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Apportionment of Permanent Disability: A Review of Recent California Court Opinions

By WARREN L. HANNA*

ALTHOUGH commonly used in workmen's compensation parlance in reference to situations in which a greater disability is involved than that caused by the industrial injury under consideration, the term "apportionment" cannot be found in those provisions of the California Labor Code dealing with determination of the extent of permanent disability.¹ As used in compensation procedure, apportionment signifies the action that the appeals board takes, or may be asked to take, in segregating the residuals of an industrial injury from those attributable to other industrial injuries or to nonindustrial factors. Undoubtedly, the term originally found its derivation in those provisions of the workmen's compensation law limiting the employer's liability for permanent disability to that "portion" due to injury in the employment,² or to that "proportion" of permanent disability reasonably attributable to aggravation of preexisting disease by injury in the employment.³

Pertinent Statutes

The statutory formulae that govern the matter of apportioning permanent disability are contained in two sections of the California Labor Code. The first of these, section 4663, deals with situations involving aggravation of preexisting disease by industrial injury, and reads as follows:

In case of aggravation of any disease existing prior to a compensable injury, compensation shall be allowed only for the proportion of the disability due to the aggravation of such prior disease which is reasonably attributed to the injury.

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1. CAL. LABOR CODE §§ 4663, 4750. The word "apportionment" itself is found only in section 5500.5 of the Labor Code, which deals with "occupational disease arising out of more than one employment."

2. CAL. LABOR CODE § 4750.

3. *Id.* § 4663.

The other provision, section 4750, deals with situations where the residuals of a compensable injury are superimposed upon "previous permanent disability or physical impairment." It reads as follows:

An employee who is suffering from a previous permanent disability or physical impairment and sustains permanent injury thereafter shall not receive from the employer compensation for the later injury in excess of the compensation allowed for such injury when considered by itself and not in conjunction with or in relation to the previous disability or impairment.

The employer shall not be liable for compensation to such an employee for the combined disability, but only for that portion due to the later injury as though no prior disability or impairment had existed.

It is interesting to note that the language of these sections has remained virtually unchanged for more than 50 years;⁴ the only variation in wording since codification of the workmen's compensation law in 1937 was the addition in 1945⁵ of the words "from the employer" in the first sentence of section 4750, in connection with the simultaneous enactment of subsequent injuries legislation.⁶

It is of equal interest to note that interpretations of these enduring and seemingly clear statutory provisions have not, until recently, varied greatly, either at the level of the Workmen's Compensation Appeals Board (and its predecessor, the Industrial Accident Commission) or of the appellate courts. To some extent, of course, there have been minor variations in construction arising from the necessity of applying the statutory limitations to differing factual situations, and from instances where the language of an earlier opinion proved too broad or too narrow for proper application to a later set of facts.

Judicial Background

The classic case dealing with the subject of apportionment, as it pertains to preexisting disease, is *Tanenbaum v. Industrial Accident Commission*,⁷ decided by the Supreme Court of California in 1935. The situation was one where a latent arthritis, assertedly asymptomatic prior to industrial injury, was "lighted up" by the injury. The condition was rated at 33-1/3 percent and apportioned one third to "pre-existing dormant disease" and two thirds to industrial injury. This result was affirmed by the court, using the following language:

It is now definitely settled that the acceleration, aggravation

4. Cal. Stats. 1917, ch. 586, § 9, at 836.

5. Cal. Stats. 1945, ch. 1161, § 1, at 2209.

6. CAL. LABOR CODE §§ 4751-55.

7. 4 Cal. 2d 615, 52 P.2d 215 (1935).

or "lighting up" of a preexisting disease is an injury in the occupation causing the same The underlying theory is that the employer takes the employee subject to his condition when he enters the employment, and that therefore compensation is not to be denied merely because the workman's physical condition was such as to cause him to suffer a disability from an injury which ordinarily, given a stronger and healthier constitution, would have caused little or no inconvenience. . . .

