No. A153811

IN THE
FIRST DISTRICT COURT OF APPEAL
FOR THE STATE OF CALIFORNIA

CITY OF PETALUMA,
Petitioner,
v.
WORKERS' COMPENSATION APPEALS BOARD and AARON LINDH,
Respondents.

WCAB Case Number ADJ153811
Hon. Jason Schaumberg

AMICUS CURIAE BRIEF OF CALIFORNIA WORKERS' COMPENSATION INSTITUTE and CALIFORNIA ASSOCIATION OF JOINT POWERS AUTHORITIES IN SUPPORT OF PETITIONER CITY OF PETALUMA

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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**
City of Petaluma	Petitioner – employer
Workers' Compensation Appeals Board	Respondent – court
Aaron Lindh	Respondent – injured worker
California Applicants' Attorneys Association	Amicus Curiae
California Association of Joint Powers Authorities	Amicus Curiae
California Workers' Compensation Institute	Amicus Curiae

Respectfully submitted,

July 7, 2018

/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 4,798 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 Association of Joint Powers Authorities because the officers of the California Association of Joint Powers Authorities are absent from the County where my office is located and are unable to verify the application, and because as counsel for CWCI, I am more familiar with the facts of this case than are the officers of the California Association of Joint Powers Authorities.

Respectfully submitted,

July 7, 2018

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V. INTRODUCTION

The central question presented by this case is whether the proverbial "eggshell skull rule" survives in workers' compensation under the new apportionment regime.[1] Based on major reform legislation, a binding Supreme Court decision, and recent appellate case law, this brief argues that the eggshell skull rule no longer has a place in California workers' compensation.[2]

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.[3] The Board's conclusions on questions of law are reviewed de novo.[4]

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[1] The eggshell skull rule is a common-law doctrine holding that the unexpected frailty of the injured person is not a valid defense to the level of harm actually caused. With its earliest reference in this country in *Vosburg v. Putney* (1891) 80 Wis. 523, the doctrine is usually stated in terms that a tortfeasor is liable for all consequences resulting from his criminal or negligent activities leading to an injury, even if the victim suffers an unusually high level of damages that another person might not. As applied in California workers' compensation, application of the rule meant that a defendant was responsible for permanent disability resulting from the aggravation of pre-existing injury or condition.

[2] The intent of this argument applies only to permanent disability, as the new apportionment rules apply only to causation of permanent disability. An injured worker's rights to temporary disability and medical treatment in any compensable claim would remain unaltered.

[3] *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.

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

VI. LEGAL ARGUMENT

A. Because The New Apportionment Regime Requires Apportionment To Causation of Disability, The Eggshell Skull Rule No Longer Applies in California Workers' Compensation.

1. BEFORE 2004, CALIFORNIA LAW PRECLUDED APPORTIONMENT OF DISABILITY RESULTING FROM A PRE-EXISTING NON-DISABLING DISEASE PROCESS.

Prior to 2004, the general rule was that an employer had to take the employee as it found him or her at the time of the employment, with no apportionment for asymptomatic preexisting, or non-disabling conditions.[5] Thus, when a subsequent injury "lit up" or aggravated a previously existing condition resulting in disability, liability for the full disability without apportionment would be imposed on the employer, and the WCAB could apportionment disability only in those cases in which a portion of the disability would necessarily have resulted, in the absence of the industrial injury, from the normal progress of the pre-existing disease.[6] The WCAB was required to allow compensation to an injured employee not only for the disability resulting solely from the employment, but also for the full extent of disability resulting from the acceleration, aggravation, or lighting up of a prior non-

[5] *Lamb v. Workmen's Comp. Appeals Bd.* (1974) 11 Cal. 3d 274 ("Industry takes the employee as it finds him. A person suffering from a preexisting disease who is disabled by an injury proximately arising out of the employment is entitled to compensation even though a normal man would not have been adversely affected by the event.").

