Breaking Down the Most Significant Appellate Decision Since SB899: How *Lindh* Brought Law & Order to the Apportionment Wild West

HANNA BROPHY

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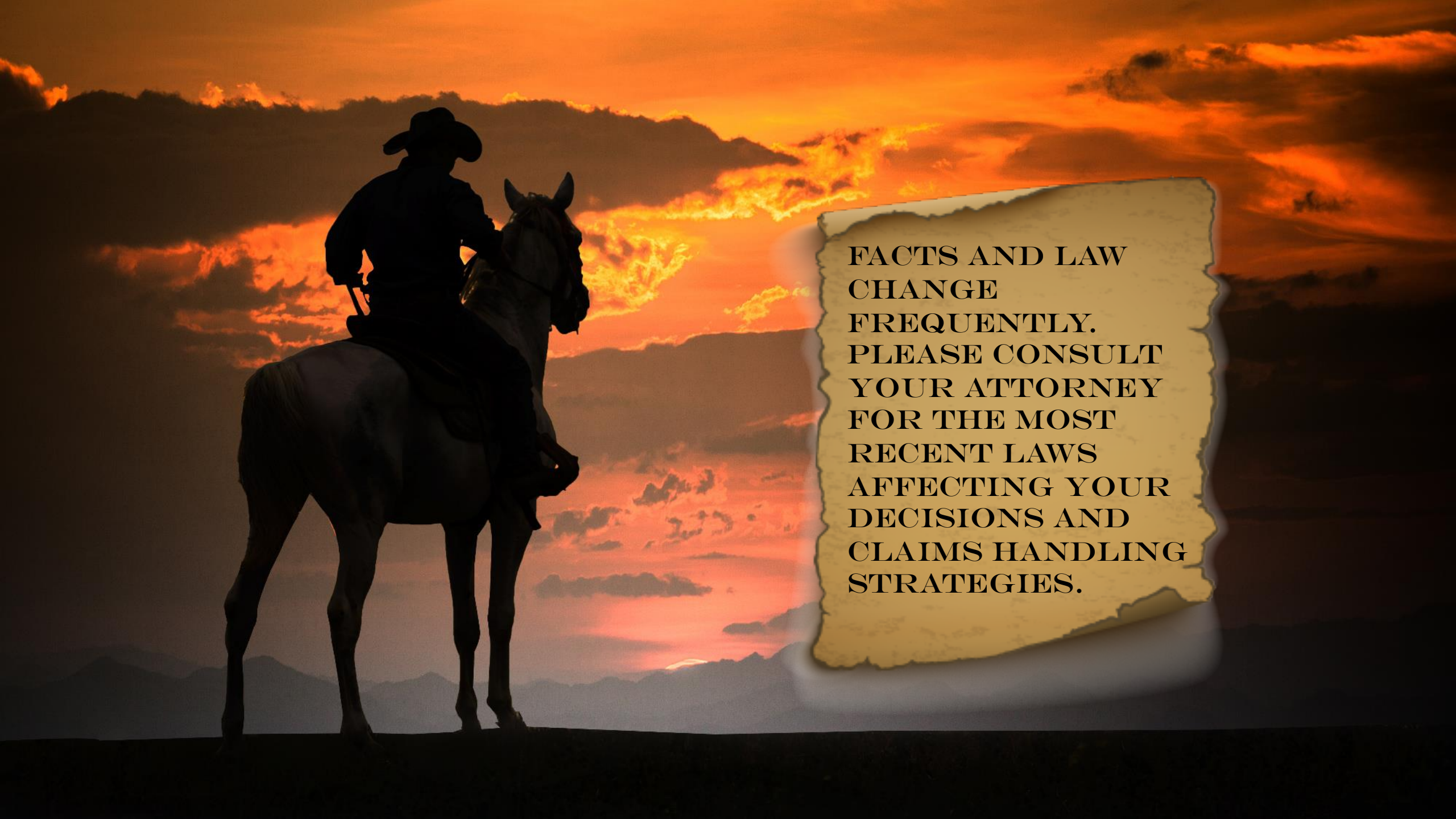
FACTS AND LAW CHANGE FREQUENTLY. PLEASE CONSULT YOUR ATTORNEY FOR THE MOST RECENT LAWS AFFECTING YOUR DECISIONS AND CLAIMS HANDLING STRATEGIES.

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The California Lawyer's Association deemed Bill Workers' Compensation Defense Attorney of the Year in 2019. He has been a practicing attorney for over 25 years.

Bill started his legal career defending public entities in Federal civil rights actions and defending businesses in civil suits. He was also a corporate attorney and led an in house Legal Department. He has been defending workers' compensation claims on behalf of self-insureds, insurance companies, public entities, and TPAs for 17 years. Bill successfully argued the *City of Petaluma v. WCAB (Lindh)* case before the Court of Appeal He frequently lectures the workers' compensation state and national communities on a variety of cutting edge topics.

SERVICES

Workers' Compensation Defense

AWARDS & RANKINGS

California Lawyer's Association Workers Compensation Defense Attorney of the Year for 2019.

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Nathan Geronimo is an attorney in Hanna Brophy's Santa Rosa Office and has been practicing workers' compensation defense with them since 2013. He has appeared before the Workers' Compensation Appeals Boards in Santa Rosa, San Francisco, Oakland, and Eureka.

Nathan attended law school at UC Davis School of Law, and, during that time, he worked as a law clerk for a civil litigation defense firm. After graduating, he was admitted to the California Bar in 2009. In addition to workers' compensation defense, Nathan has also practiced civil litigation, including real estate litigation, contract disputes, corporate fiduciary duty claims, employment law class-action litigation, and products-liability claims. Nathan attended undergrad at San Diego State University and earned a B.A. in Sociology in 2005.

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Charlie **Castillo**

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Charlie Castillo is currently the Human Resources Director for the City of Petaluma. He brings over two decades of experience with many aspects of the Human Resources portfolio ranging from recruitment and retention where Charlie started his career to negotiations and labor relations in his more recent positions. Prior to Petaluma, he worked in the San Francisco Unified School District, the San Francisco Airport, the General Services Agency, and the Fine Arts Museums.

Charlie has also served on the Board for the San Francisco Conservation Corps, the CALPELRA conference planning committee, the California Association of Museums planning committee, and the San Francisco Access Community Advisory Board.

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Greg Mariano is an Assistant Claims Manager at Keenan's Riverside office.

His 18-year career in Workers' Compensation began in New Orleans, Louisiana as a Claims Investigator for a Third-Party Administrator in partnership with Northrop Grumman.

In 2004, he relocated to California where he continued his career as a Claims Examiner, Claims Supervisor, Safety Manager, and for the past three years, Assistant Claims Manager overseeing the Municipalities department for Keenan's Riverside office.

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Discussion Roadmap

- Labor Code section 4663
- Labor Code section 4664
- Cases before *Lindh* including *Hikida*
- *Lindh* bringing order to the Wild West of Apportionment
- Cases after *Lindh* including *Justice* and the impact on *Hikida*
- What about apportionment and COVID-19?

CA Labor Code §4663

Three critical provisions of Labor Code §4663:

(a) Apportionment of permanent disability shall be based on causation.

(b) Any physician who prepares a report addressing the issue of permanent disability due to a claimed industrial injury shall in that report address the issue of causation of the permanent disability.

(c) "…A physician shall 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."

CA Labor Code §4663

Apportionment shall be based on causation.

Causation of permanent disability vs. causation of injury.

§4663 deals only with causation of permanent disability and not causation of injury.

CA Labor Code §4663

Proper consideration of risk factors:

> Does the condition go beyond being a risk factor to being an actual cause of his increased permanent disability.

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.

CA Labor Code §4663

- Age and\or sex?
  - Degenerative conditions
  - Osteoporosis
- Approximate percentage of the permanent disability caused by “other factors”
  - Is it a contributing cause of disability?
  - Can include pathology, asymptomatic underlying conditions, and genetic factors
  - Can be approximate – need not be precise

CA Labor Code §4664

Four critical provisions of Labor Code § 4664:

(a) “The employer shall only be liable for the percentage of permanent disability directly caused by the injury arising out of and occurring in the course of employment.”

(b) If the applicant has received a prior award of permanent disability, it shall be conclusively presumed that the prior permanent disability exists at the time of any subsequent industrial injury. This presumption is a presumption affecting the burden of proof.

CA Labor Code §4664

Four critical provisions of Labor Code § 4664:

(c)(1) The accumulation of all permanent disability awards issued with respect to any one region of the body in favor of one individual employee shall not exceed 100% over the employee's lifetime unless the employee's injury or illness is conclusively presumed to be total in character pursuant to §4662.

(C)(2) "Nothing in this section shall be construed to permit the permanent disability rating for each individual injury sustained by an employee arising from the same industrial accident, when added together, from exceeding 100%".

CA Labor Code §4664

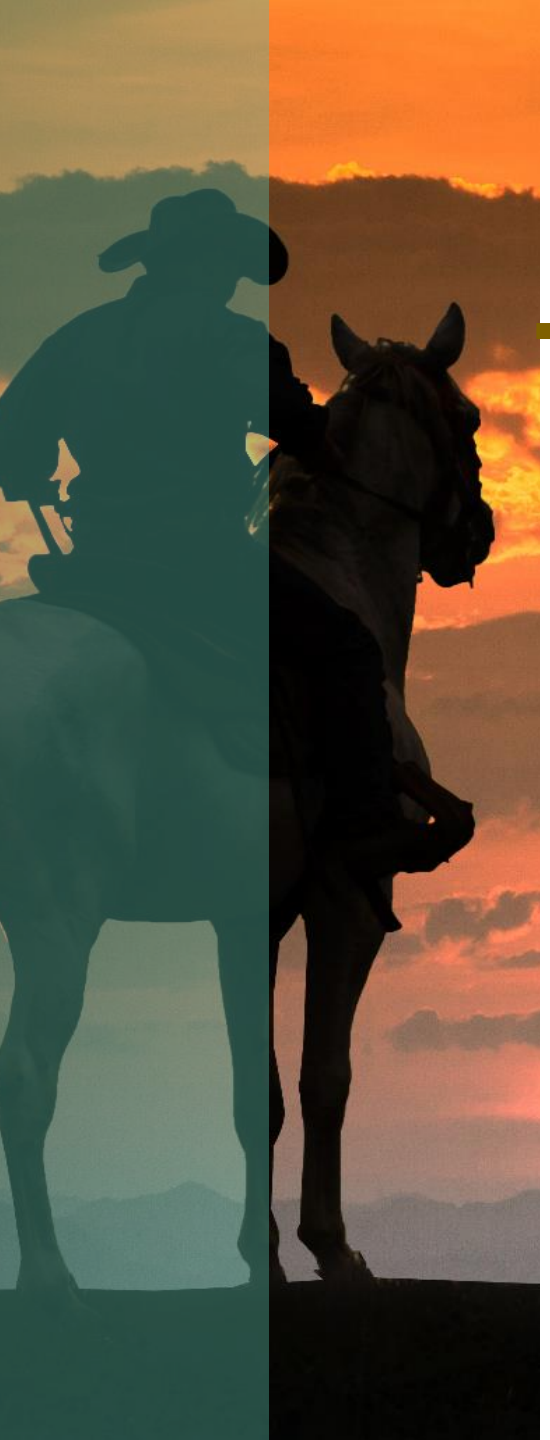
The percentage of permanent disability directly caused by the injury arising out of and occurring in the course of employment.

What about the thin skulled or eggshell skulled Applicant?

