

COA – May 2017

Apportionment

Evaluating Tough Cases



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1. Apportionment Basics

Step 1: Dr. must distinguish between Causation of Injury and Causation of **Disability**

Step 2: Dr. must make an apportionment determination

Step 3: Dr. must base his or her conclusion on “**reasonable medical probability.**”



1. Apportionment Basics

Step 4: Dr. must explain basis
for how and why

Step 5: Dr. must avoid the
danger zones



1. Apportionment Basics



- Causation of injury affects MT
(If cause of IW's injury = 1% industrial, IW gets 100% MT needed to treat injury)
- Causation of disability affects PD
(If cause of IW's disability = industrial, IW gets PD% payout, less % of **apportionment** to non-industrial factors.)

1. Apportionment Basics

James v. Entertainment Partners, 2016 Cal. Wrk. Comp. P.D. LEXIS 640



The doctor “briefly discussed that applicant's rodeo activities may have contributed to the development of low back symptoms. However, causation of injury and causation of permanent disability is not the same.

Moreover, he did not provide any discussion as to how or why 50% of the low back impairment is apportionable to non-industrial causes.”

1. Apportionment Basics

Escobedo v. Marshalls, (2007) 70 CCC 604

Marlene Escobedo, salesperson, sustained industrial injuries after a fall at work:

- Direct injury – left knee
- Compensable Consequence – right knee

WCJ found **53% PD**, but after **50% apportionment to non-industrial degenerative arthritis**, the **FINAL PD = 27%**



1. Apportionment Basics

Escobedo v. Marshalls, (2007) 70 CCC 604

Doctor's report re Marlene **Escobedo** constituted substantial evidence:

- (1) "**trivial nature**" of applicant's knee injury;
- (2) **immediate onset** of knee symptoms after that injury;
- (3) "obvious, significant degenerative arthritis in both knees" reflected in a **pre-surgical MRI** of applicant's knee shortly after the injury
- (4) Adequate medical history
- (5) The **reasoning** behind his conclusions
- (6) Opinion based on "**reasonable medical probability.**"



1. Apportionment Basics

Escobedo v. Marshalls, (2007) 70 CCC 604

EXAMPLE for Disc Disease: If a physician opines that 50% of an employee's back disability is caused by degenerative disc disease, the physician must explain:

- The nature of the degenerative disc disease,
- How it is causing permanent disability at the time of the evaluation,
- Why it is causing permanent disability at the time of the evaluation,
- How it is responsible for approximately 50% of the disability, and
- Why it is responsible for approximately 50% of the disability.

1. Apportionment Basics

Escobedo v. Marshalls, (2007) 72
CCC 336

EXAMPLE for Disc Disease: If a physician opines that 50% of an employee's back disability is caused by **non-industrial** degenerative disc disease, the physician must explain how & why the disc disease is responsible for 50% of the **non-industrial factors**.



1. Apportionment Basics



Neither Medical Treatment nor TD is apportionable:

If at least a portion of the cause for MT = industrial, the IW get 100% of MT needed to treat industrial injury.

Granado v. WCAB, (1968) 33 CCC 647.

The court in *Granado* stated, “If medical treatment reasonably necessary to relieve from the industrial injury were apportionable, a worker, who is disabled, may not be able to pay his share of the expenses and thus forego treatment.”

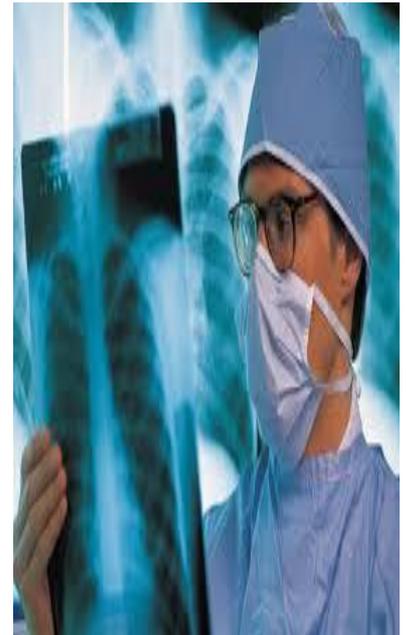
2. Ortho Not the Same As Psych...

Law does not mandate that apportionment % determination for one body part be applied to all industrially injured body parts.

Jackson v. County of Los Angeles, (2013) 2013 Cal Wrk Comp PD LEXIS 558

“It is settled law that the defendant has the burden of proof on apportionment...

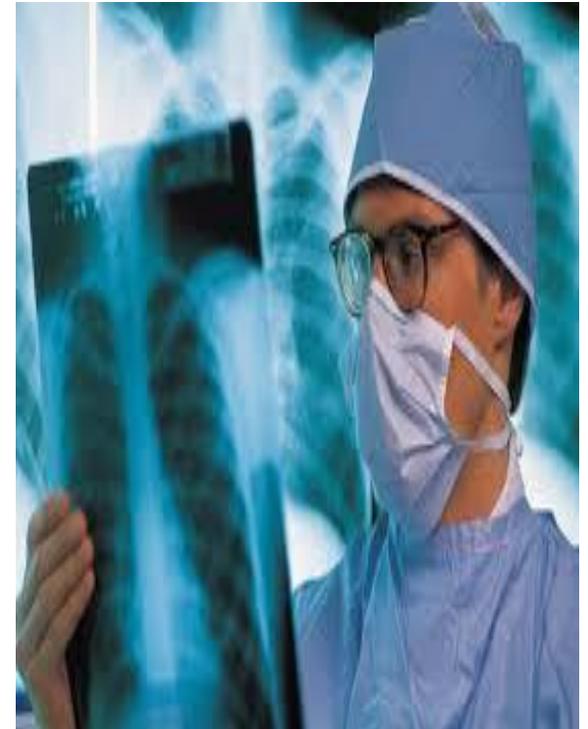
Nevertheless, even if there is legal apportionment of the applicant's back disability, no where in the apportionment mandates of the *Escobedo* case or **LC 4663** does it indicate that apportionment of one part of body necessarily flows to each and every injury claimed.”