[6] *See, e.g., Ballard v. Workers' Comp. Appeals Bd.* (1971) 3 Cal. 3d 832.

disabling disease.[7] Apportionment was justified only if the Appeals Board found that the portion of the current disability would have resulted from the normal progress of the underlying nonindustrial disease, even absent the industrial event.[8]

2. 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***.[9] 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.[10]

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

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[7] *Marsh v. Workers' Comp. Appeals Bd.* (2005) 130 Cal. App. 4th 906, 912.

[8] *See, e.g., Pullman Kellogg v. Workers' Comp. Appeals Bd.* (1980) 26 Cal. 3d 450, 454; *Zemke v. Workers' Comp. Appeals Bd.* (1968) 68 Cal. 2d 79.

[9] Lab. C. §4663 (a): "Apportionment of permanent disability shall be based on causation."

[10] Lab. C. §4663 (c).

liable for the percentage of permanent disability directly caused by the injury arising out of and occurring in the course of employment."[11]

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."[12]

The employer is liable to compensate the injured employee only for the former, and not the latter.[13]

3. IN AN EN BANC DECISION, THE WCAB OUTLINED HOW THE NEW LAWS OF APPORTIONMENT HAVE CHANGED THE TRADITIONAL RULES.

Shortly after SB 899 was first implemented, the Workers' Compensation Appeals Board issued an en banc decision in *Escobedo v. Marshalls*.[14] The decision addressed the new requirement that apportionment be based on causation, outlined

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[11] Lab. C. §4664 [emphasis added].

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

[13] It should be emphasized that the new apportionment rules apply only to causation of permanent disability. An injured workers' unfettered rights to temporary disability and medical treatment in any compensable claim remain unaltered by the new rules.

[14] *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."[15] The Appeals Board concluded that "the Legislature intended to expand rather than narrow the scope of legally permissible apportionment.[16]

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.[17]

4. THE NEW LAWS OF APPORTIONMENT HAVE BEEN DEFINITIVELY ADDRESSED BY THE SUPREME COURT IN *BRODIE*.

The prior general rule that the employer takes the employee as it find him or her, with no apportionment for asymptomatic, preexisting, or non-disabling

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[15] *Escobedo, supra*, 70 Cal. Comp. Cases at 616.

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

[17] *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).

conditions, has now been replaced by SB 899 with new apportionment rules. The Supreme Court, writing in *Brodie v. Worker's Comp. Appeals Bd.*,[18] has conclusively defined this new apportionment regime,[19] with its rules of 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.[20]

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.[21] "Apportionment is the process employed…to segregate the residuals of an industrial injury from those attributable to other industrial injuries, or to nonindustrial factors, in order to fairly allocate the legal responsibility."[22] 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

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

[19] 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.

[20] *Brodie*, *supra*, 40 Cal. 4th at 1328.

[21] 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.

[22] *Brodie*, *supra*, 40 Cal. 4th at 1321 [emphasis added] [citation omitted].

not alone have given rise to a disability.[23] At least one treatise has posited that the Supreme Court's opinion in *Brodie* meant that **"the concept of the eggshell plaintiff was now gone."**[24]

Subsequent cases have been even more explicit. In *Costa v. Workers' Comp. Appeals Bd.*,[25] the employee was found to be 100% permanently and totally disabled due to cauda equina syndrome. However, 20% apportionment was granted where the medical examiner opined that the employee's permanent disability was worsened by the existence of a congenital spinal stenosis, *even though the employee was asymptomatic prior to the industrial injury*.[26] The Appeals Board pointed to medical evidence that applicant's industrial injury would have produced a less severe disability if the congenital condition had not been present, and held that apportionment was properly attributed to the cause of applicant's permanent

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[23] *Brodie*, *supra*, 40 Cal. 4th at 1326.

[24] California Workers' Compensation Law and Practice, "Apportionment Post-SB 899," vol. 1 §8:128 (James Publishing © 2016) (concluding that the opinion in *Brodie* signaled that "the intent of the legislature in amending LC § 4663 was to apportion to the causation of disability, including silent pathology, and that the concept of the eggshell plaintiff was now gone.").