Doesn't the employer take the employee as they find them?

The prior rule that the employer takes the employee as it finds them, with no apportionment for asymptomatic, preexisting, or non-disabling conditions, has been replaced by the new apportionment rules in SB 899.

The "thin skulled" Applicant no longer rules in regards to apportionment.



CASES PRIOR TO *LINDH (KOPPING V. WCAB)*

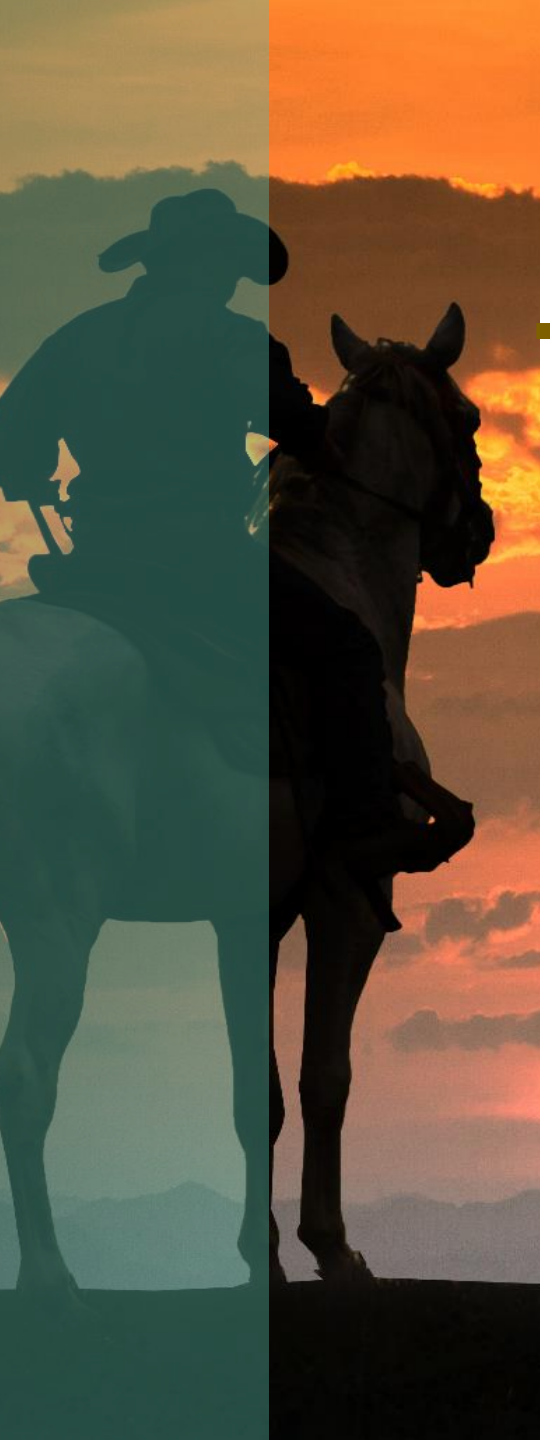
What about prior Awards?

Court of Appeal in *Kopping v. WCAB* held that the defendant had a dual burden:

1. Prove the existence of a prior Award;
2. Prove the overlapping of factors of disability between the prior award and the current award.

Apples to Apples comparison.

Easier if both Awards are under the same rating schedule.



CASES PRIOR TO *LINDH (ESCOBEDO V. MARSHALLS)*

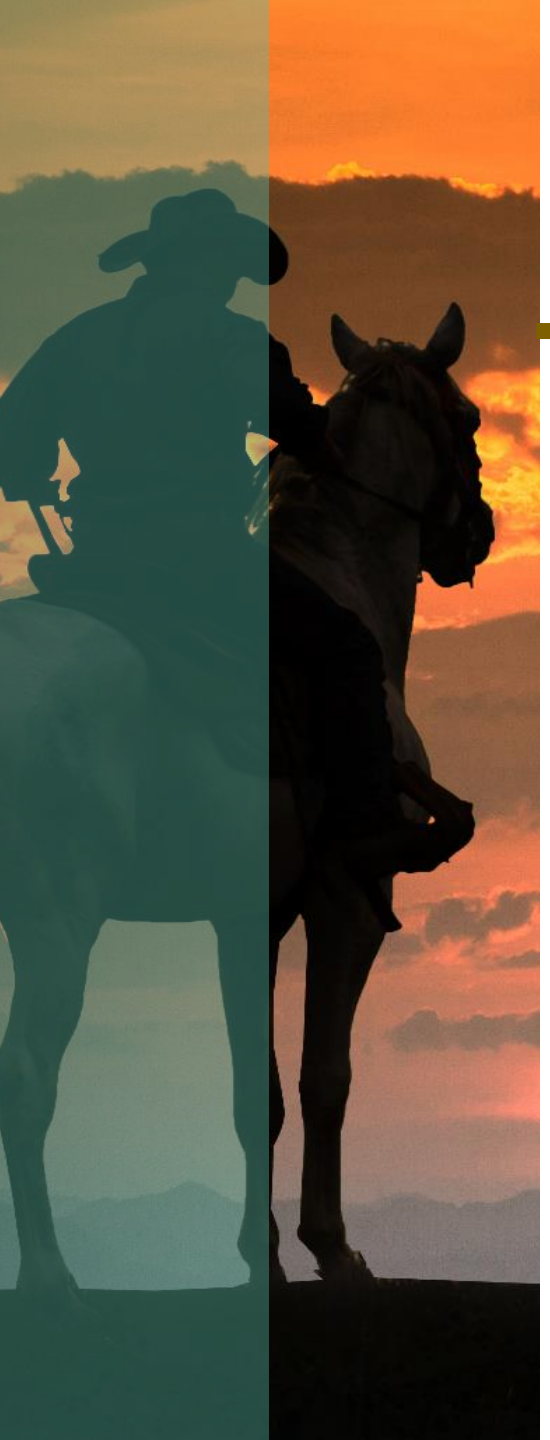
WCAB en banc - *Escobedo v. Marshalls* (2005) 70 Cal. Comp. Cases 604

Apportionment may be based on non-industrial pathology, if that the non-industrial pathology has caused some of the permanent disability. This could be congenital, pathological, traumatic, or a preexisting degenerative condition caused by heredity or genetics.

Apportionment could be based on an asymptomatic condition.

The underlying asymptomatic condition did not need to be labor-disabling at the time of the industrial injury. Prior disability or modified work is not required.

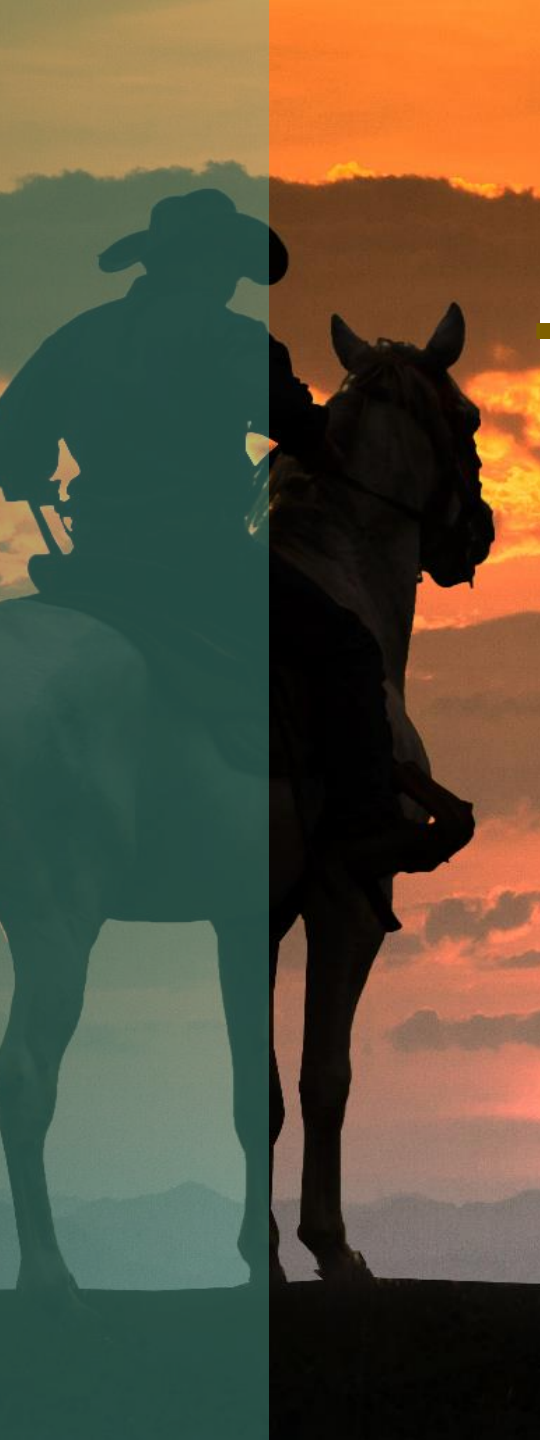
Physician must apportion to causation of PD, not causation of the injury.



CASES PRIOR TO *LINDH (ESCOBEDO V. MARSHALLS)*

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

The examining physician must explain how and why the approximate percentage of the disability is causally related to the industrial injury, and how and why the approximate percentage of disability is causally related to non-industrial factors.



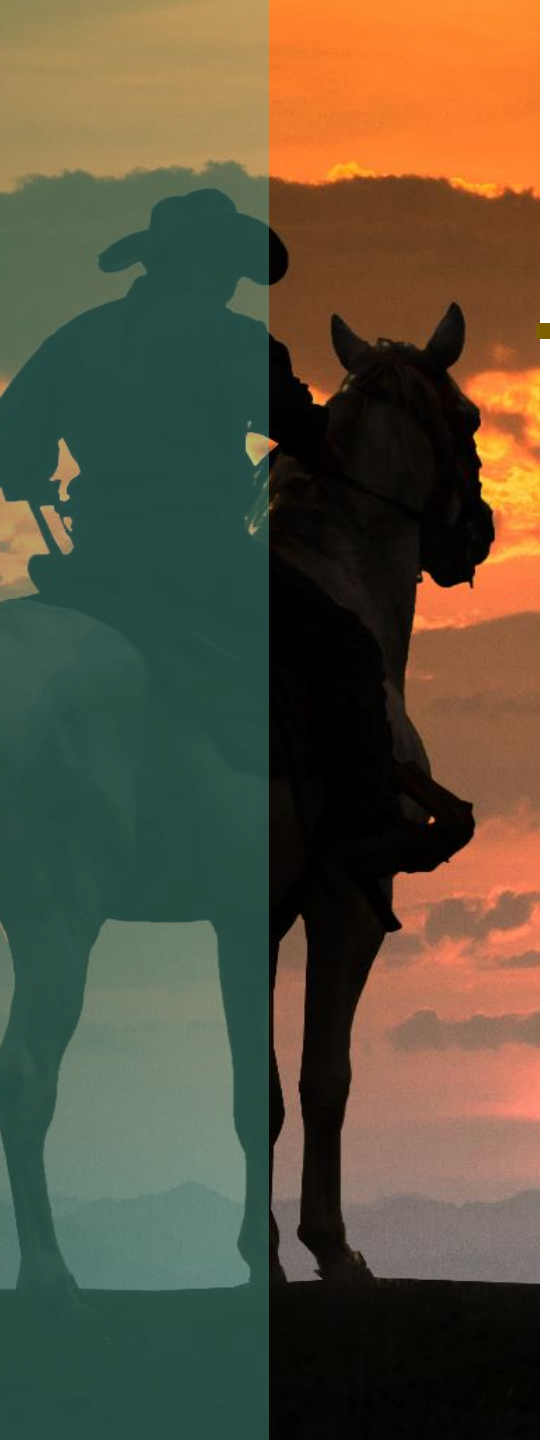
CASES PRIOR TO *LINDH* *(BRODIE V. WCAB)*

California Supreme Court - *Brodie v. WCAB* (2007) 40 Cal.4th 131

"…the new approach to apportionment is to look at the current disability and parcel out its causative sources, nonindustrial prior industrial, current industrial, and decide the amount directly caused by the current industrial source. This approach requires thorough consideration of past injuries, not disregard of them."