2. Ortho Not the Same As Psych...

Sasco Electric v. WCAB
(*Anemone*), (2014) 79 Cal
Comp Cases 1354

“The WCJ did not find merit to Defendant’s contention that compensable consequence injuries must be apportioned in the same manner as their underlying orthopedic cause.”



3. Apportion to Medical Condition



Avoid the “danger zones”

“risk factors”

“normal aging process”

“evolutionary process”

“gender related issues”

“genetic factors”

4. Benson Issues

LC §3208.1. An injury may be either:

- (a) "specific," occurring as the result of one incident or exposure which causes disability or need for medical treatment; or
- (b) "cumulative," occurring as repetitive mentally or physically traumatic activities extending over a period of time, the combined effect of which causes any disability or need for medical treatment.



4. Benson Issues

Benson v. WCAB (2009) 73 CCC
113 (1st DCA) On 6.3.03, Ms.
Benson, a file clerk, reached for a
plastic bin and felt a pain in her
neck.

AME said:

50% = specific injury of 6.3.03

50% = CT ending on 6.3.03.



4. Benson Issues



Doctor's Option #1:

“A physician evaluating a case involving successive industrial injuries might determine that all of the resulting PD is solely attributable to one of the successive injuries.” (Benson, at p. 16)

100% to CT ending 6.3.03 = \$67,016

4. Benson Issues

Doctor's Option #2:

“A Dr. may determine that it is medically reasonable to assign a % cause of the overall disability to each injury (e.g., 50/50, 75/25, 90/10), resulting in multiple (non-combined) awards for each injury's portion of the permanent disability.” (Benson, at p.16)

50% - CT ending 6.3.03=	\$24,605
50% - SI of 6.3.03	= <u>24,605</u>
Total	<u>\$49,210</u>



4. Benson Issues

Doctor's Option #3:

If the doctor is unable to “parcel out degree to which each injury is causally contributing” to the PD. (*Benson*, at p. 18)



Lester v. WCAB, (2nd DCA writ denied.)
2011 CWC LEXIS 162. Argument didn't work for IME who changed his mind with no new medical evidence.

Can't parcel out causative injury = \$67,016

4. Benson Issues

Flowserve Corp v. WCAB (Espinoza), (2016)
81 Cal Comp Cases 812



In his subsequent deposition testimony, the doctor changed his opinion on apportionment, testifying that he believed it would be too speculative to separate the disabling effects of the specific injury from those of the CT injury, and that the disabilities from each injury were **“inextricably intertwined.”**

4. Benson Issues

LC §4663(c):

Richardson v. Prospect Health, 2010 CWC PD LEXIS 606

“Once the AMEs develop an opinion regarding applicant's overall level of permanent disability, they must then, "look at the current disability and parcel out its causative sources - nonindustrial, prior industrial, current industrial," if that is possible...”

“In this regard it is important to **distinguish between causation of injury and causation of disability...**”

“If the physicians cannot provide the necessary apportionment opinions, they should explain the reasons why, and **should consult with other physicians** or refer the applicant to another physician in order to make such a determination.”

5. Case Law Example



Huber v. Laboratory Corp, 2015 CWC PD
LEXIS 195

IW, a phlebotomist, had industrial injury to
her wrists (CTS), and psyche.

Ortho PD: 15% for right wrist and **15%** for
left wrist (using motor and sensory lost
per p. 495)

Psyche PD: 17% (using GAF score 60 = 15%
WPI and **after** 51% apportionment)

17 C 15 C 15 = 40% PD

5. Case Law Example

Huber v. Laboratory Corp, 2015 CWC PD LEXIS 195

Ortho apportionment Not = Substantial Evidence

Doctor apportioned 50% to non-industrial:

- Symptoms from non-industrial fibromyalgia
- Use of drug “Synthorid” to treat her Hypothyroidism.

Judge explained that these factors may have played a role in the **cause** of the ortho **injury** (CTS), but doctor didn't explain how these factors **caused** 50% of ortho **disability**. Doctor was unclear on how to distinguish these 2 concepts.



5. Case Law Example

Huber v. Laboratory Corp, 2015 CWC PD LEXIS 195

Ortho apportionment Not = Substantial Evidence



Judge explained, “It appears that Dr. may have been apportioning to the **causation of injury** (hand intensive work and hypothyroidism as a risk factor for developing **carpal tunnel**) and not necessarily the **causation of impairment**. Dr. does not explain how and why hypothyroidism, that IW has had for over 20 years and for which IW was taking Synthroid, was responsible for an approximate percentage of the current sensory and motor deficit impairments of the median nerve.

Therefore, applicant is entitled to an unapportioned award regarding the impairment for her bilateral wrists.

5. Case Law Example

Huber v. Laboratory Corp, 2015 CWC PD LEXIS 195

Psyche apportionment = Substantial Evidence

IW had GAF score of 60 “Moderate symptoms (e.g. flat affect and circumstantial speech, occasional panic attacks) OR moderate difficulty in social, occupational, or school functioning (e.g. few friends, conflicts with peers or co-workers.)

GAF score of 60 = **15% WPI**

AME indicated 51% of psych PD industrial and 49% due to non-industrial conditions.

51% (14.01.00.00—**15%**-[8]-21—220J-31—**33%**) = **17%**



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