[25] *Costa v. Workers' Comp. Appeals Bd*. (2011) 76 Cal. Comp. Cases 261, 264 (writ denied).

[26] "[T]he fact that an asymptomatic pathological condition is not labor disabling at the time of the industrial injury, but is lit up by the injury, will not prevent apportionment." *Costa*, *supra*, 76 Cal. Comp. Cases at 264 (apportionment allowed where medical evidence showed that pre-existing spinal stenosis caused applicants industrial condition to be more severe than it would have been had he not had the congenital condition).

disability. In reaching this conclusion, the WCAB itself expressly confirmed the demise of the eggshell skull rule: "[W]e must answer in the affirmative to applicant's question, 'is the concept of "lighting up" dead?'"[27]

As in *Costa*, the injured worker in the present case is the embodiment of the eggshell skull plaintiff. The WCJ's description of the underlying circumstances of injury in this case exactly captures the fragility of the asymptomatic, underlying pathology that applicant brought with him to his employment:

> [Applicant had] an increased risk of catastrophic failure [and] a congenital, pre-existing, asymptomatic problem affecting the blood vessels in his left eye. This congenital abnormality created a greater risk that he could suffer a sudden and catastrophic loss of blood flow in his left eye as a result of trauma. The injured worker suffered blows to the head that likely would have had no effect on an individual without the same type of genetic predisposition. In [applicant's] case, however, these relatively minor blows caused a catastrophic injury — complete loss of vision in his left eye.[28]

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[27] *Ibid*. As in the present case, the injured worker in *Costa* had contended that apportionment could not be based on a "risk factor" and was not warranted where his nonindustrial condition was dormant until it was lit up by the industrial injury.

[28] Findings & Award / Opinion on Decision, dated 8/11/17, at 4. Notably, the WCJ's own review of the underlying facts belies his ultimate refusal to award apportionment, when he states that the "relatively minor blows caused a catastrophic injury – complete loss of vision in his left eye." The loss of vision in the left eye is the disability, not the injury, and the WCJ concedes in this passage that this disability was caused in part by applicant's "congenital, pre-existing" abnormality.

A recent published appellate decision in *City of Jackson v. Workers' Comp. Appeals Bd. (Rice)*[29] has confirmed that apportionment may now be based on "the natural progression of a non-industrial condition or disease, a pre-existing disability, or a post-injury disabling event[,]… pathology, asymptomatic prior conditions, and retroactive prophylactic work conclusions…."[30] *Rice* provides further support for the demise of the eggshell skull rule in workers' compensation, by validating apportionment where, as in the instant case, the industrial event would not have resulted in as severe a residual disability absent the underlying pre-existing disease process.[31]

In light of the foregoing historical context of SB 899, and particularly the interpretation and application of apportionment as defined by *Escobedo*, *Brodie*, *Costa*, and *Rice*, it must be recognized that the new apportionment regime no longer permits the traditional application of the eggshell skull rule.[32] Because the employer

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[29] *City of Jackson v. Workers' Comp. Appeals Bd. (Rice)* (2017) 11 Cal. App. 5th 109.

[30] *Rice*, *supra*, 11 Cal. App. 5th at 116.

[31] At deposition, the PQME in this case testified that it was "unlikely" that applicant would have had loss of vision due to the industrial blows to his head, if he had not had the underlying vasovascular spasticity condition. Deposition of Dr. Kaye, dated 6/17/16, at 16:9-12. Notably, the WCJ and WCAB appear to have missed this portion of the PQME's testimony. *See, e.g.,* Findings & Award / Opinion on Decision, dated 8/11/17, at 5; Opinion and Decision After Reconsideration, dated 1/25/18, at 11:3-15.

[32] It bears repeating that the termination of the eggshell skull rule would apply only to causation of permanent disability. An injured workers' rights to temporary disability and medical treatment in any compensable claim would remain unaltered.