Determine what percentage of applicant's current overall permanent disability is attributable to each contributing cause, whether industrial or non-industrial.

Apportionment limits the employer's liability to that percentage of actual permanent disability caused by the industrial injury, not what the level of permanent disability would have been absent the non-industrial cause.

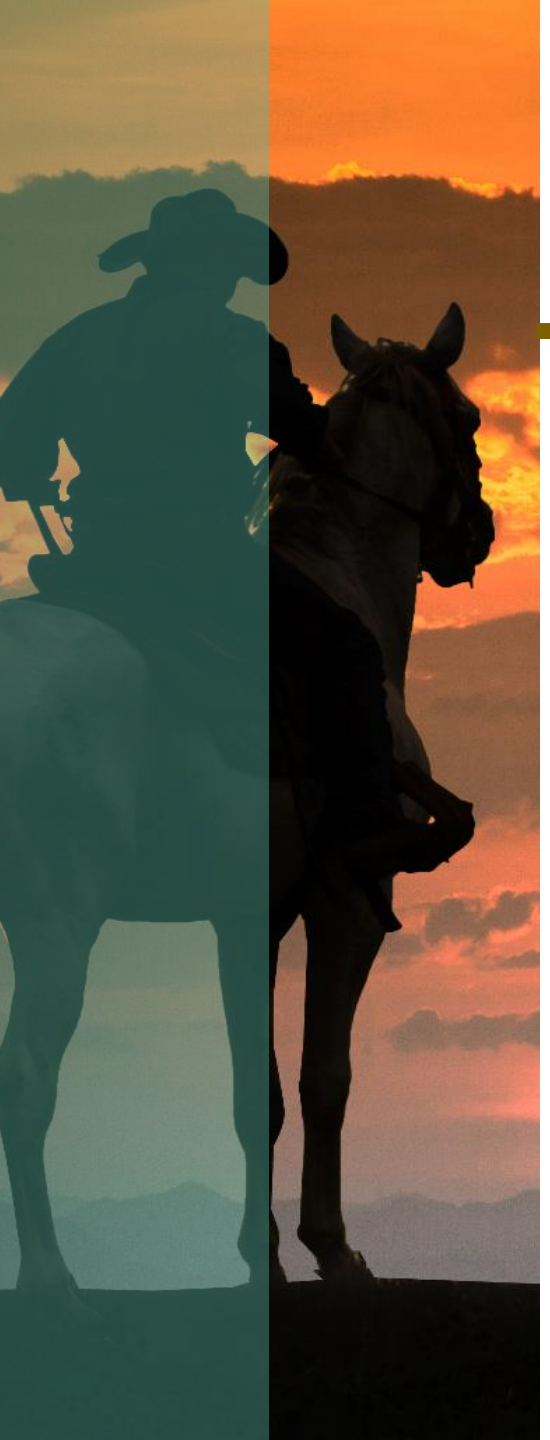


CASES PRIOR TO *LINDH* *(ACME STEEL V. WCAB (BORMAN))*

Court of Appeal - *Acme Steel v. WCAB (Borman)* (2013) 218 Cal.App.4th 1137

Apportionment allowed for congenital degeneration.

“Again, we see no relevant distinction between apportionment for a preexisting disease that is congenital and degenerative, and apportionment for a preexisting degenerative disease caused by heredity or genetics.”



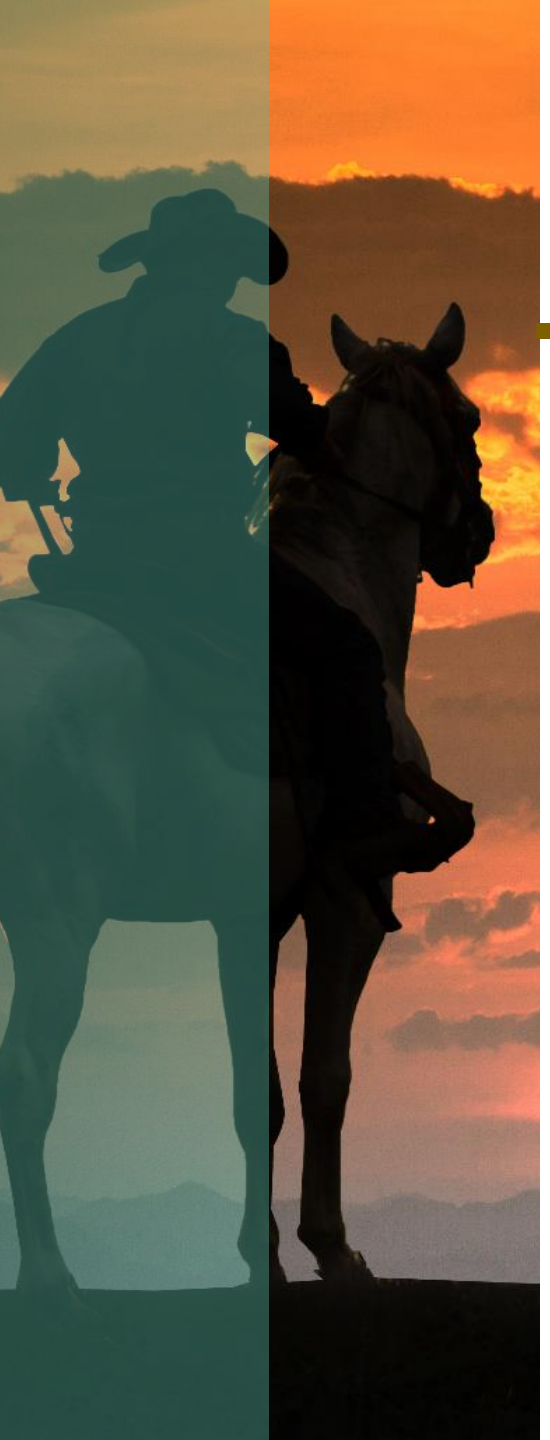
CASES PRIOR TO *LINDH* *(JACKSON V. WCAB (RICE))*

Court of Appeal - *City of Jackson v. Workers' Compensation Appeals Bd. (Rice)* (2017)
11 Cal.App. 5th 109

Valid non-industrial apportionment may be based on genetics and heredity as long as it is supported by substantial medical evidence.

Relying on *Escobedo*, the Court held that the "other factors" on which apportionment may be based included:

The natural progression of non-industrial condition or disease;
A preexisting disability;
A post-injury disabling event;
Pathology or asymptomatic prior conditions; and
Retroactive prophylactic work preclusions



CASES PRIOR TO *LINDH (HIKIDA V. WCAB)*

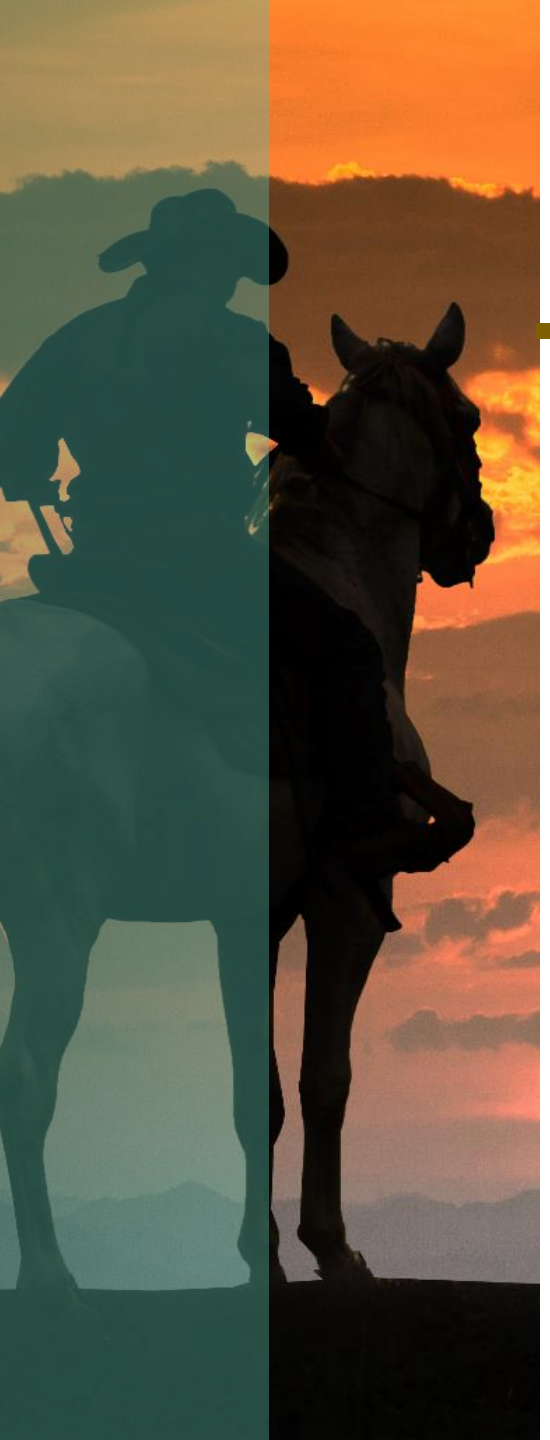
Court of Appeal - *Hikida v. WCAB(2017)* 12 Cal.App.5th 1249

An employer is responsible for both medical treatment and permanent disability arising directly from unsuccessful medical intervention without apportionment.

Relied on pre SB 899 California Supreme Court case *Granadov. WCAB* (1968), which held that medical treatment is not apportionable.

“Nothing in the 2004 legislation had any impact on the reasoning that has long supported the employer's responsibility to compensate for medical treatment and the consequences of medical treatment without apportionment.”

The adverse consequences of industrially provided medical treatment cannot be apportioned. Therefore, the PD consequences could not be apportioned.



