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THIRD READING

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Bill No: SB 788  
Author: Bradford (D)  
Amended: 6/17/21  
Vote: 21

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SENATE LABOR, PUB. EMP. & RET. COMMITTEE: 4-0, 3/22/21  
AYES: Cortese, Durazo, Laird, Newman  
NO VOTE RECORDED: Ochoa Bogh

SENATE APPROPRIATIONS COMMITTEE: 6-0, 5/20/21  
AYES: Portantino, Bates, Bradford, Kamlager, Laird, Wieckowski  
NO VOTE RECORDED: Jones

SENATE FLOOR: 37-0, 6/2/21  
AYES: Allen, Archuleta, Atkins, Bates, Becker, Borgeas, Bradford, Caballero, Cortese, Dahle, Dodd, Durazo, Eggman, Glazer, Gonzalez, Grove, Hertzberg, Hueso, Hurtado, Kamlager, Laird, Leyva, Limón, McGuire, Min, Newman, Ochoa Bogh, Pan, Portantino, Roth, Rubio, Skinner, Stern, Umberg, Wieckowski, Wiener, Wilk  
NO VOTE RECORDED: Jones, Melendez, Nielsen

ASSEMBLY FLOOR: 77-0, 7/1/21 (Consent) - See last page for vote

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**SUBJECT:** Workers' compensation: risk factors

**SOURCE:** California Applicants' Attorneys Association

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**DIGEST:** This bill prohibits the reduction (or apportionment) of permanent disability benefits on the basis of race, religious creed, color, national origin, age, gender, marital status, sex, sexual identity, sexual orientation, or genetic characteristics.

*Assembly Amendments* remove genetic characteristics and age as factors that apportionment would be prohibited for.

**ANALYSIS:**

## Existing law:

- 1) Establishes a workers' compensation system that provides benefits to an employee who suffers from an injury or illness that arises out of and in the course of employment, irrespective of fault. This system requires all employers to secure payment of benefits by either securing the consent of the Department of Industrial Relations to self-insure or by securing insurance against liability from an insurance company duly authorized by the state.
- 2) Requires that, if an occupational injury results in a permanent disability, the percentage of disability to total disability shall be determined, and the disability payment computed on the basis of the percentage of disability to total disability. (Labor Code §4658)
- 3) Requires that, when doctors are determining the nature and severity of an occupational injury, the American Medical Association (AMA) Guides to the Evaluation of Permanent Impairment (5th Edition) must be used to measure physical impairment and determine an injured worker's whole person impairment (WPI). (Labor Code §4660.1)
- 4) Creates the Permanent Disability Ratings Schedule (PDRS), which increases the WPI by 40% and adjusts for occupation and age to calculate a percentage of permanent disability (PD), also known as a PD rating. (Labor Code §4660.1)
- 5) Requires that any physician who prepares a report addressing the issue of permanent disability include an *apportionment determination*, where the physician determines *what approximate percentage of the permanent disability was caused by other factors*, including prior industrial injuries. (Labor Code §4663)
- 6) Requires workers' compensation law to be liberally construed by the courts with the purpose of extending their benefits for the protection of persons injured in the course of their employment. (Labor Code §3202)

## This bill:

- 1) Prohibits the consideration of race, religious creed, color, national origin, gender, marital status, sex, sexual identity, or sexual orientation in the development of an apportionment declaration.

- 2) Makes legislative findings and declarations on the need to eliminate bias and discrimination in the workers' compensation system.

## Comments

### *What is Apportionment?*

Under existing law, every time a doctor prepares a report on if a claimed workplace injury is permanently disabling, the physician must determine causation AND what percentage of the injury is due to non-occupational issues, including prior workplace injuries. An injured worker's PD award is then adjusted down by this percentage. Only a physician can determine if apportionment is appropriate and to what degree.

This makes apportionment a uniquely provocative policy. On one hand, it would be difficult to defend requiring an employer to provide PD awards for an injury that is unrelated to work or occurred at another place of employment. This is why language limiting PD awards to only cover the consequences of a workplace injury has been in law since 1917. While the current apportionment statute dates back to 2004, the idea behind it is nearly a century old.

On the other hand, determining what percentage of an injury is or is not occupational is highly dependent on the judgment of the physician. Workers' Compensation Appeals Board (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)

Despite this case law, sometimes physicians fail to meet these requirements when making an apportionment determination. Apportionment determinations by QMEs (Qualified Medical Evaluator) are and will be a cause and source of litigation in workers' compensation system.

One final note on apportionment: the apportioning of a PD award has no impact on the ability of an injured worker to receive medical care. Even in the event that a PD award is apportioned to 0%, the worker has a right to medical care if the injury arises or occurs in the course of employment (See *Employers Mutual Liability Ins. Co. of Wisconsin v. Industrial Acc. Com. (Gideon)* (1953) 41 Cal.2d 676 and *Reyes v. Hart Plastering* (2005) 70 Cal.Comp.Cases 223).