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.[33]

B. The Evidence In This Case Demonstrates That The PQME Has Correctly Apportioned To The Cause Of Permanent Disability, And Not To The Cause Of Injury.

In the new apportionment regime, the focus is properly on causation of permanent disability. Under *Escobedo*, the issue of causation of permanent disability for purposes of apportionment is distinct from the issue of the causation of an injury, and the percentage to which an employee's injury is causally related to his employment "is not necessarily the same" percentage to which the employee's permanent disability is causally related to his injury.[34]

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[33] The PQME opined that the work precipitated [meaning "hurried" or "hastened"] the underlying vasculopathy resulting in ischemic optic neuropathy of the left eye, and that the industrial event to the left side of applicant's head aggravated his underlying condition. PQME Report of Dr. Kaye, dated 12/29/15, at pp. 11-12.

[34] *Escobedo, supra*, 70 Cal. Comp. Cases at 611.

1. CONTRARY TO THE FINDINGS OF THE APPEALS BOARD BELOW, THE PQME HAS NOT APPORTIONED TO THE CAUSE OF APPLICANT'S INJURY.

The Appeals Board below asserts that the PQME has apportioned to injury rather than disability.[35] To the contrary, the evidence confirms that the PQME has correctly apportioned to the cause of permanent disability and not to injury.

The case of *Kos v. Workers' Comp. Appeals Bd*.[36] is illustrative. In *Kos*, the Appeals Board held that substantial evidence supported apportionment of 90% of applicant's permanent total disability to nonindustrial degenerative disc disease. The Appeals Board specifically addressed the argument that the medical-legal evaluator had apportioned to "causation of injury," rather than causation of the permanent disability:

> [T]he fact that causation of the injury "is not necessarily" the same as causation of the disability does not mean they cannot be the same. **Moreover...it would be incorrect to conclude that, in degenerative disease cases, an applicant's permanent disability is necessarily entirely "directly caused" by the industrial injury, with no possible apportionment to nonindustrial causation: (1) if the injury was the "straw that broke the camel's back;" (2) if, but for the industrial injury, it is not clear when, or if, the degenerative condition was progressed to cause disability; or (3) if the degenerative condition was asymptomatic or largely asymptomatic before the injury occurred.** To the contrary, any such conclusion would be inconsistent with the holding of *Escobedo* that section

[35] Opinion and Decision After Reconsideration, dated 1/25/18, at pp. 12-14.

[36] *Kos v. Workers' Comp. Appeals Bd.* (2008) 73 Cal. Comp. Cases 529 (writ denied) (apportionment to causation may be based on age-related degenerative conditions).

> 4663 allows for apportionment pathology and asymptomatic prior conditions.[37]

Kos provides further support for the demise of the eggshell skull rule in California workers' compensation. By confirming that apportionment to disability can include instances in which it is not clear when (or even whether) the underlying condition would have progressed to cause disability, the case stands for the proposition that the employer is no longer required to "take the employee as it finds him or her."[38]

Using a different example, a finding that an employee has high cholesterol would be merely a risk factor for stroke and heart disease; therefore apportionment to high cholesterol in a stroke case would not be valid apportionment under *Escobedo*.[39] But where that high cholesterol is demonstrated to have caused significant narrowing or hardening of the blood vessels to the point that such occlusion is a causative factor in the stroke and heart disease, apportionment to that underlying pathology is valid under *Escobedo*, even if the condition had previously been asymptomatic.

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[37] *Kos*, *supra*, 73 Cal. Comp. Cases at 533 [emphasis added].

[38] Again, inasmuch as the new apportionment regime applies only to causation of permanent disability, the end of the eggshell skull rule would not affect an injured worker's unapportionable rights to temporary disability or medical treatment.

[39] *American Airlines v. Workers' Comp. Appeals Bd. (Milivojevich)* (2007) 72 Cal. Comp. Cases 1415 (writ denied).