We find nothing in the above authorities . . . that in any way militates against the apportionment made in the present case. As we read the record in this proceeding, the petitioner is now suffering from a disability made up in part of an industrial disability growing out of the injury, including the aggravation or "lighting up" of the preexisting dormant arthritic condition, and, in part, though in a lesser degree, of what may be termed a non-industrial disability, resulting from the normal progress of the preexisting arthritis. Obviously, the latter disability is not attributable to industry and should not be saddled thereon. It is this latter or non-industrial disability, resulting from the natural and normal progress of the preexisting condition, that underlies the finding that petitioner's permanent disability is "partly caused by preexisting dormant disease and partly by said injury" and requires the apportionment here made. Such apportionment finds ample support in at least one of the medical reports filed with the commission⁸

Subsequent appellate action continued to give recognition to finality of the actions of the commission when resolving factual conflicts on the issue of apportionment. In *Industrial Indemnity Co. v. Industrial Accident Commission*,⁹ the court stated the rule in these words:

It was a question of fact for determination of the Commission as to whether applicant's permanent disability resulted from the effects of the accident, including the aggravative effect of the accident upon a preexisting disease. If a part of the disability resulted from the normal progress of a preexisting disease then a portion of the permanent disability rating herein should have been attributed to the preexisting disease. The question therefore is whether there was substantial evidence to support the determination of the Commission that there should be no apportionment.¹⁰

This statement, of course, is based upon the provisions of section 5953 of the Labor Code and has been echoed in many court opinions. It has recently been restated by our supreme court in the case of *Reynolds Electrical and Engineering Co. v. Workmen's Compensation Appeals Board*,¹¹ in the following words:

Whether a disability results in whole or in part from the normal progress of a preexisting disease or represents a fully com-

8. *Id.* at 617-18, 52 P.2d at 216.

9. 95 Cal. App. 2d 443, 213 P.2d 11 (1949).

10. *Id.* at 450, 213 P.2d at 15.

11. 65 Cal. 2d 438, 421 P.2d 102, 55 Cal. Rptr. 254 (1966).

pensable lighting up or aggravation of a preexisting condition is a factual question for the Commission to determine, and its award will not be annulled if there is any substantial evidence to support it.¹²

In reviewing appellate action over the 30 years immediately following the landmark decision of the supreme court in the *Tanenbaum* case,¹³ it becomes clear that the deciding factor in each case has been the question whether the commission had before it evidence of a substantial character to support its action in respect to apportionment. In a number of cases involving assertedly asymptomatic preexisting conditions, the commission's denial of requested apportionment was upheld on the ground that the record contained medical evidence adequately supporting such action.¹⁴ In others, and upon similar grounds, an apportionment of the disability was upheld.¹⁵

Recent Appellate Action

In June 1968, the California Supreme Court handed down two decisions reflecting a more critical examination of the substantiality of medical evidence being relied upon by the appeals board for its apportionment of permanent disabilities in cases involving assertedly asymptomatic preexisting conditions.¹⁶ In these decisions, the court determined that medical opinion based merely on a doctor's feeling that it would be "fair" to conclude that a certain part of the final permanent disability was attributable to preexisting problems or pathology and the balance to the aggravating incident was merely a legal conclusion and did not represent substantial evidence to support an apportionment.

In one of these opinions, *Zemke v. Workmen's Compensation Ap-*

12. *Id.* at 443, 421 P.2d at 105, 55 Cal. Rptr. at 257.

13. 4 Cal. 2d 615, 52 P.2d 215 (1935); see text accompanying note 6 *supra*.

14. Reynolds Elec. & Eng'r Co. v. Workmen's Comp. App. Bd., 65 Cal. 2d 438, 421 P.2d 102, 55 Cal. Rptr. 254 (1966); Gledhill Chevrolet v. Industrial Acc. Comm'n, 62 Cal. 2d 59, 396 P.2d 586, 41 Cal. Rptr. 170 (1964); Argonaut Ins. Co. v. Industrial Acc. Comm'n, 57 Cal. 2d 589, 371 P.2d 281, 21 Cal. Rptr. 545 (1962); Pacific Employers Ins. Group v. Workmen's Comp. App. Bd., 247 Cal. App. 2d 102, 55 Cal. Rptr. 176 (1966); Idaho-Maryland Mines Corp. v. Industrial Acc. Comm'n, 104 Cal. App. 2d 567, 232 P.2d 11 (1951); Industrial Indem. Co. v. Industrial Acc. Comm'n, 95 Cal. App. 2d 443, 213 P.2d 11 (1949).

15. Southern Cal. Edison Co. v. Industrial Acc. Comm'n, 238 Cal. App. 2d 567, 48 Cal. Rptr. 46 (1965); Gross v. Industrial Acc. Comm'n, 30 Cal. Comp. Cases 372 (1965); Bowler v. Industrial Acc. Comm'n, 135 Cal. App. 2d 534, 287 P.2d 562 (1955); California Subsequent Injuries Fund v. Industrial Acc. Comm'n, 135 Cal. App. 2d 544, 288 P.2d 31 (1955).