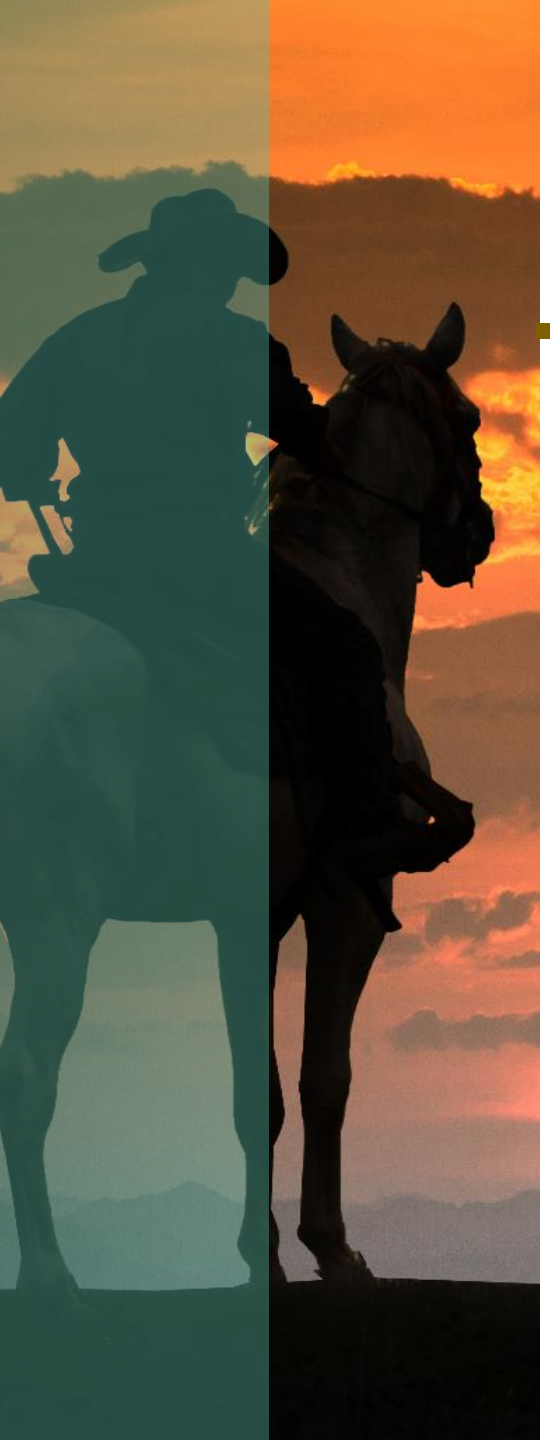
LINDH – BRINGING ORDER

Court of Appeal – *Lindh v. City of Petaluma* (2018) 29 Cal. App. 5th 1175

Where there are multiple contributing factors of an injured worker's permanent disability,

apportionment is required so long as there is substantial medical evidence establishing that apportionment.

"[T]he salient question is whether the disability resulted from both nonindustrial and industrial causes, and if so, apportionment is required".



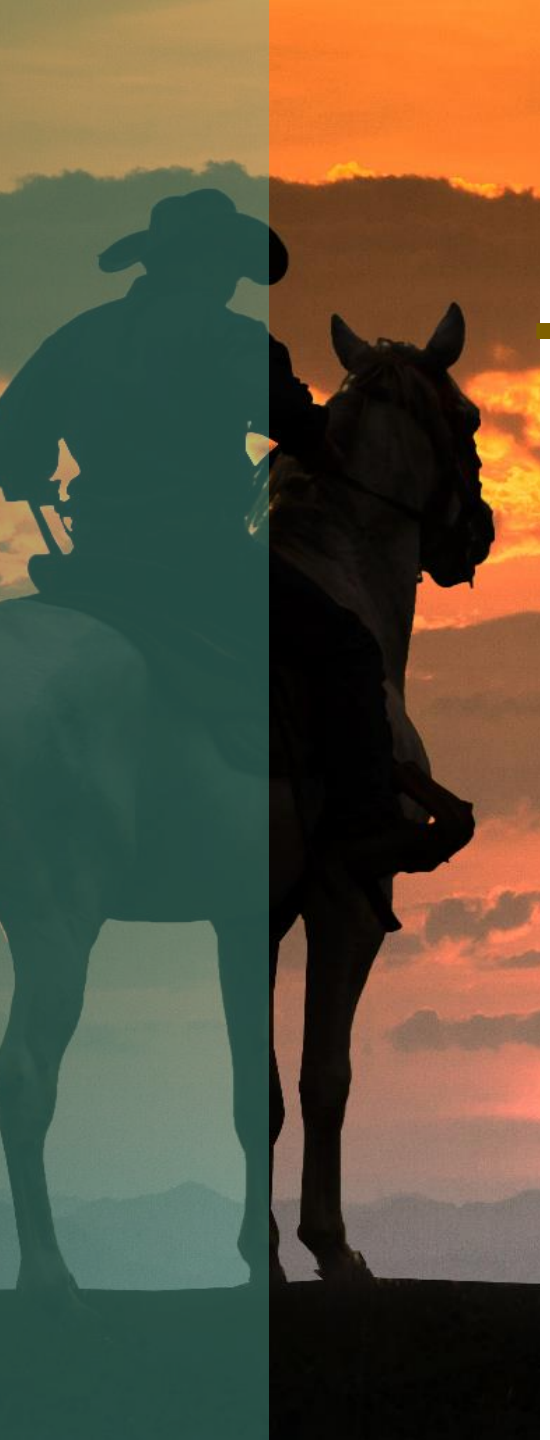
LINDH – BRINGING ORDER

Background:

Police Officer who sustained an admitted injury to his left eye, while engaged in canine training after three to six blows to the left side of his head. He lost nearly all sight in the left eye while off duty a short time later.

The treating physicians found no industrial injury.

The PQME neuro-ophthalmolgist diagnosed the applicant with five different asymptomatic conditions. None of these conditions had caused disability prior to canine training.

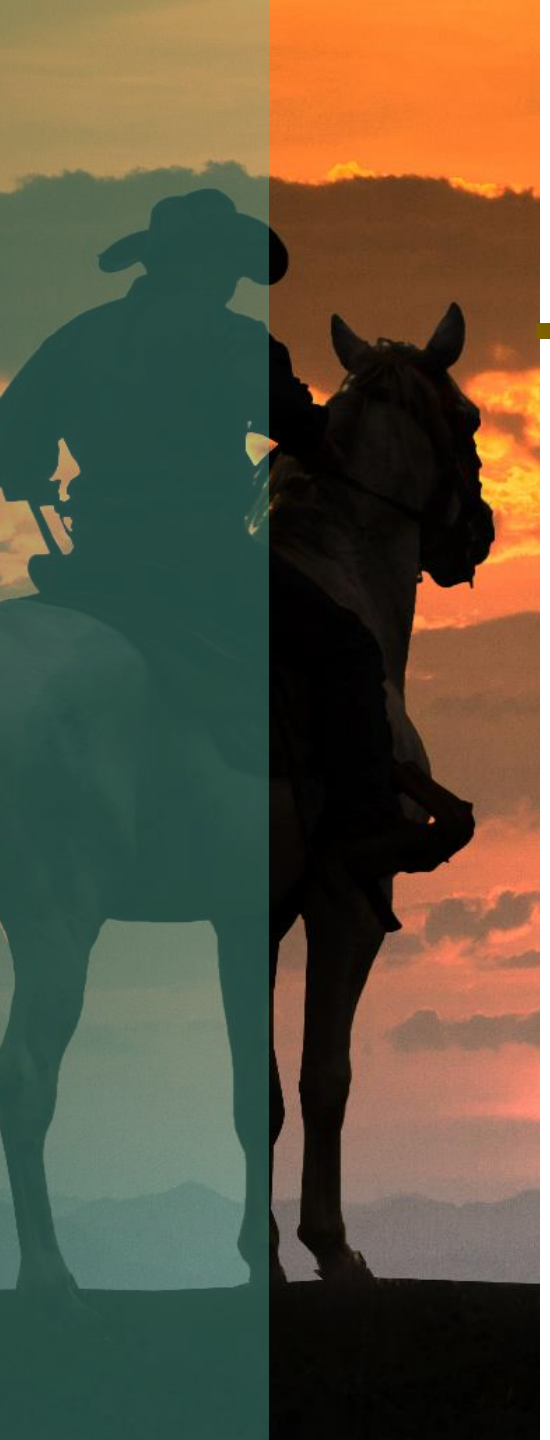


LINDH – BRINGING ORDER

Background con't:

The QME diagnosed a rare "vasospastic-type personality" and stated that this underlying condition put the applicant at higher risk of suffering a disability. The QME stated that the applicant's blood circulation to his left eye was defective due to this condition.

The QME stated that it was unlikely the applicant would have lost his vision in the eye but for the underlying condition. The QME ultimately apportioned 85% to the non-industrial risk factors which he deemed a contributing cause to the overall disability.



LINDH – BRINGING ORDER

Background con't:

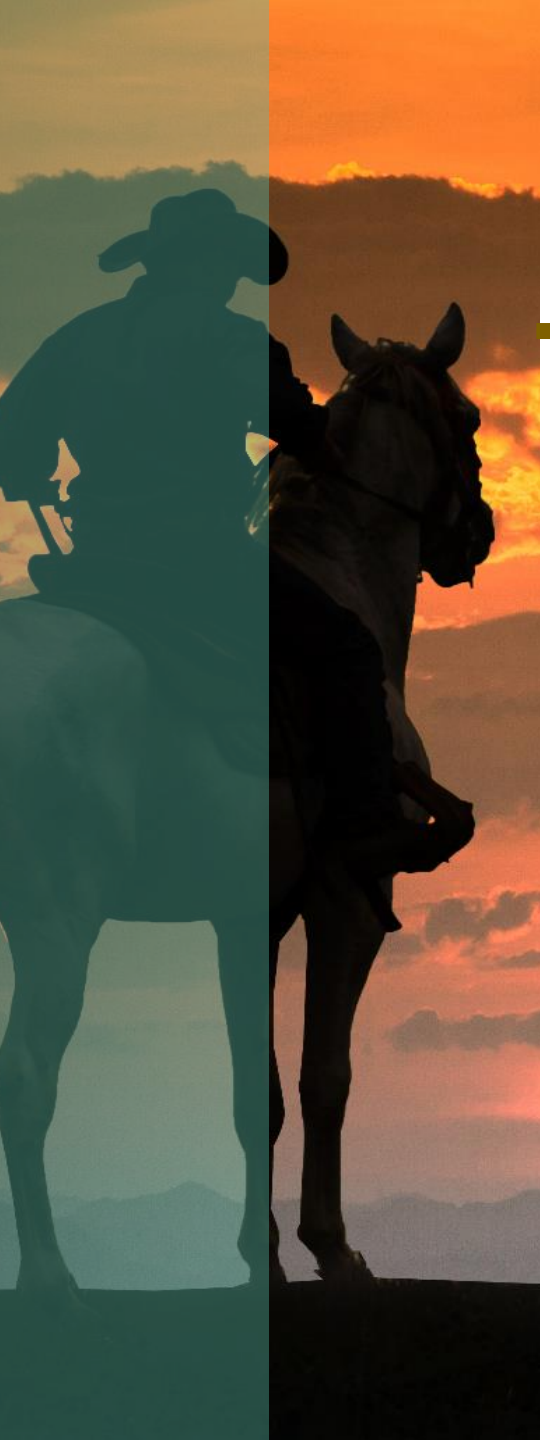
The Judge disallowed apportionment finding that:

The QME's opinion was relying purely on risk factors,

The QME confused causation of injury with causation of permanent disability,

The employer takes the employee and they find him, the thin-skulled plaintiff rule.