That is exactly what happened in this case: The diagnostic testing for applicant's underlying vasovascular spasticity condition demonstrated that the pre-existing and asymptomatic pathology had progressed to the point that the medical expert considered it to be a causative factor in applicant's current disability. The PQME did not apportion to injury, but rather to the actual pathology presently causing disability in this injured worker.

In a more recent case, *Alvarez v. Workers' Comp. Appeals Bd.*,[40] the Appeals Board upheld the WCJ's finding of apportionment where the medical evidence supported a finding that 95% of applicant's condition for which she needed a wheelchair was apportionable to her nonindustrial (and previously undiagnosed) multiple sclerosis and only 5% to her industrial injury. The IME had found permanent and total disability requiring the use of a wheelchair, but opined that only 5% of the need for a wheelchair was due to the industrial injury. According to the Appeals Board in *Alvarez*, "It would be **fundamentally unfair** to award applicant 100% permanent total disability without apportionment for the use of a wheelchair due 95% to nonindustrial multiple sclerosis."[41]

The analysis in *Alvarez* applies to the instant case as well. In *Alvarez*, the apportionment of the disability (need for wheelchair) to a nonindustrial disease

[40] *Alvarez v. Workers' Comp. Appeals Bd.* (2017) 2017 Cal. Wrk. Comp. P.D. LEXIS 209 (Noteworthy Board Panel Decision).
[41] *Alvarez, supra*, 2017 Cal. Wrk. Comp. P.D. LEXIS at *6.

process (multiple sclerosis) exactly mirrors Dr. Kaye's apportionment of applicant's disability (blindness) to the nonindustrial disease process (vasovascular spasticity) at issue here. Just as the injured worker's injury to her low back in *Alvarez* was not caused by her underlying MS, applicant's **injury** in this case (being hit in the head) was not caused by his underlying vasculopathy. Rather, that underlying condition or pathology played a majority role in the causation of applicant's **disability**, *i.e.*, his blindness:

> Q: Do you agree that the **cause of the disability**, which is the [effective] total vision loss in his left eye is due to the blows to the head on March 2015?
>
> A: Partially, yes…
>
> […]
>
> Q: So are you saying that it is in part the blow to the head and in part due to work stress?
>
> A: **You left out the whole other part.** I pointed out to both of you that he has a vasospastic-type personality with a long history of migraine that's associated with this, and the majority of that is from his underlying condition and, yes, at the time of a stress in his life such as at work or being smacked in the head with some dogs, that places him at a much higher risk category and I am comfortable in my own mind attributing that to the severe loss of vision.
>
> […]
>
> Q: So he was just more susceptible to losing his eyesight?
>
> A: Yes.
>
> Q: And so your -- then your final accounting of the apportionment then is what, if you could reiterate?

> A: Yes. I arrived at the figure of 90 -- excuse me -- **90 percent due to the underlying condition** and 10 percent due to the stress of the injuries.[42]

As this section of his deposition readily demonstrates, Dr. Kaye was asked about causation of disability, and answered the question. Contrary to the Appeals Board's analysis, there has been no improper apportionment to causation of injury. Instead, it is the rightful apportionment of the causes of the disability that validates the medical-legal analysis in this case.

2. THE PQME HAS NOT IMPERMISSIBLY APPORTIONED TO RISK FACTORS.

In his Answer, applicant contends that Dr. Kaye has improperly based apportionment on "risk factors."[43]

Amici curiae herein do not argue that applicant's hypertension, vasovascular spasticity, and left central vein occlusion were merely "risk factors" that made him more susceptible to a spontaneous loss of vision; under such circumstances, no apportionment would be permitted. Instead, the medical evidence in this case shows

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[42] Deposition of Dr. Kaye, dated 6/17/16, at 13:6-15:7 [emphasis added]. In a subsequent report, Dr. Kaye settled on an 85%-15% split of apportionment to causation.

