

AMENDED IN ASSEMBLY APRIL 30, 2015

AMENDED IN ASSEMBLY MARCH 26, 2015

CALIFORNIA LEGISLATURE—2015–16 REGULAR SESSION

## ASSEMBLY BILL

**No. 305**

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**Introduced by Assembly Member Gonzalez  
(Coauthors: Assembly Members Chiu and McCarty)**

February 12, 2015

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An act to amend ~~Section~~ *Sections 4660, 4660.1, and 4663* of the Labor Code, relating to employment.

### LEGISLATIVE COUNSEL'S DIGEST

AB 305, as amended, Gonzalez. Workers' compensation: permanent disability apportionment.

Existing workers' compensation law generally requires employers to secure payment of workers' compensation, including medical treatment, for injuries incurred by their employees that arise out of, or in the course of, employment. An employer is liable only for the percentage of the permanent disability directly caused by the injury arising out of, and occurring in the course of, employment.

Existing law requires apportionment of permanent disability to be based on causation, and a physician who prepares a report addressing the issue of permanent disability due to a claimed industrial injury is required to address the issue of causation of the permanent disability. The physician is 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.

This bill would prohibit apportionment of permanent disability, in cases of physical injury, from being based on pregnancy, ~~breast cancer~~, menopause, or ~~osteoporosis~~. *osteoporosis if the condition is contemporaneous with the claimed physical injury.* The bill would also prohibit apportionment of permanent disability, in cases of psychiatric injury, from being based on psychiatric disability or impairment caused by sexual harassment, pregnancy, ~~breast cancer~~, menopause, or ~~osteoporosis~~. *osteoporosis if the condition is contemporaneous with the claimed injury. The bill would also provide, notwithstanding any other law, that the impairment ratings for breast cancer and the aftereffects of the disease, known as sequelae, shall in no event be less than comparable ratings for prostate cancer and its sequelae.*

Vote: majority. Appropriation: no. Fiscal committee: no.  
State-mandated local program: no.

*The people of the State of California do enact as follows:*

- 1     SECTION 1. Section 4660 of the Labor Code is amended to
- 2     read:
- 3     4660. This section shall only apply to injuries occurring before
- 4     January 1, 2013.
- 5     (a) In determining the percentages of permanent disability,
- 6     account shall be taken of the nature of the physical injury or
- 7     disfigurement, the occupation of the injured employee, and his or
- 8     her age at the time of the injury, consideration being given to an
- 9     employee's diminished future earning capacity.
- 10    (b) (1) For purposes of this section, the "nature of the physical
- 11    injury or disfigurement" shall incorporate the descriptions and
- 12    measurements of physical impairments and the corresponding
- 13    percentages of impairments published in the American Medical
- 14    Association (AMA) Guides to the Evaluation of Permanent
- 15    Impairment (5th Edition).
- 16    (2) For purposes of this section, an employee's diminished future
- 17    earning capacity shall be a numeric formula based on empirical
- 18    data and findings that aggregate the average percentage of
- 19    long-term loss of income resulting from each type of injury for
- 20    similarly situated employees. The administrative director shall
- 21    formulate the adjusted rating schedule based on empirical data and

1 findings from the Evaluation of California's Permanent Disability  
2 Rating Schedule, Interim Report (December 2003), prepared by  
3 the RAND Institute for Civil Justice, and upon data from additional  
4 empirical studies.

5 (c) The administrative director shall amend the schedule for the  
6 determination of the percentage of permanent disability in  
7 accordance with this section at least once every five years. This  
8 schedule shall be available for public inspection and, without  
9 formal introduction in evidence, shall be prima facie evidence of  
10 the percentage of permanent disability to be attributed to each  
11 injury covered by the schedule.

12 (d) The schedule shall promote consistency, uniformity, and  
13 objectivity. The schedule and any amendment thereto or revision  
14 thereof shall apply prospectively and shall apply to and govern  
15 only those permanent disabilities that result from compensable  
16 injuries received or occurring on and after the effective date of the  
17 adoption of the schedule, amendment or revision, as the fact may  
18 be. For compensable claims arising before January 1, 2005, the  
19 schedule as revised pursuant to changes made in legislation enacted  
20 during the 2003–04 Regular and Extraordinary Sessions shall apply  
21 to the determination of permanent disabilities when there has been  
22 either no comprehensive medical-legal report or no report by a  
23 treating physician indicating the existence of permanent disability,  
24 or when the employer is not required to provide the notice required  
25 by Section 4061 to the injured worker.

26 ~~(e) On or before January 1, 2005, the administrative director~~  
27 ~~shall adopt regulations to implement the changes made to this~~  
28 ~~section by the act that added this subdivision.~~

29 *(e) Notwithstanding any other law, the impairment ratings for*  
30 *breast cancer and its sequelae shall in no event be less than*  
31 *comparable ratings for prostate cancer and its sequelae.*

32 SEC. 2. Section 4660.1 of the Labor Code is amended to read:  
33 4660.1. This section shall apply to injuries occurring on or  
34 after January 1, 2013.

35 (a) In determining the percentages of permanent partial or  
36 permanent total disability, account shall be taken of the nature of  
37 the physical injury or disfigurement, the occupation of the injured  
38 employee, and his or her age at the time of injury.