### *City of Jackson and Apportionment*

The issue of genetics in apportionment decisions recently came to the fore in *City of Jackson v. WCAB (Rice)*, (2017) 11 Cal.App.5th 109. In *City of Jackson*, a QME (based on “family history”) apportioned a peace officer’s permanent disability award. The WCAB found this apportionment to be impermissible, as apportioning on the basis of immutable factors is impermissible, and returned the case to the local board for a new unapportioned award of permanent disability. *However, the WCAB also found that apportionment based on specific, identifiable factors is permissible.*

On appeal, however, the Court found that, not only was apportionment based on genetics permitted, it had been appropriately done by the QME. Specifically, *City of Jackson* cited three past precedents (*Escobedo, Kos, and Acme Steel*) to support the notion that apportionment based on genetics has been present in the workers’ compensation system since 2004. After the California Supreme Court declined to hear *City of Jackson* in August of last year, it became settled law.

In response to stakeholder concerns about a potential broad reading of *City of Jackson*, Senator Bradford (and later Senator Pan) authored SB 899 in 2018. After significant negotiation, stakeholders reached an agreement to exclude race, gender, and national origin from any apportionment decision. This agreement removed all opposition and brought in significant support from workers’ compensation stakeholders. Despite this unprecedented level of cooperation and support, Governor Brown vetoed SB 899. SB 788 (Bradford), with amends taken in the Assembly Insurance Committee, largely mirror SB 899 (Pan).

### **Related/Prior Legislation**

SB 731 (Bradford, 2019), as introduced, would have prohibited the use of race, religious creed, color, national origin, age, gender, marital status, sex, sexual identity, sexual orientation, or genetic characteristics as apportionable factors. Once the bill reached the assembly, the original language was struck and the bill progressed as a substantively different piece of legislation until it failed passage on the Assembly Floor.

SB 899 (Pan, 2018) would have explicitly excluded race, gender, and national origin as apportionable factors. SB 899 was vetoed by Governor Brown.

**FISCAL EFFECT:** Appropriation: No Fiscal Com.: No Local: No

**SUPPORT:** (Verified 7/1/21)

California Applicants' Attorneys Association (source)

AFSCME, AFL-CIO

Association of Orange County Deputy Sheriff's

California Labor Federation, AFL-CIO

California Professional Firefighters

California State Firefighters' Association

California Teamsters Public Affairs Council

National Association of Social Workers, California Chapter

Organization of SMUD Employees

United Food and Commercial Workers, Western States Council

**OPPOSITION:** (Verified 7/1/21)

None received

**ARGUMENTS IN SUPPORT:** The California Applicants' Attorneys Association writes in support:

California has led the nation in anti-discriminatory measures in the workplace. One area of law that contains discriminatory provisions and practices is workers' compensation. SB 788 abrogates a recent court decision and explicitly prohibits reducing workers' compensation benefits on the basis of immutable factors, such as race, gender, or genetic make-up.

Under existing law, every time a doctor prepares a report on whether a claimed workplace injury is permanently disabling, the physician must determine causation and what percentage of the injury is due to non-occupational issues, including prior workplace injuries.

By allowing for the reduction of PD benefits on the basis of a worker's immutable characteristics, the *City of Jackson* decision opens the door to race, gender, and other factors being used as a basis for reducing PD benefits, inviting disparate impacts on injured workers of color, and undermining the fundamental justice of California's workers' compensation system.

ASSEMBLY FLOOR: 77-0, 7/1/21

AYES: Aguiar-Curry, Arambula, Bauer-Kahan, Bennett, Berman, Bigelow, Bloom, Boerner Horvath, Burke, Calderon, Carrillo, Cervantes, Chau, Chen, Chiu, Choi, Cooley, Cooper, Cunningham, Megan Dahle, Daly, Davies, Flora, Fong, Frazier, Friedman, Gabriel, Gallagher, Cristina Garcia, Eduardo Garcia, Gipson, Lorena Gonzalez, Gray, Grayson, Holden, Irwin, Jones-Sawyer, Kalra, Kiley, Lackey, Lee, Levine, Low, Maienschein, Mathis, Mayes, McCarty, Medina, Mullin, Muratsuchi, Nazarian, Nguyen, O'Donnell, Patterson, Petrie-Norris, Quirk, Quirk-Silva, Ramos, Reyes, Robert Rivas, Rodriguez, Blanca Rubio, Salas, Santiago, Seyarto, Smith, Stone, Ting, Valladares, Villapudua, Voepel, Waldron, Ward, Akilah Weber, Wicks, Wood, Rendon

NO VOTE RECORDED: Bryan, Luz Rivas

Prepared by: Jake Ferrera / L., P.E. & R. / (916) 651-1556

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\*\*\*\* END \*\*\*\*