16. *Zemke v. Workmen's Comp. App. Bd.*, 68 Cal. 2d 794, 441 P.2d 928, 69 Cal. Rptr. 88 (1968); *Berry v. Workmen's Comp. App. Bd.*, 68 Cal. 2d 786, 441 P.2d 908, 69 Cal. Rptr. 68 (1968).

peals Board,¹⁷ Justice Tobriner, speaking for a unanimous court, cited the *Tanenbaum* case and distinguished the case at bar on the ground that nowhere in its medical reports was there an indication that the employee's disability was partially "due to the natural progress" of his preexisting arthritic condition. The basis for the decision would seem to have been well summarized in the following excerpt from the *Zemke* opinion:

Although the Board must rely on expert medical opinion in resolving the issue of apportionment, an expert's opinion which does not rest upon relevant facts or which assumes an incorrect legal theory cannot constitute substantial evidence upon which the Board may base an apportionment finding.¹⁸

The "incorrect legal theory" mentioned by the court had reference to the doctor's apparent assumption that disability is apportionable between the effects of disease and injury without the necessity for showing that part of it was due to natural progress of the underlying pathology, and to his opinion that the employee would have recovered sooner had he not had the preexisting condition. The principles enunciated in *Zemke* and *Berry v. Workmen's Compensation Appeals Board*,¹⁹ have been subsequently adhered to in other court of appeal decisions involving similar factual situations.²⁰

Effect of Recent Court Action

It is apparent that the so-called ground rules or guide lines pertaining to the apportionment of permanent disability have been tightened considerably. It is no longer sufficient for an attending or examining physician to make an off-hand estimate of a percentage of permanent disability which he feels it would be "fair" to attribute to the underlying disease, particularly since section 4663 uses the word "reasonably" in establishing the basis for such an apportionment.²¹

The judicially established rules governing the apportionment of cases in the category under discussion may be summarized as follows:

(1) The acceleration, aggravation, or "lighting up" of a preexisting, nondisabling condition is an injury in the employment causing it.

(2) If the resultant permanent disability is entirely due to the industrial injury, the employer is fully liable and there can be no apportionment.

17. 68 Cal. 2d 794, 441 P.2d 928, 69 Cal. Rptr. 88 (1968).

18. *Id.* at 798, 441 P.2d at 931, 69 Cal. Rptr. at 91.

19. 68 Cal. 2d 786, 441 P.2d 908, 69 Cal. Rptr. 68 (1968).

20. *Skinner v. Workmen's Comp. App. Bd.*, 269 A.C.A. 1021, 75 Cal. Rptr. 314 (1969); *Negri v. Workmen's Comp. App. Bd.*, 34 Cal. Comp. Cases 176 (1969).

21. The wording of this statute is set out in the text accompanying notes 3-4 *supra*.

(3) Whether a disability results in whole or in part from the normal progress of a preexisting disease or represents a fully compensable lighting up or aggravation of a preexisting condition is a factual question for the appeals board to determine, and its award will not be annulled if there is any substantial evidence to support it.

(4) The supporting evidence, to be substantial, must be medical opinion based upon relevant facts and correct legal theory; apportionments not based upon such evidence are subject to annulment. The recent opinions have made it clear that medical evidence will not be deemed substantial when:

(a) It merely states a legal conclusion, *i.e.*, offers the doctor's statement, without disclosure of its underlying basis, that it would be fair to charge a specified percentage of the patient's over-all disability to preexisting factors and the balance to the industrial injury.

(b) It provides no indication of how much of the disability has been due to underlying pathology and its natural progress apart from work aggravation, *i.e.*, how much of such disability would be present even though the industrial injury had not occurred.

(c) It is predicated upon the fact or belief that the underlying preexisting condition hindered recovery from the industrial injury, or that the disability was greater than that which would have resulted if the employee had had a stronger or healthier constitution.

Meeting the New Evidentiary Requirements

Thus, when seeking medical opinion on the issue of apportionment under Labor Code section 4663, it would be advisable to direct the doctor's attention to the considerations expressed herein and, where appropriate, to request that his opinion in the matter provide answers to the following:

(1) Is any part of the patient's permanent disability due to the normal progress of underlying pathology which had been either dormant or active prior to injury, *i.e.*, does he now have residuals which would be present even though the industrial injury had not occurred?