39 (b) For purposes of this section, the “nature of the physical  
40 injury or disfigurement” shall incorporate the descriptions and

1 measurements of physical impairments and the corresponding  
2 percentages of impairments published in the American Medical  
3 Association (AMA) Guides to the Evaluation of Permanent  
4 Impairment (5th Edition) with the employee's whole person  
5 impairment, as provided in the Guides, multiplied by an adjustment  
6 factor of 1.4.

7 (c) (1) Except as provided in paragraph (2), there shall be no  
8 increases in impairment ratings for sleep dysfunction, sexual  
9 dysfunction, or psychiatric disorder, or any combination thereof,  
10 arising out of a compensable physical injury. Nothing in this  
11 section shall limit the ability of an injured employee to obtain  
12 treatment for sleep dysfunction, sexual dysfunction, or psychiatric  
13 disorder, if any, that are a consequence of an industrial injury.

14 (2) An increased impairment rating for psychiatric disorder shall  
15 not be subject to paragraph (1) if the compensable psychiatric  
16 injury resulted from either of the following:

17 (A) Being a victim of a violent act or direct exposure to a  
18 significant violent act within the meaning of Section 3208.3.

19 (B) A catastrophic injury, including, but not limited to, loss of  
20 a limb, paralysis, severe burn, or severe head injury.

21 (3) *Notwithstanding any other law, the impairment ratings for*  
22 *breast cancer and its sequelae shall in no event be less than*  
23 *comparable ratings for prostate cancer and its sequelae.*

24 (d) The administrative director may formulate a schedule of age  
25 and occupational modifiers and may amend the schedule for the  
26 determination of the age and occupational modifiers in accordance  
27 with this section. The Schedule for Rating Permanent Disabilities  
28 pursuant to the American Medical Association (AMA) Guides to  
29 the Evaluation of Permanent Impairment (5th Edition) and the  
30 schedule of age and occupational modifiers shall be available for  
31 public inspection and, without formal introduction in evidence,  
32 shall be prima facie evidence of the percentage of permanent  
33 disability to be attributed to each injury covered by the schedule.  
34 Until the schedule of age and occupational modifiers is amended,  
35 for injuries occurring on or after January 1, 2013, permanent  
36 disabilities shall be rated using the age and occupational modifiers  
37 in the permanent disability rating schedule adopted as of January  
38 1, 2005.

39 (e) The schedule of age and occupational modifiers shall  
40 promote consistency, uniformity, and objectivity.

(f) The schedule of age and occupational modifiers and any amendment thereto or revision thereof shall apply prospectively and shall apply to and govern only those permanent disabilities that result from compensable injuries received or occurring on and after the effective date of the adoption of the schedule, amendment, or revision, as the case may be.

(g) Nothing in this section shall preclude a finding of permanent total disability in accordance with Section 4662.

(h) In enacting the act adding this section, it is not the intent of the Legislature to overrule the holding in *Milpitas Unified School District v. Workers' Comp. Appeals Bd. (Guzman)* (2010) 187 Cal.App.4th 808.

(i) The Commission on Health and Safety and Workers' Compensation shall conduct a study to compare average loss of earnings for employees who sustained work-related injuries with permanent disability ratings under the schedule, and shall report the results of the study to the appropriate policy and fiscal committees of the Legislature no later than January 1, 2016.

**SECTION 1.**

**SEC. 3.** Section 4663 of the Labor Code is amended to read:

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) (1) In order for a physician's report to be considered complete on the issue of permanent disability, the report must include an apportionment determination.

~~(A)~~

(2) (A) 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.

(B) Apportionment in cases of physical injury shall not be based on any of the following ~~conditions~~: *conditions if those conditions are contemporaneous with the claimed physical injury*:

- 1 (i) Pregnancy.  
2 ~~(ii) Breast cancer.~~  
3 ~~(iii) —~~  
4 (ii) Menopause.  
5 ~~(iv)~~  
6 (iii) Osteoporosis.

7 (C) Apportionment in cases of psychiatric injury shall not be  
8 based on psychiatric disability or impairment caused by sexual  
9 harassment *that is contemporaneous with the claimed psychiatric*  
10 *injury*, or caused by any of the conditions listed in subparagraph  
11 (B) *that are contemporaneous with the claimed psychiatric injury*.

12 (3) If the physician is unable to include an apportionment  
13 determination in his or her report, the physician shall state the  
14 specific reasons why the physician could not make a determination  
15 of the effect of a prior condition on the permanent disability arising  
16 from the injury. The physician shall then consult with other  
17 physicians or refer the employee to another physician from whom  
18 the employee is authorized to seek treatment or evaluation in  
19 accordance with this division in order to make the final  
20 determination.

21 (d) An employee who claims an industrial injury shall, upon  
22 request, disclose all previous permanent disabilities or physical  
23 impairments.

24 (e) Subdivisions (a), (b), and (c) shall not apply to injuries or  
25 illnesses covered under Sections 3212, 3212.1, 3212.2, 3212.3,  
26 3212.4, 3212.5, 3212.6, 3212.7, 3212.8, 3212.85, 3212.9, 3212.10,  
27 3212.11, 3212.12, 3213, and 3213.2.