The WCAB on Recon upheld the WCJ

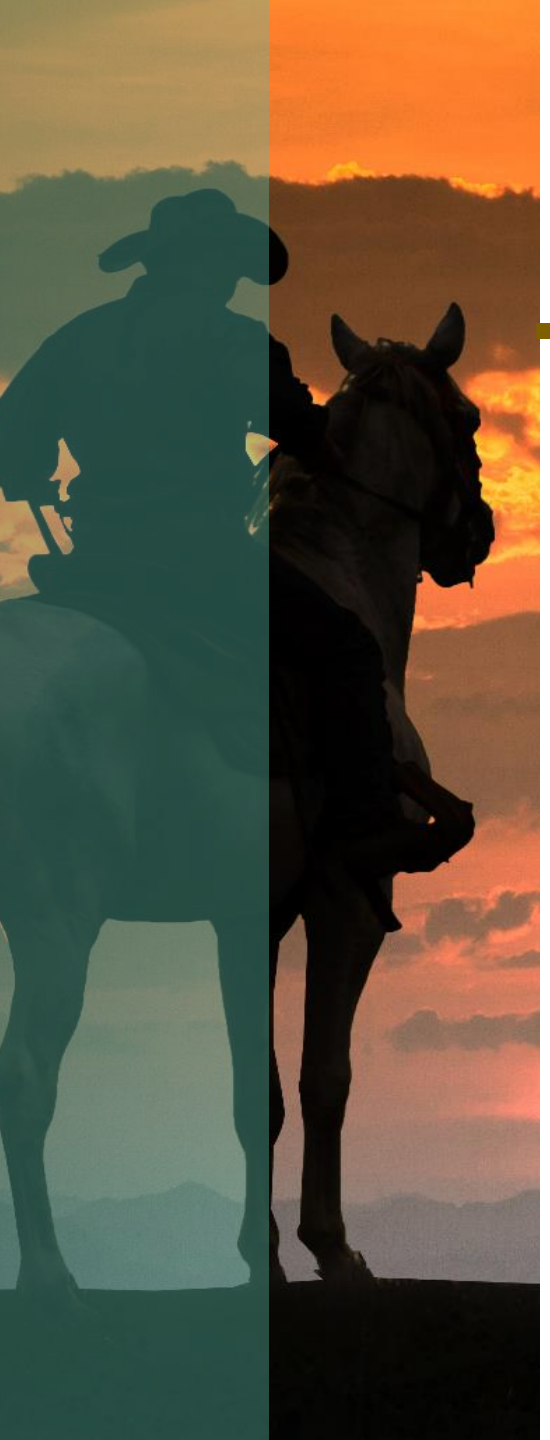


LINDH – BRINGING ORDER

Court of Appeal held that there was valid and legal apportionment.

The Court relied on Labor Code §4664 which clearly states “The employer shall only be liable for the percentage of the permanent disability directly caused by the injury arising out of and occurring in the course of employment”.

Apportionment can be based on pathology and asymptomatic conditions, so long as they were there is substantial medical evidence that the conditions were causal factors that contributed to the applicant’s permanent disability.



LINDH – BRINGING ORDER

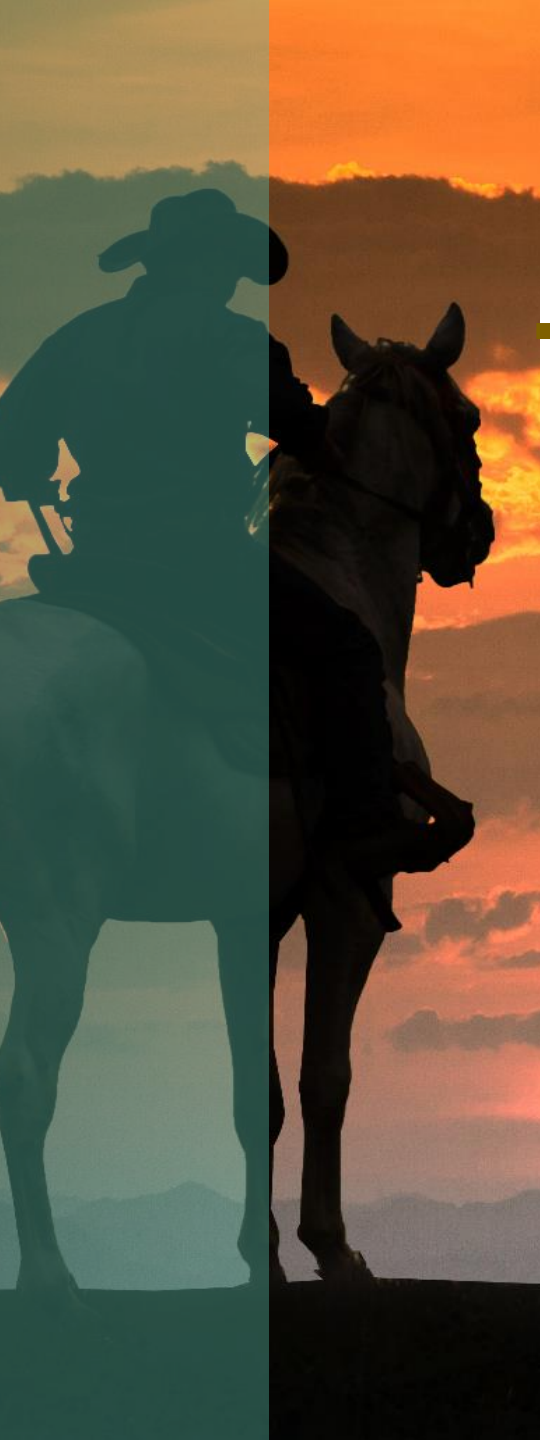
Considering Risk Factors:

The PQME did not base the apportionment on risk factors.

In regards to considering risk factors, the Court of Appeal cited to the *Costa* case.

"Applicant's argument that the WCJ improperly apportioned to a risk factor ignores the medical opinion that applicant's preexisting congenital condition went beyond being a risk factor to being an actual cause of his increased permanent disability, when applicant sustained his industrial injury".

Merely characterizing an underlying condition as a "risk factor" does not change the fact that it is still an "underlying condition" that can be a contributing factor of the applicant's permanent disability.



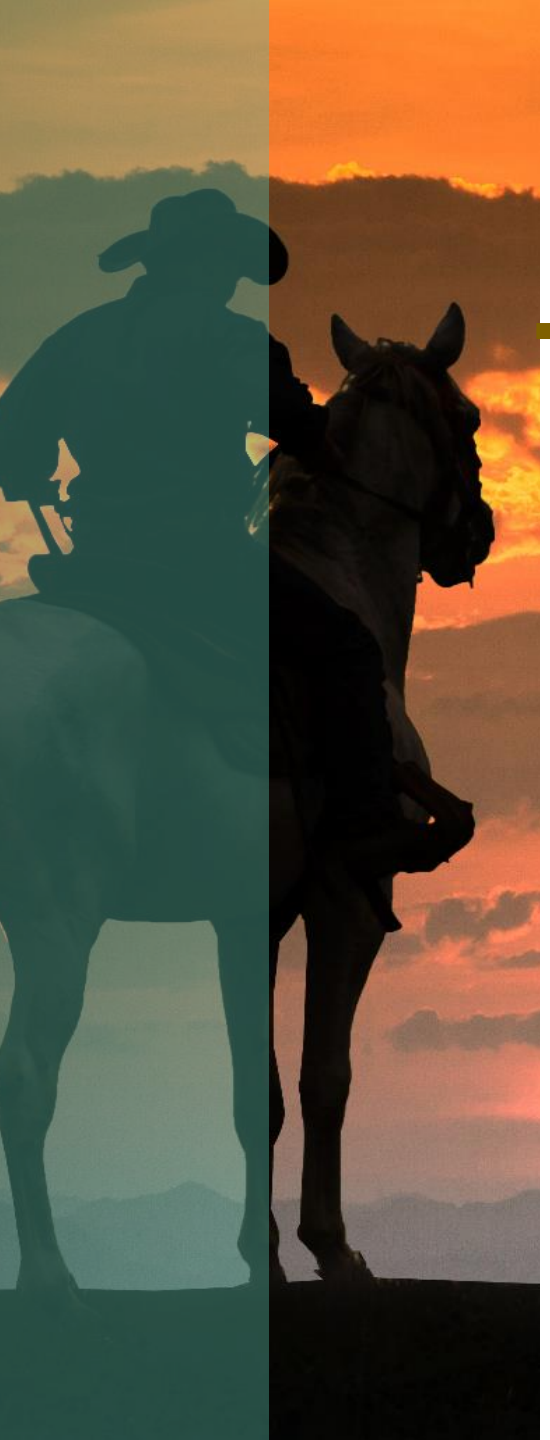
LINDH – BRINGING ORDER

<u>No requirement that the asymptomatic preexisting condition, in and of itself, would eventually have become symptomatic</u>

The Court rejected applicant's arguments that apportionment is required only "where there is
medical evidence the asymptomatic preexisting condition would invariably have become symptomatic, even without the workplace injury".

"The post-amendment cases do not require medical evidence that an asymptomatic preexisting condition, in and of itself, would eventually have become symptomatic. Rather, what is required is substantial medical evidence that the asymptomatic condition or pathology was a contributing cause of the disability".

"Whether or not an asymptomatic preexisting condition that contributed to the disability would, alone, have inevitably become manifest and resulted in disability, is immaterial".

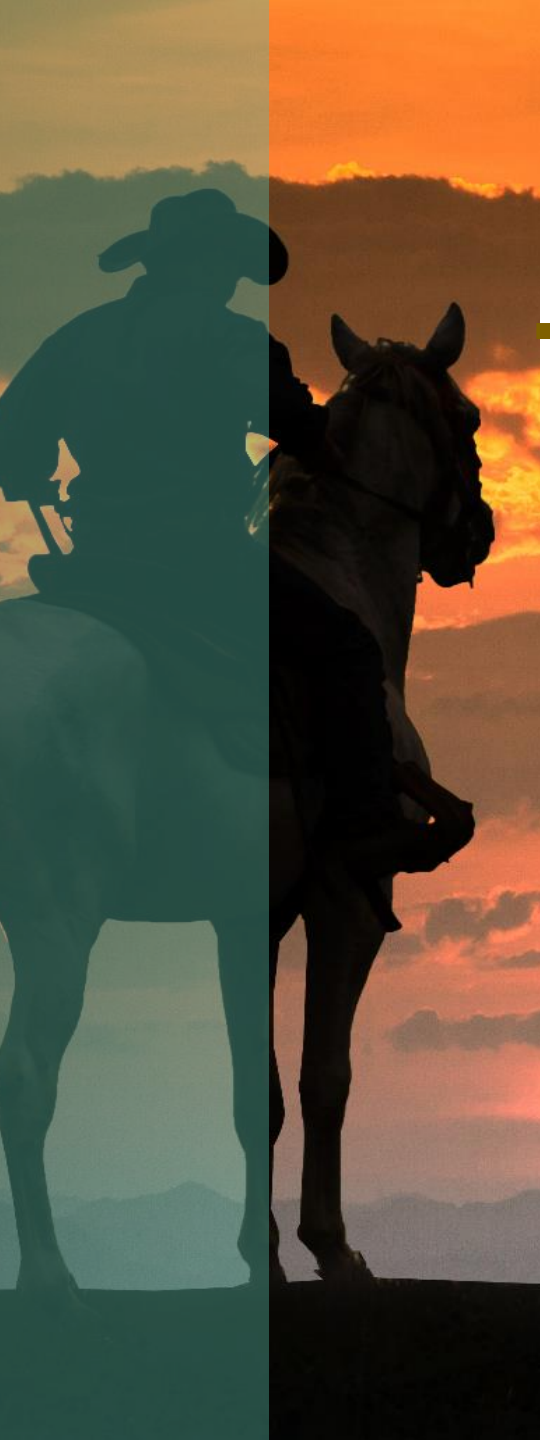


LINDH – BRINGING ORDER

<u>No need for a pre-existing degenerative condition</u>

The Court rejected applicant's argument that apportionment can only be found if there is a preexisting degenerative condition.

The court held that the presence of a degenerative condition was not needed but that this type of condition was just one of the nonindustrial other factors, which can include pathology, asymptomatic prior conditions for which the worker has an inherited predisposition, and retroactive prophylactic work preclusions.

