

# Apportioning to Genetic Disease

Why Orthopaedic Surgeons Need to be  
Thinking About This :  
Legislation Pending in Sacramento

# Conflict of Interest Statement

- None.

# *City of Jackson: Why it Matters*

- Brief History of Apportionment
- Impact of SB 899 (2004)
- *Rice v. City of Jackson* (2017)
- The Legislature responds: SB 899 (2018)

# SB 818 (Statutes of 1917, Chapter 586)

(10) The percentage of permanent disability caused by any injury shall be so computed as to cover the permanent disability caused by that particular injury without reference to any injury previously suffered or any permanent disability caused thereby.

# SB 899 (Statutes of 2004, Chapter 34)

- Labor Code Sections 4663 & 4664
- WCAB case law provides that an apportionment finding is only valid if the physician's medical opinion:
  - 1) Framed in terms of reasonable medical probability;
  - 2) Not speculative;
  - 3) Based on pertinent facts and on an adequate examination;
  - 4) Sets forth the reasoning in support of its conclusion; and
  - 5) Explains how and why the apportionable factor is responsible for the disability.

(See *Escobedo v. Marshalls*, (2005) 70 Cal. Comp. Cases 604)

# 2017 DWC Ed Conference Handout

“Counsel, medical providers, and other practitioners should be alert and sensitive to this issue at all times, and should raise the issue and act accordingly if any language suggestive of gender or age-based discrimination, or discrimination based on any other protected category, appears in a medical report. **A workers’ permanent disability compensation should never be reduced as a result of discrimination.**” (emphasis added)

# Title 8, §41. Ethical Requirements.

(c) All QMEs, regardless of whether the injured worker is represented by an attorney, shall with respect to his or her comprehensive medical-legal evaluation:

...

**(3) Render expert opinions or conclusions without regard to an injured worker's race, sex, national origin, religion or sexual preference.**

(4) Render expert opinions or conclusions only on issues which the evaluator **has adequate qualifications, education, and training**. All conclusions shall be based on the facts and on the evaluator's training and specialty-based knowledge and shall be without bias either for or against the injured worker or the claims administrator, or if none the employer.

# City of Jackson Background

- Police Officer with CT injury (29 Years Old)
- 1998 vehicle roll-over, knee surgery, 2004 shoulder surgery
- Familial history of hip and back problems
- Initial QME report apportioned 25% to “personal history”
- Subsequent Report apportioned 49% to personal history, “including genetic issues”

# Initial QME Report (2011)

20 causation and apportionment as follows:

21 Causation stems from (1) his work activities with the City of Jackson since  
22 his employ in 8.05; (2) his prior work activities, including the construction  
23 and scaffold activities for which he was seen in 2003 complaining of neck  
24 pain; (3) his personal injuries include the motor vehicle accident of 1998,  
25 as well as his recreational activities, for example, his rowing activity was  
26 sufficient to cause his ACL and meniscal injury; therefore, they would  
27 likely have an impact on his cervical spine; (4) his personal history. There  
are twinning studies out of Minnesota and other research that indicate  
heritability and genetics play a significant role in the genesis of  
degenerative disease of the spine. This is rational, as the collagen, which is  
the building block of all of our tissues, and its assembly, tensile strength,  
and other mechanical forces are related to the DNA and genetic coding. His  
father was noted to have a very significant history of back problems, as  
well as a need for a hip replacement, which indicates degenerative issues as

**RICE, Christopher**

# City of Jackson WCAB Decision (2015)

1 appportionment analysis, Dr. Blair is assigning causation to applicant's genetic makeup and not to specific  
2 debilitating factors causing his current level of disability. Just as the WCJ found Dr. Blair's  
3 appportionment to prior injuries failed to satisfy the *Escobedo* requirements, finding causation on  
4 applicant's "genetics" opens the door to appportionment of disability to impermissible immutable factors.  
5 Further, relying upon applicant's genetic makeup leads Dr. Blair to appportion the causation of applicant's  
6 injury rather than appportionment of the extent of his disability. Without proper appportionment to specific  
7 identifiable factors, we cannot rely upon Dr. Blair's determination as substantial medical evidence to  
8 justify appportioning 49% of applicant's disability to non-industrial factors.

9       Accordingly, we will amend the WCJ's determination to defer the issue of permanent disability,  
10 as well as the award of attorney fees, and return this matter to the trial level for a new unappportioned  
11 award of permanent disability.

12       For the foregoing reasons,

13       **IT IS ORDERED** that as our Decision After Reconsideration, the Findings of Fact and Awards,  
14 issued March 14, 2014, is **AMENDED** as follows:

# City of Jackson Decision (2017)

legal decisions de novo. (*Department of Rehabilitation v. Workers' Comp. Appeals Bd.* (2003) 30 Cal.4th 1281, 1298; *Le Vesque v. Work's Comp. Appeals Bd.* (1970) 1 Cal.3d 627, 637.) This case turns on the Board's legal decisions.

## II

### Apportionment May Be Properly Based on Genetics/Hereditability

The Board opined without explanation that apportioning causation to “ ‘genetics’ opens the door to apportionment of disability to impermissible immutable factors.” We perceive no impermissible apportionment here, and the Board's prior apportionment decisions under similar circumstances belies the validity of its statement.

Prior to 2004, when the Legislature enacted Senate Bill No. 899 (2003-2004 Reg. Sess.), apportionment based on causation was prohibited. (*Brodie v. Workers' Comp. Appeals Bd.* (2007) 40 Cal.4th 1313, 1326 (*Brodie*)). A disability that resulted from both industrial and nonindustrial causes was apportionable only if the nonindustrial portion would have resulted from the normal progression of the nonindustrial disease. (*Ibid.*) This meant employers were liable for the entire disability if the disability arose in part

# City of Jackson Decision (2017)

...explained up to 75 percent by genes alone.’ ” In other words, every case of degenerative disc disease in adults is caused in part by genetics or heredity, and the other part by other factors. This is also the reason that Rice’s claim that Dr. Blair’s opinion lacked evidentiary support is wrong. Rice argues Dr. Blair cannot have known his degenerative disc disease was caused by genetics because she never researched his familial medical history. It was unnecessary for Dr. Blair to conduct such an analysis because her research indicated that genetics or heredity was a majority factor in all cases of degenerative disc disease. This explains Dr. Blair’s response to Rice’s attorney’s request that Dr. Blair consider a hypothetical in which one patient has cervical degenerative disease caused by genetics and the other one has the disease caused by environmental factors. She responded that such a hypothetical situation would never be seen in practice and that the assumption was not reasonable.

Dr. Blair’s reports meet all of the requirements of *Escobedo*. Dr. Blair expressly stated that confidence in her opinion was predicated on reasonable degree of medical

# SB 899: The Legislature Responds

- Originally a bill authored by Senator Bradford, now authored by Senator Pan
- States that the “City of Jackson decision is an abhorrent decision that violates legal norms, undermines legislative intent, and abuses the dignity of injured workers.”
- Declares intent of the Legislature to abrogate the decision in City of Jackson and to affirm prior administrative and judicial decisions, including Rice, prohibiting apportionment of disability to immutable factors.
- It is also the intent of the Legislature that this subdivision does not prohibit apportionment of disability to specific identifiable factors.

# Contact Information

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