[43] Answer to Petition for Writ of Review, dated 3/30/18, at p. 22. Notably, the PQME was questioned as to whether applicant's migraine headaches were "nothing more than a risk factor"; he was not asked whether the actual underlying vasovascular spasticity condition was merely a risk factor. Moreover, the PQME's only reference to "risk factor" was in an affirmative response to a question from applicant's attorney; in virtually all other instances, the PQME uses the term "underlying condition."

that the industrial event *aggravated* his underlying condition and thus applicant's underlying pathology represents an actual, current, and contributing cause of his overall permanent disability following the injury.[44]

3. APPORTIONMENT IS NOT LIMITED TO DEGENERATIVE CONDITIONS.

In the proceedings below, it has been suggested that only a degenerative disease process is eligible for apportionment to causation.[45] To the contrary, neither *Escobedo* nor *Brodie* includes any such limitation. Indeed, subsequent cases have confirmed that virtually any pre-existing, asymptomatic, nonindustrial condition, pathology, or disease may be a valid basis for apportionment, including inherited cervical spine pathology,[46] and congenital hearing loss.[47]

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[44] "It is my opinion that the muzzle dog assault to the left side of his head aggravated his underlying condition.… For this reason, I believe that **90%** is due to the underlying condition and **10%** due to stress of the injuries." PQME Report of Dr. Kaye, dated 12/29/15, at pp. 10-11 [emphasis in original]. In a subsequent report, Dr. Kaye settled on an 85%-15% split of apportionment to causation.

[45] *See, e.g.*, Findings & Award / Opinion on Decision, dated 8/11/17, at 4.

[46] *City of Jackson v. Workers' Comp. Appeals Bd. (Rice)* (2017) 11 Cal. App. 5th 109.

[47] *Acme Steel v. Workers' Comp. Appeals Bd. (Borman)* (2013) 218 Cal. App. 5th 1137.

4. WHERE THE QME HAS PROVIDED SUBSTANTIAL MEDICAL EVIDENCE, THE APPEALS BOARD MAY NOT SUBSTITUTE ITS JUDGMENT FOR THAT OF THE MEDICAL EXPERT.

The medical evidence from Dr. Kaye does not merely apportion to risk factors, or to causation of injury. Instead, by demonstrating through multiple medical-legal reports and deposition testimony the "how and why" applicant's underlying vasovascular spasticity condition was causing a portion of his present disability, Dr. Kaye has provided an opinion in full conformity with the new apportionment regime.[48]

In determining whether a medical opinion constitutes substantial evidence, the Appeals Board may not substitute its judgment when the physician's conclusion was based on his expertise in evaluating the significance of the medical facts.[49] Dr. Kaye's reports constitute substantial evidence. The reports reflect that he reviewed numerous medical records and reports, covering the period of time from shortly after the date of injury through a few months before he issued his own report. He

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[48] *See, e.g., Costa v. Workers' Comp. Appeals Bd*. (2011) 76 Cal. Comp. Cases 261, 264 (writ denied): "Applicant's argument that the WCJ improperly apportioned to a risk factor ignores the medical opinion that applicant's pre-existing congenital condition went beyond being a risk factor to being an actual cause of his increased permanent disability."

[49] *Yeager Construction v. Workers' Comp. Appeals Bd. (Gatten*) (2006) 145 Cal. App. 4th 922, 930 (where physician has "made a determination based on his medical expertise of the approximate percentage of permanent disability caused by" nonindustrial components, Appeals Board may not substitute its judgment).

performed a thorough examination and diagnostic testing.[50] The reports and his deposition testimony demonstrate that Dr. Kaye is familiar with both applicant's medical history as well as "the concept of apportionment [… and] the exact nature of the apportionable disability."[51] Finally, his opinions are based on his medical expertise in evaluating the significance of the facts of applicant's injuries, as required.[52] Based on the substantial medical evidence of apportionment provided by Dr. Kaye, the Appeals Board has erred by disregarding the opinion of the medical expert.[53]

VII. CONCLUSION

Where an evaluating physician determines that a pre-existing condition and/or disease process causes a percentage of a current disability, and apportions

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[50] The record reflects that Dr. Kaye performed a physical evaluation, undertook an examination with instrumentation, obtained retinal photography, and performed injection of dye to measure circulation in the left eye. *See* Deposition of Dr. Kaye, dated 6/17/16, at 8:3-7.

