrial injury”).

encompassed within the compensation bargain; if not, then the chain of causation must be seen as broken and the resulting injury as non-compensable.

If there is no compensable consequence injury, there is no compensable PTSD, there is no 100% industrial disability, and neither *Hikida* nor *Fitzpatrick* ever enters the picture. In the absence of any instructional case law on point, the question is one of first impression and it is critically important for this Court to address the issue of compensability at the outset.

VII. CONCLUSION

It has perhaps not escaped the careful reader's attention that, up until this point, amici curiae have not referenced the *Fitzpatrick*⁵⁰ case at all. This was intentional, despite the Court's pointed questions to the parties as to the application of the standards described in *Fitzpatrick*.

The reasons for this omission are twofold: First, the parties have already addressed the Court's questions directly; secondly, the deliberate omission underscores the fact that *Fitzpatrick* did not come out of nowhere. It is based (as is this brief) upon years of solid precedent, which is itself grounded in statutory authority.

⁵⁰ *Dept. of Corrections v. Workers' Comp. Appeals Bd. (Fitzpatrick)* (2018) 27 Cal. App. 5th 607.

Fitzpatrick was not wrongly decided, as suggested by applicant and her amicus. It is merely the necessary application of all that came before it. And the rule of law summed up by *Fitzpatrick* is this:

Section 4660 is *mandatory*. There is nothing ambiguous or unclear in section 4660's directive that "[i]n determining the percentages of permanent disability, account shall be taken of the nature of the physical injury or disfigurement, the occupation of the injured employee, and his or her age at the time of the injury, consideration being given to an employee's diminished future earning capacity" and the 2005 Schedule "shall be prima facie evidence of the percentage of permanent disability to be attributed to each injury covered by the schedule."⁵¹

Because the Appeals Board below failed to properly consider the mandate of Labor Code section 4660, failed to properly apply the standards of rebuttal, failed to properly address apportionment, failed to properly consider the underlying question of causation of injury, and failed to base its decision on substantial evidence, the decision below is invalid and should be reversed.

Respectfully submitted,

October 19, 2020

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⁵¹ *Fitzpatrick*, *supra*, 27 Cal. App. 5th at 622 [emphasis in original].

VIII. CERTIFICATE OF SERVICE

I certify that on October 19, 2020, I electronically filed the foregoing
**AMICUS CURIAE BRIEF OF CALIFORNIA WORKERS' COMPENSATION
INSTITUTE AND THE CALIFORNIA CHAMBER OF COMMERCE
IN SUPPORT OF PETITIONERS
ARROWHEAD INDEMNITY AND XL SPECIALTY INSURANCE**
with the Clerk of the Court for the Sixth District Court Of Appeal by using the
appellate TrueFiling system. The following case participants were served
electronically through the TrueFiling system:

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I certify that all participants in the case are registered TrueFiling users and that
service will be accomplished by the appellate TrueFiling system.

Respectfully submitted,

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