(2) If the answer is in the affirmative, how much, or what percentage, of the over-all disability may reasonably be attributed to the normal progress of such pathology, apart from any aggravating effect of the injury?

(3) What are the facts and reasons (3) on which the opinion is based?

In other cases of assertedly asymptomatic preexisting pathology, where there has been no normal progress of the disease subsequent to

injury, it is at times important, under section 4750 of the Labor Code, to have an opinion on the extent of pre-injury disability.²² In other words, there are many cases in which the preexisting condition, whether admittedly recognized by the patient or not, has progressed, prior to injury, to the point where if attributable to an industrial injury, it would have constituted a ratable disability or impairment.²³

Such a situation is commonly presented by an individual with moderately advanced heart disease of which he may have been unaware. The condition, as far as he is concerned, was "asymptomatic" because he had continued to be able to perform his duties (often in spite of an insidious decrease in capacity), and because, not having consulted a physician who could become fully informed on his condition, appropriate limitations upon the nature and extent of his activities had not been imposed.

In many such cases, it is obvious to the specialist who sees the patient soon after a disabling heart attack or who has become familiar with the medical status of the case, that pre-injury coronary deterioration had not only reached the point where the patient was suffering a handicap in his ability to perform occupational activity, but also where, if the condition had then been known to the patient's physician, the latter would have advised avoidance of heavy lifting, of heavy work or, perhaps, of any activity not sedentary in character.

In this connection, one should remember that, on the basis of permanent disability standards under the compensation law, the question is not whether the employee was able to carry on his occupational duties prior to injury, but the extent to which he may have been theretofore disabled. In such cases, the opinion sought from the medical expert should cover the following:

(1) From the doctor's knowledge of the medical facts of the case, had the patient's preexisting underlying pathology (whether known to him or not) reached the point where it is reasonable to believe that it was significantly reducing his pre-injury capacity to function?

(2) If the answer is in the affirmative, then to what extent was there a probable reduction of capacity?

(3) Had the preexisting condition reached a point where, if known to the medical expert in the position of the patient's personal physician, he would have advised the patient to restrict his activities to

22. This statute is set out in the text accompanying notes 3-4 *supra*.

23. *E.g.*, *Bowler v. Industrial Acc. Comm'n*, 135 Cal. App. 2d 534, 287 P.2d 562 (1955).

any extent (such as avoidance of heavy work, limitation to sedentary duties, or other restriction)?

(4) If the answer is in the affirmative, what limitation or restriction would have been advised?

(5) In the event it is believed that there was a significant pre-injury reduction of functional capacity, what are the facts and reasons on which such an opinion is based?

Summation

From the standpoint of the appeals board, the supreme court has made it clear that apportionment under section 4663 of the Labor Code must be made, not merely upon expert medical opinion, but upon opinion which substantially conforms to the criteria set forth in *Berry*²⁴ and *Zemke*.²⁵ It follows that the board will be unable, without such evidence in the record, to make an apportionment that will withstand appeal, no matter how clearly it may otherwise appear that a part of the residuals are nonindustrial in character.

From the standpoint of the employer, the message is equally clear: It would appear that he may now expect to be held liable for all of an injured employee's permanent disability, nonindustrial as well as industrial, unless he succeeds in obtaining and presenting evidence which will be regarded by the court as substantial under its 1968 standards, and which will support apportionment in cases eligible therefor under the provisions of section 4663.²⁶

24. 68 Cal. 2d 786, 441 P.2d 908, 69 Cal. Rptr. 68 (1968); see text accompanying note 15 *supra*.

25. 68 Cal. 2d 794, 441 P.2d 928, 69 Cal. Rptr. 88 (1968).

26. Pursuant to CAL. LABOR CODE § 5705, which places the burden of proof on the party holding the affirmative of the issue, it has been held that the employee is bound to present such evidence as will enable the commission (appeals board) to make a proper apportionment of disability. *Hercules Powder Co. v. Industrial Acc. Comm'n*, 131 Cal. App. 587, 593, 21 P.2d 1014, 1016 (1933). The employee, having no incentive to do so, has rarely assumed this burden; the employer has therefore recognized the necessity on his part to present evidence on the issue. He will now find that useful opinions on apportionment can no longer be obtained by merely asking the doctor for an expression of his views on the subject.