[51] *Escobedo*, *supra*, 70 Cal. Comp. Cases at 621 (en banc).

[52] *Gatten*, *supra*, 145 Cal. App. 4th at 930; *see also Andersen v. Workers' Comp. Appeals Bd*. (2007) 149 Cal. App. 4th 1369. Dr. Kaye's curriculum vitae is attached to his deposition transcript.

[53] *See, e.g.*, *Gatten*, *supra*, 145 Cal. App. 4th at 930 ("We find nothing questionable about a medical expert's reliance on an accepted diagnostic tool. A medical expert may well view a person's history of minor back problems as being more significant in light of evidence of substantial degeneration of the back shown by an MRI…[The QME's] conclusion cannot be disregarded as being speculative when it was based on his expertise in evaluating the significance of these facts. This was a matter of scientific medical knowledge and the Board impermissibly substituted its judgment for that of the medical expert.").

accordingly, he is simply following the new apportionment regime outlined in *Brodie*. The physician is recognizing that a portion of the disability exists for reasons other than the industrial injury. In awarding such apportionment, the WCAB would be in full compliance with the Labor Code requirement that an injured worker may be compensated only for the disability caused by the industrial injury.[54]

But here, the WCAB ignored the substantial medical evidence presented by Dr. Kaye, who explained in painstaking detail that applicant's current level of impairment could not be attributed solely to the industrial injury. Dr. Kaye provided an extensive explanation of how and why the pre-existing asymptomatic conditions are presently causing a portion of applicant's current disability. Faced with the unrebutted substantial medical evidence from the PQME, the WCAB should have parceled out the "causative sources -- nonindustrial, prior industrial, current industrial -- and decide[d] the amount directly caused by the current industrial source."[55]

The Appeals Board erred in this case by continuing to endorse the traditional eggshell skull rule – a concept that has been eliminated in California's workers'

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[54] Lab. C. §4664.

[55] *Brodie, supra*, 40 Cal. 4th at 1328.

compensation system by SB 899.[56] Because the Appeals Board below failed to properly evaluate the medical-legal evidence under the new rules of apportionment, the decision below is invalid and should be reversed.

Respectfully submitted,

July 7, 2018

/s/ *Ellen Sims Langille*

Ellen Sims Langille, CWCI General Counsel
elangille@cwci.org
Counsel for *Amici Curiae* CWCI / CAJPA

[56] Because temporary disability and medical treatment benefits are not apportionable, those rights are unaffected by either the new apportionment regime or the end of the eggshell skull rule – both of which address permanent disability only.

VIII. CERTIFICATE OF SERVICE

I certify that on July 7, 2018, I electronically filed the foregoing

AMICUS CURIAE BRIEF OF CALIFORNIA WORKERS' COMPENSATION INSTITUTE and CALIFORNIA ASSOCIATION OF JOINT POWERS AUTHORITIES IN SUPPORT OF PETITIONER CITY OF PETALUMA

with the Clerk of the Court for the First District Court Of Appeal by using the appellate TrueFiling system. The following case participants were served electronically through the TrueFiling system:

Karina Kowler Law Offices of Linda J. Brown 999 5th Ave Ste 430 San Rafael, CA 94901	William E. Davis Mullen & Filippi, LLP 111 Santa Rosa Avenue, Suite 200 Santa Rosa, CA 95404
John Frederick Shields, Jr Workers' Compensation Appeals Board P.O. Box 42459 San Francisco, CA 94142	Mark Gearheart Gearheart & Sonnicksen 367 Civic Drive, Suite 17 Pleasant Hill, CA 94523

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,

July 7, 2018

/s/ *Ellen Sims Langille*
Ellen Sims Langille, CWCI General Counsel
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