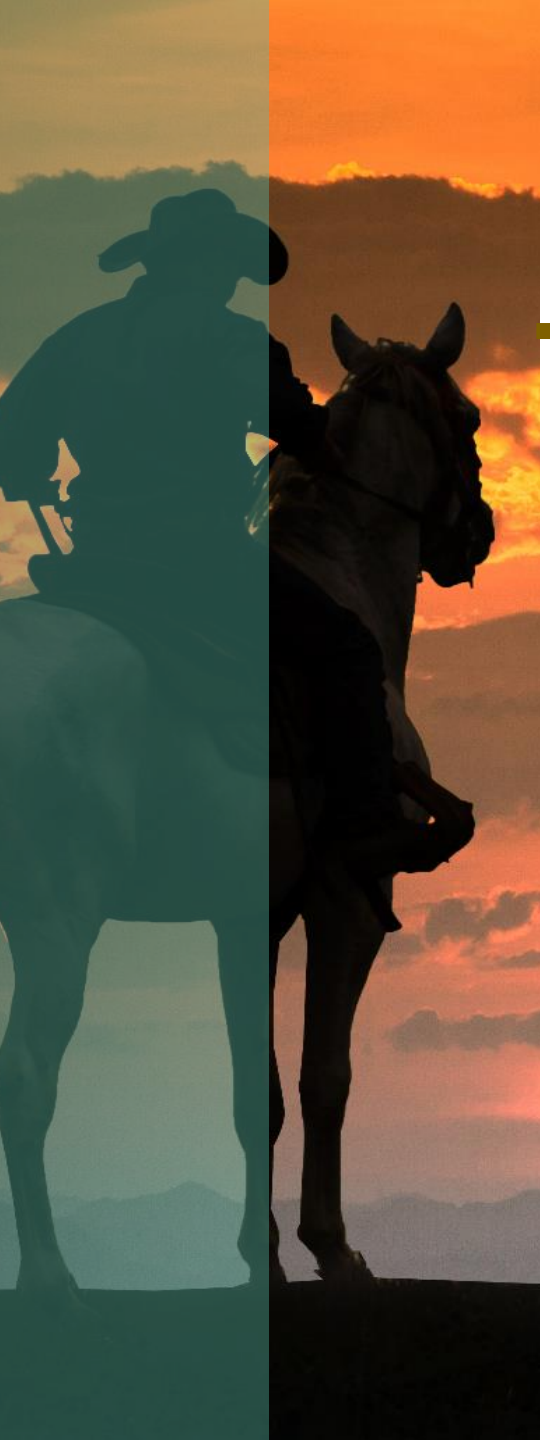


LINDH – BRINGING ORDER

<u>The underlying condition could have caused no disability prior to the work-related injury</u>

"By definition, an asymptomatic preexisting condition has not manifested itself and, thus, by definition has not caused a prior disability".

The Court held that SB899 removed the need for the underlying condition to have caused disability prior to the work related injury in order for apportionment to be applied. The applicant was attempting to apply the law prior to SB899

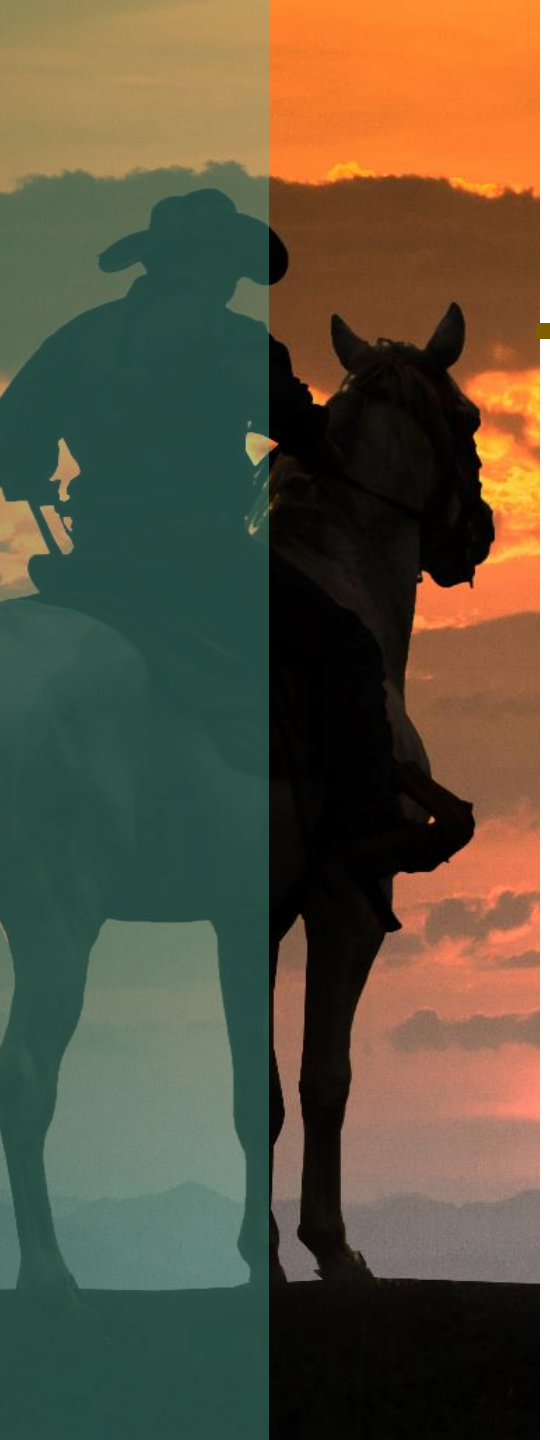


LINDH – BRINGING ORDER

<u>The thin skulled plaintiff rule does not apply in regards to apportionment</u>

The employer takes the employee as they find them for medical treatment and temporary disability.

For permanent disability, the employer is only “liable for the percentage of permanent disability directly caused by the injury arising out of and occurring in the course of
employment”.



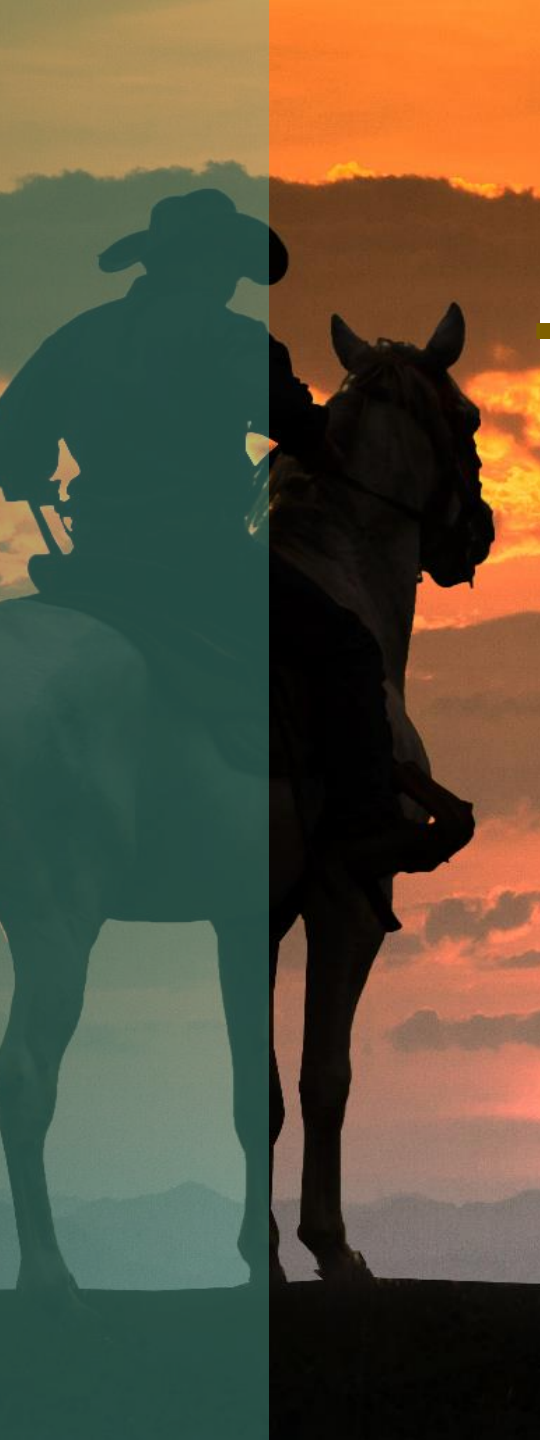
LINDH – IMPACT

What did Lindh give us that was new?

How did it bring order to the Wild West of Apportionment?

It did not establish any new concepts or principles related to apportionment law.

Why is it important?



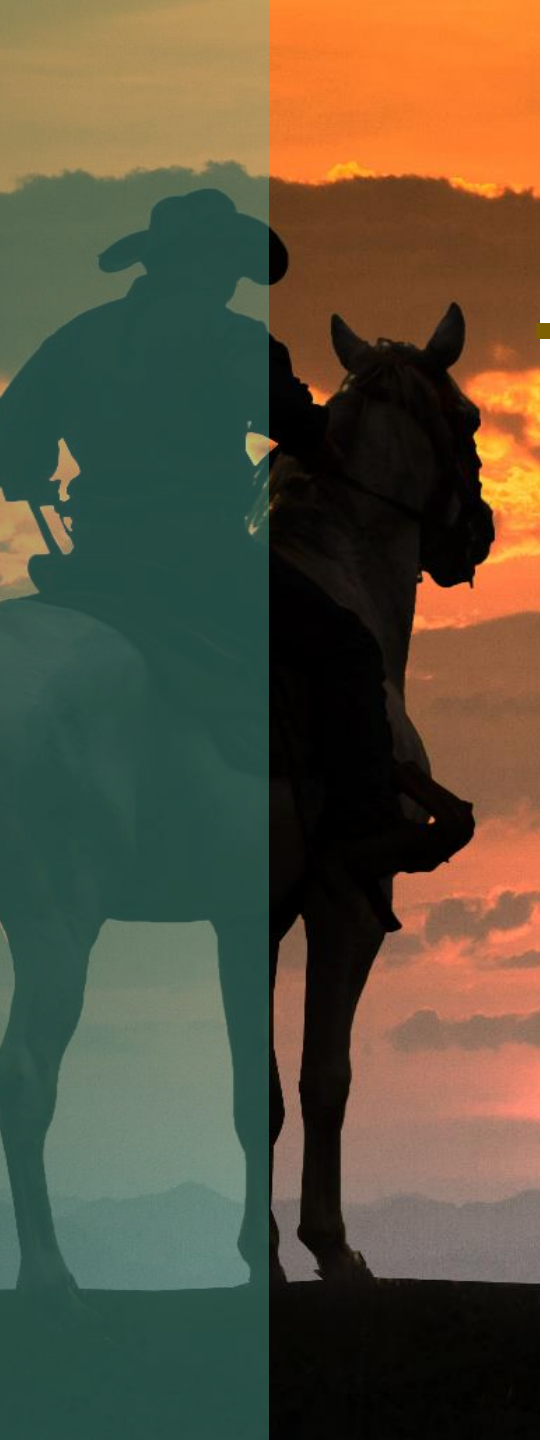
LINDH – IMPACT

Lindh provided an incredibly detailed and comprehensive review and analysis of the major cases on apportionment and how this has changed post SB899.

It provided a clear and unambiguous roadmap of what is allowed as valid and legal apportionment.

