

KEGEL, TOBIN & TRUCE
INTER-OFFICE MEMORANDUM

TO: ALL ATTORNEYS/CLIENTS
FROM: JOE TRUCE
DATE: October 15, 2004
RE: APPORTIONMENT TO PRE-EXISTING DISABILITY
INVOLVING DIFFERENT BODY PARTS

With the passage of Senate Bill 899, the concept of **apportionment** has drastically changed. However, many of the landmark decisions by the **Appellate Courts** may well still be relevant to a discussion of apportionment to preexisting injuries or disability.

Such a case is the **Supreme Court** decision in *Patrick Mercier v. Workers' Compensation Appeals Board*, 41 CCC 205.

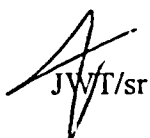
In *Mercier*, a 1976 decision, our **Supreme Court** forever changed the landscape with respect to apportionment to pre-existing injuries and/or disability, much to the chagrin of the applicants' attorneys.

Prior to *Mercier*, applicants' attorneys argued that there could be no apportionment to a prior injury or disability if said injury/disability related to a different body part.

However, the **Supreme Court** in *Mercier* ruled that **apportionment** to pre-existing injuries and/or disability can involve different body parts, as follows:

In such a case, apportionment turns on whether the second injury decreases the employee's earning capacity or his ability to compete in the open labor in the same manner as the first. The fact that the injuries occurred to different anatomical parts of the body, while relevant, does not in itself preclude apportionment...

Although the principles may be rendered moot by the eventual interpretation of Senate Bill 899, we certainly want to be aware of the **Supreme Court's** holding in *Mercier* when the applicant's attorney argues that apportionment to a pre-existing injury is not applicable, as it involves a different body part.


JWT/sr