It put to rest several erroneous arguments still being made about apportionment including whether it applied to asymptomatic conditions, whether the underlying condition to be labor disabling or would have become labor disabling, and whether the thin skulled plaintiff rule still applied.

It brought order.



JUSTICE ARRIVES POST-*LINDH*

Court of Appeal - *County of Santa Clara v. WCAB (Justice)* (2020)

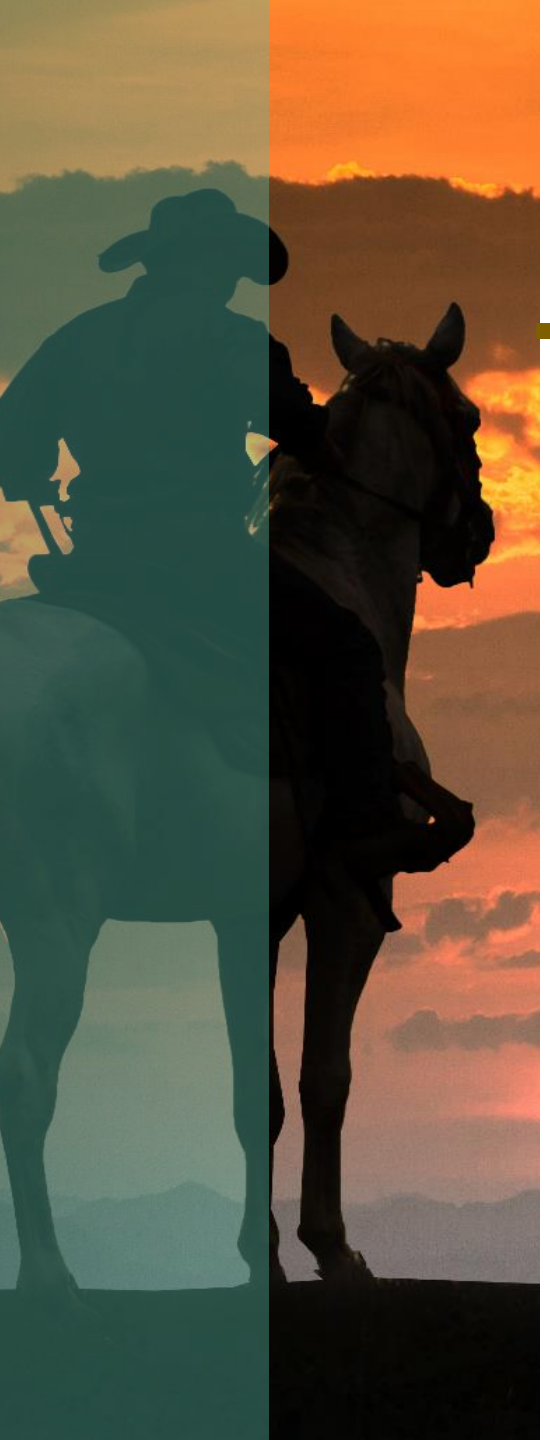
The applicant had a knee injury underwent bilateral knee replacement surgeries.

The AME found the applicant had underlying osteoarthritis and that 50% of the overall disability was related to the applicant's underlying non-industrial factors.

The surgeries were successful and the only cause for a change in the impairment rating was that the surgeries were ratable under the AMA Guides.

The WCJ rejected the apportionment determination on the basis the *Hikida* case did not allow it because the PD resulted from the medical treatment.

On Recon, the WCAB agreed with the trial Judge.



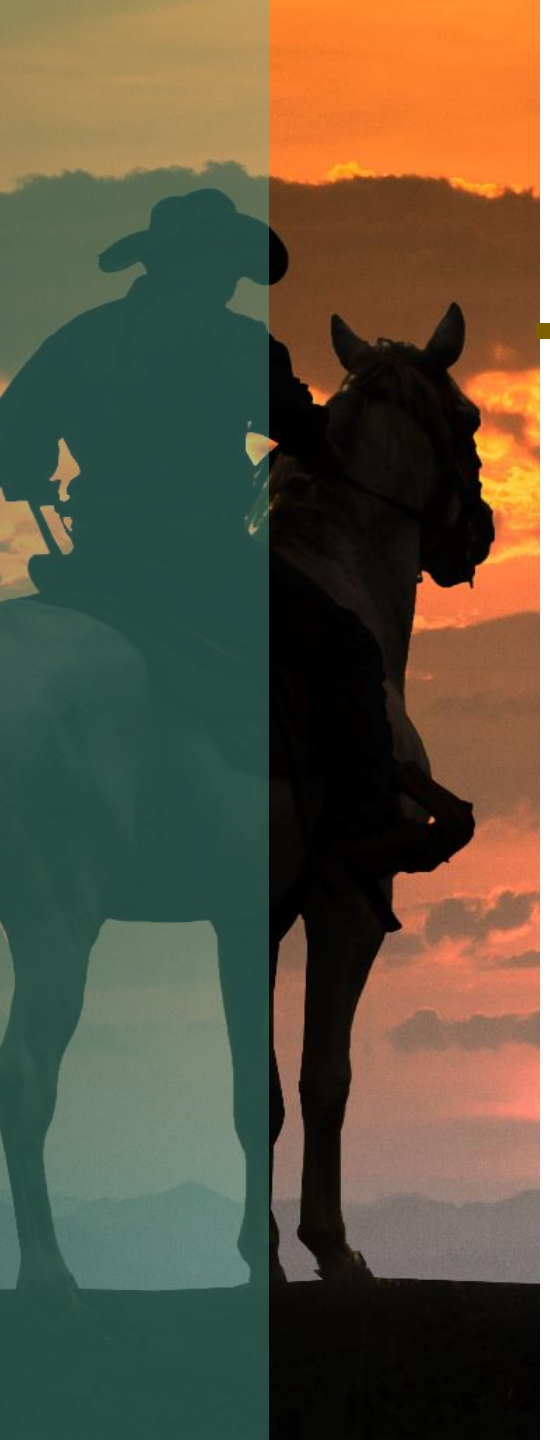
JUSTICE CON'T

Echoing *Lindh*, the *Justice* Court held:

"Where there is unrebutted substantial medical evidence that nonindustrial factors played a causal role in producing the permanent disability, the Labor Code demands that the permanent disability 'shall' be apportioned".

The Court went on to hold:

"There is no case or statute that stands for the principle that permanent disability that follows medical treatment is not subject to the requirement of determining causation and thus apportionment, and in fact such a principle is flatly contradicted by sections 4663 and 4664".

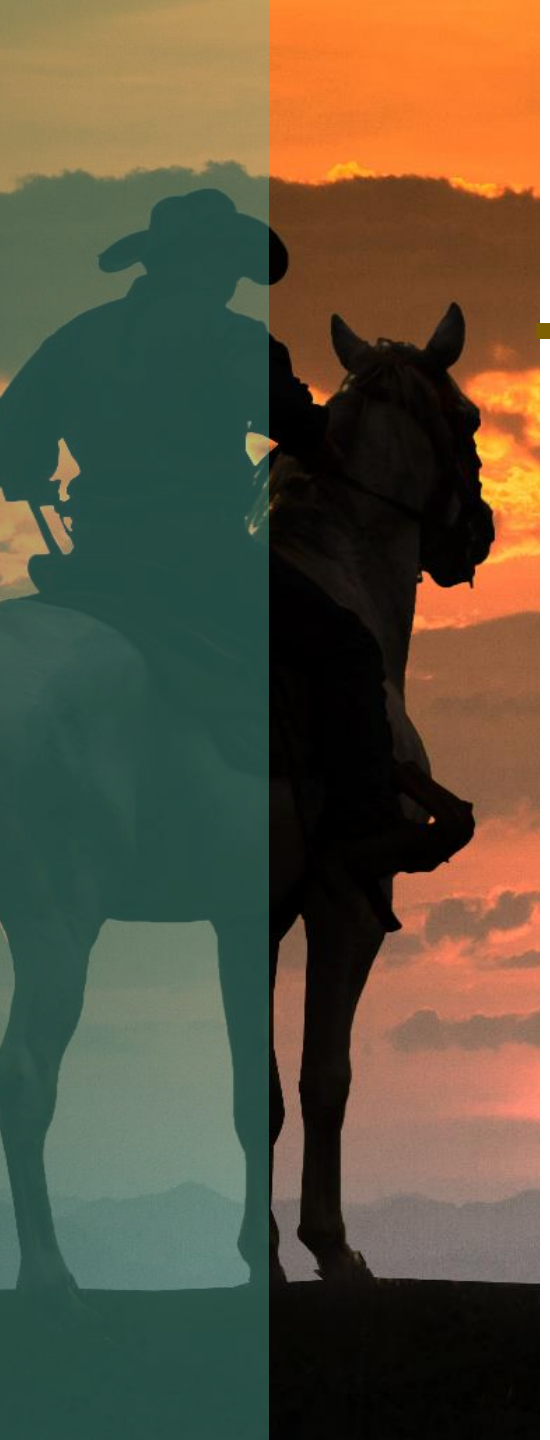


JUSTICE CON'T

Regarding the *Hikida* case, the Court held:

"Understood in context, the *Hikida* court's conclusion that there should be no apportionment makes sense only because the medical treatment in *Hikida* resulted in a new compensable consequential injury, namely CRPS, which was entirely the result of the industrial medical treatment. It was this new compensable consequential injury that, in turn, led entirely to the injured worker's permanent disability".

"Although parts of the *Hikida* opinion can be read to announce a broader rule that there should be no apportionment when medical treatment increases or precedes permanent disability, it is clear that the rule is actually much narrower. Put differently, *Hikida* precludes apportionment only where the industrial medical treatment is the sole cause of the permanent disability".

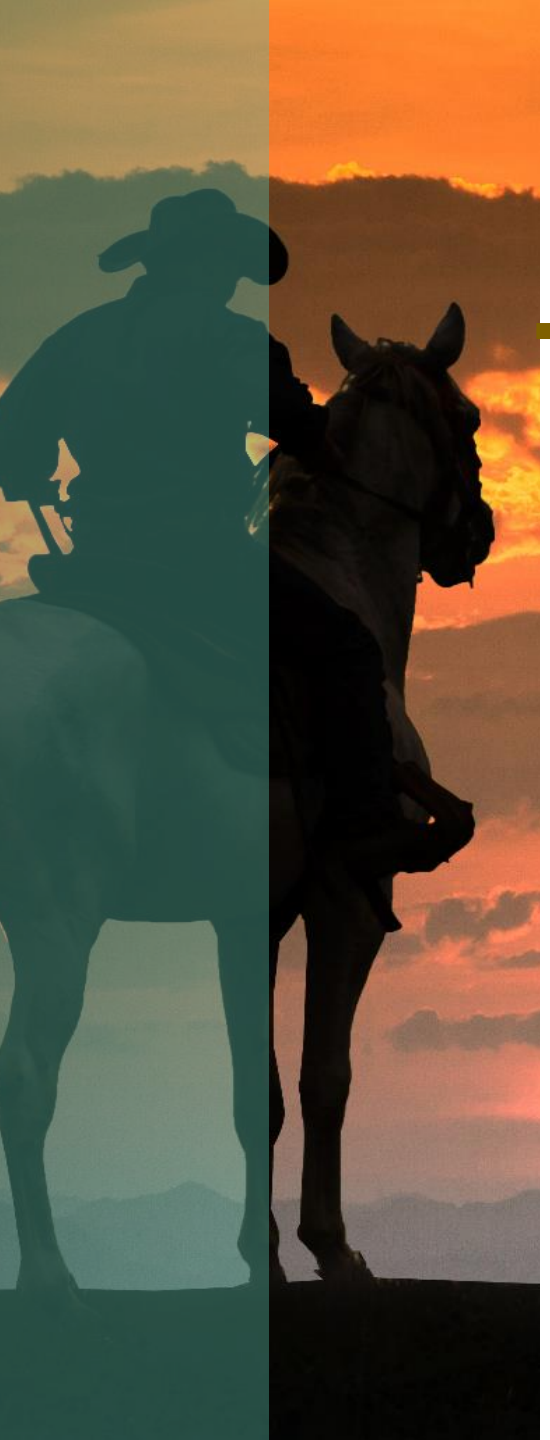


APPORTIONMENT AFTER MEDICAL TREATMENT

Apportionment is required unless the medical treatment resulted in a new condition which was entirely the result of that treatment. Otherwise, per *Lindh*, "the salient question is whether the disability resulted from both nonindustrial and industrial causes, and if so, apportionment is required".

There has been substantial litigation since SB899 on the issue of whether a defendant can obtain apportionment where a joint has been replaced. Most of the more recent cases found that it is permissible but these have been lower level or writ denied cases.

We now have a published Court of Appeal case in which apportionment was allowed where there has been a joint replacement that removed the underlying degenerative condition.



APPORTIONMENT AFTER MEDICAL TREATMENT

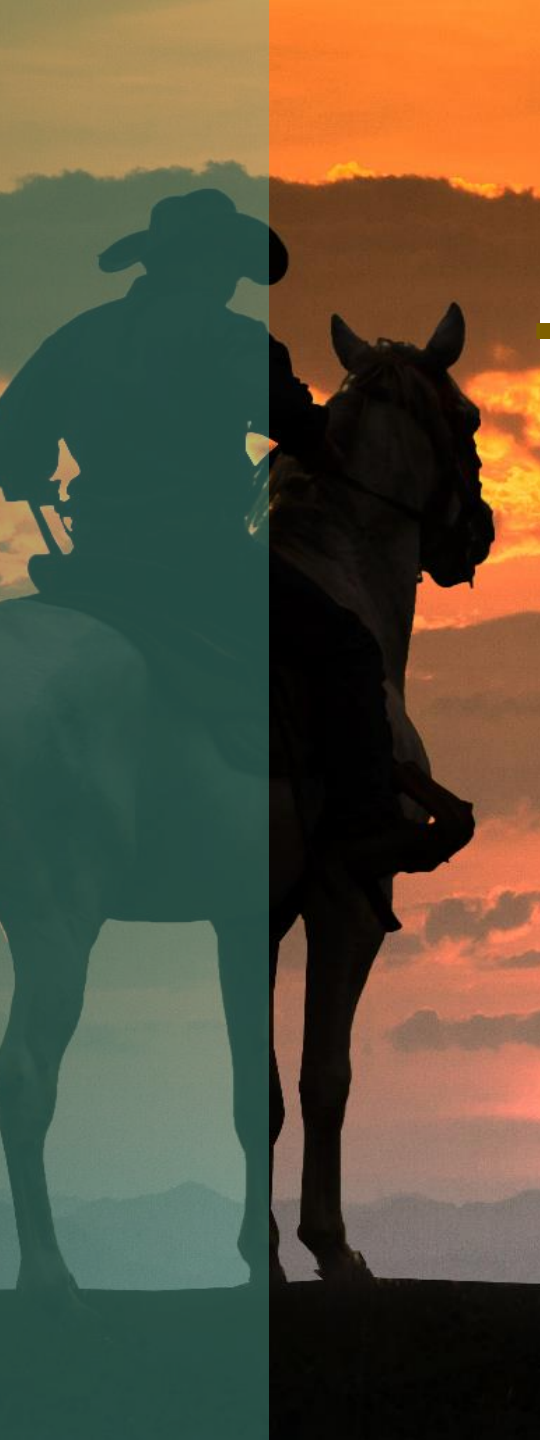
WCAB Panel Decision – *Fuller v Monterey Bay Aquarium (Fuller II)* 2020 Cal.Wrk.Comp. P.D. LEXIS 190

The Applicant had an admitted injury that led to nine knee surgeries including two total right knee replacements.

The Applicant also had a long history of knee injuries, osteoarthritis with anatomic changes, and the knee was occasionally symptomatic before the industrial injury.

Apportionment of the PD was required under Labor Code sections 4663 and 4664 since the industrial medical treatment did not cause an entirely new injury that was the sole cause of the permanent disability.

Relied on *Justice*, to apply apportionment after nine surgeries, including two total knees.



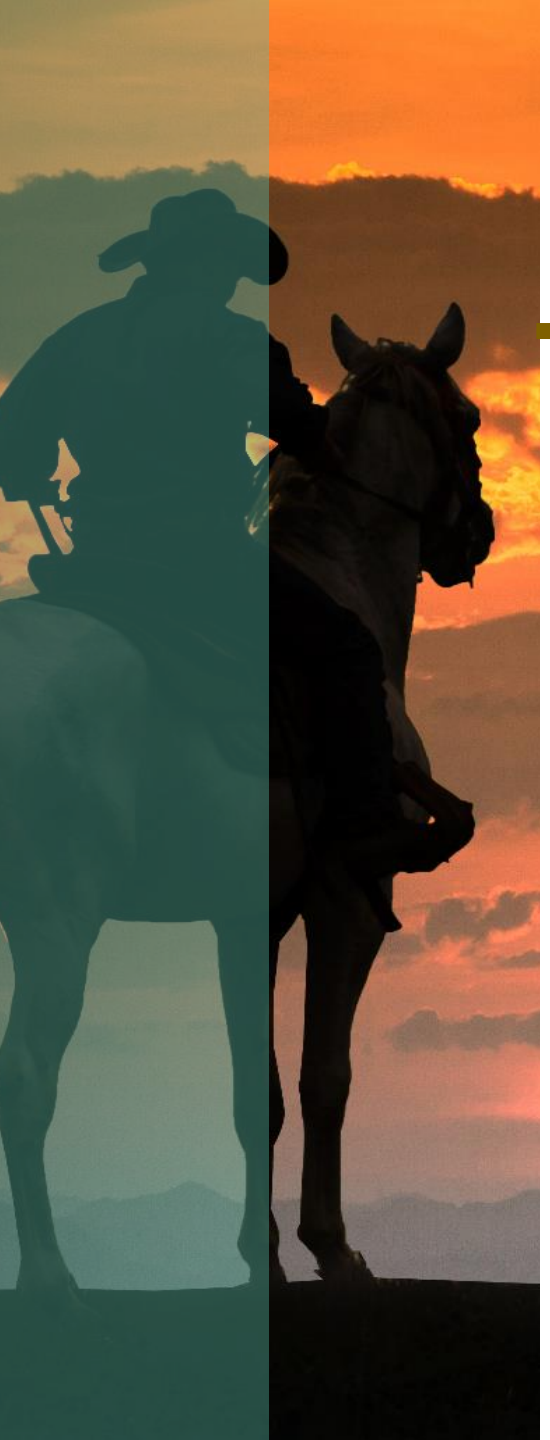
APPORTIONMENT AFTER MEDICAL TREATMENT

WCAB Panel Decision - *Durazo v. Dental Wellness* (2020) ADJ8884861

Applicant had a knee injury and documented pre-existing osteoarthritis. She had multiple surgeries including a knee replacement. The PQME found 50% apportionment to non-industrial factors

At trial, no apportionment was allowed based on a PTP opinion and the *Hikida* holding. Decision upheld on Recon. *Justice* issued after Recon but during Appeal.

"[I]f a conflict exists between *Justice* and *Hikida*, then the WCAB is free to choose between the conflicting lines of authority until either the Supreme Court resolves the conflict or the Legislature clears up the uncertainty by legislation".



APPORTIONMENT & COVID-19

No current legislation (including SB 1159) prohibits application of apportionment.

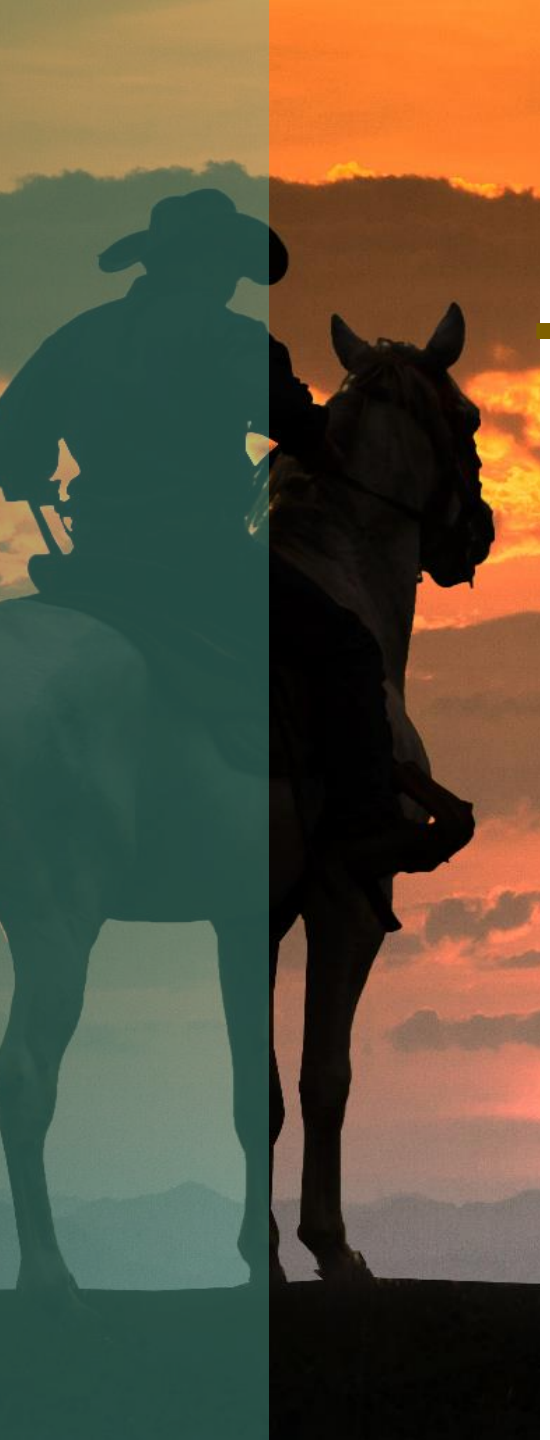
But, be mindful of anti-attribution clauses particularly for heart and lung claims.

COVID-19 claims would need to result in permanent disability for apportionment to apply. Many cases have no PD. If there is PD, it would be subject to potential apportionment under Labor Code 4663 and 4664.

The doctor should be asked whether in addition to the industrially related coronavirus, there may be other nonindustrial contributing causal factors of the applicant's permanent disability.

Also, did the COVID-19 aggravate any underlying conditions that preexisted the COVID-19 injury?

If yes to either, apportionment would apply.



APPORTIONMENT BOTTOM-LINE

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 AME\QME, the WCJ, and the Appeals Board are required to apportion to those factors.

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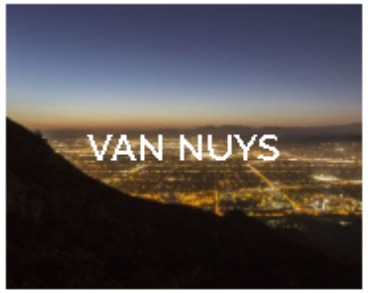
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