

# COA – April 2015

## Apportionment: Other Considerations



# Overlap & Rehabilitation

**1997 PDRS: Overlap** “When factors of disability resulting from the current injury duplicate factors resulting from a *different injury or condition, the disabilities are* said to “overlap”. Overlap occurs to the extent that the factors of disability resulting from the current injury do not reduce an injured worker’s ability to compete in an open labor market beyond the disability resulting from pre-existing injury(ies) and/or condition(s).

The attribution of overlapping factors of disability to different causes is called apportionment. Overlapping disability(ies) resulting from the prior injury or condition must be factored out of the current disability so that the rating reflects only the residual disability caused by the current injury.

Overlap may be total, partial or absent...”



# Overlap & Rehabilitation

**2005 PDRS:** Overlap = NO DEFINITION, NO SUCH CONCEPT.

**AMA GUIDES 5<sup>TH</sup> EDITION:** NO DEFINITION, NO EXPLAINED, DETAILED CONCEPT.



# Overlap & Rehabilitation

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**See *Perez v. UC Santa Cruz, PSI (2013)* [page 28 of Raymond Corrieo's Apportionment: Case Law Update included in materials]**

***So...Distinction between Labor Code Section 4663 and 4664. Unlike Labor Code Section 4664, under Labor Code Section 4663 an applicant can prove rehabilitation from a prior industrial or nonindustrial injury.***



# Overlap & Rehabilitation

*Unlike Labor Code Section 4664, under Labor Code Section 4663 an applicant can prove rehabilitation from a prior industrial or nonindustrial injury.*

*Questions for doctors to consider in the analysis:*

- 1. Time off work?**
- 2. Temporary modified duties?**
- 3. Diagnostics done?**
- 4. Surgery?**
- 5. Permanent functional limitations?**
- 6. Gap between treatment? Ongoing need for medicine?**
- 7. Self modification of work or ADLs?**

*Conclusion: Explain how and why the prior injury did, nor did not, have an impact in the current nonindustrial apportionment analysis.*



# RISK FACTORS

# Risk Factors

*What are risk factors?*

- **Age**
- **Ethnicity**
- **Gender**
- **Obesity**
- **Genetic predisposition**
- **Disease processes**

*Are they apportionable factors?*



# Gender Bias

## **AB 305 (Gonzalez)**

**Prohibition on Gender Bias in Workers' Compensation  
Amendments are in *italics*.**

### **Amend Labor Code Section 4663 (c)**

(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 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.



# Gender Bias

## **AB 305 (Gonzalez)**

### **Prohibition on Gender Bias in Workers' Compensation**

**Amendments are in *italics*.**

#### **Amend Labor Code Section 4663 (c)**

*Apportionment in cases of physical injury shall not be based on any of the following contemporaneous conditions:*

*Pregnancy,  
Menopause,  
Osteoporosis.*

*Apportionment in cases of psychiatric injury may not be based on psychiatric disability or impairment caused by contemporaneous sexual harassment, or caused by any of the conditions listed above.*

# Gender Bias

## **AB 305 (Gonzalez)**

### **Prohibition on Gender Bias in Workers' Compensation**

**Amendments are in *italics*.**

Add to LC Section 4660

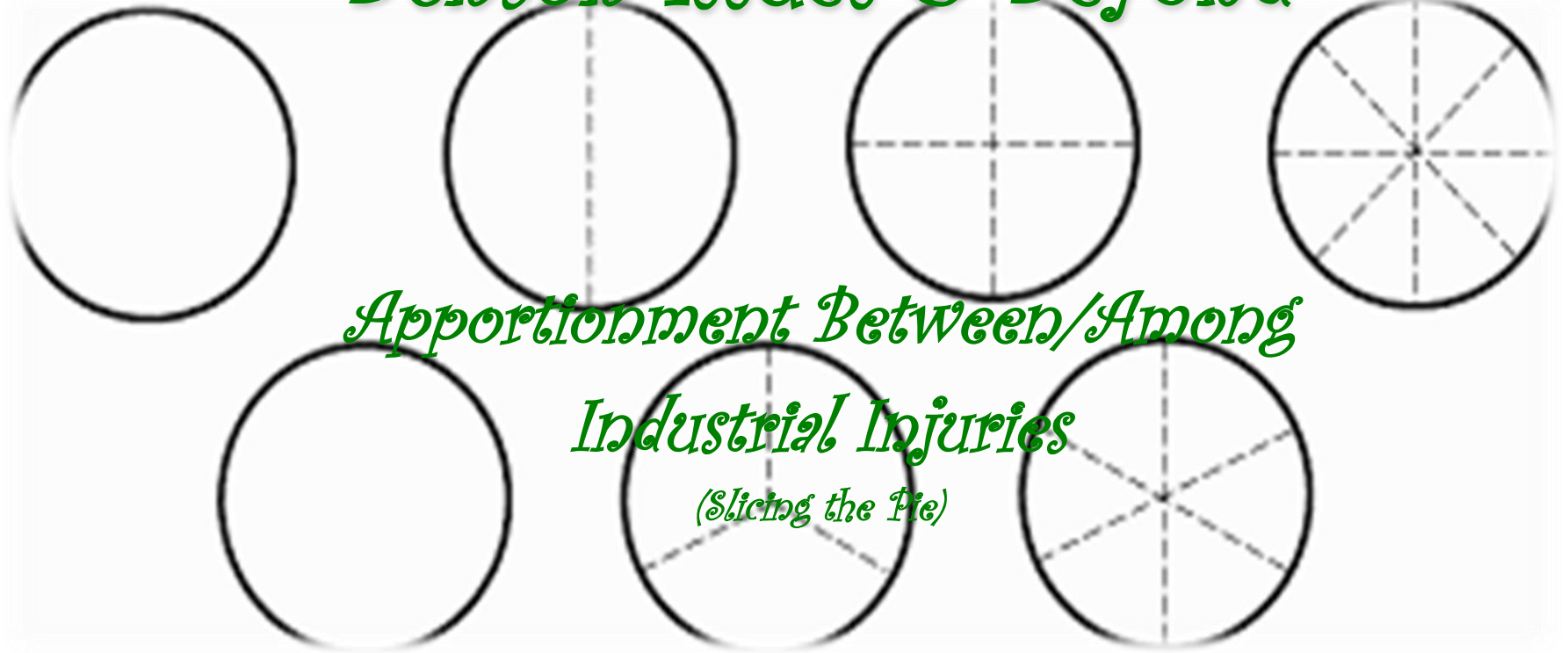
*(f) The impairment ratings for breast cancer and its sequelae shall in no event be less than comparable ratings for prostate cancer and its sequelae.*

Add to LC Section 4660.1

*(j) The impairment ratings for breast cancer and its sequelae shall in no event be less than comparable ratings for prostate cancer and its sequelae.*

# *Benson Issues & Beyond*

*Apportionment Between/Among  
Industrial Injuries  
(Slicing the Pie)*



## *Apportionment Between/Among Industrial Injuries*

- Labor Code § 4663 applies to apportionment between and among different work related injuries just as it applies to apportionment between industrial and non industrial
- Labor Code § 4664 applies to Apportionment to prior Awards of Permanent Disability
  - Sometimes...
  - If Labor Code § 4664 does not apply, Labor Code § 4663 does apply

## *Apportionment Between/Among Industrial Injuries*

### LC 4663 - Apportionment

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



## *Apportionment Between/Among Industrial Injuries*

***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 opined 60% PD  
overall.

AME allocated:

50% = specific injury of 6.3.03

50% = CT ending on 6.3.03.



## *Apportionment Between/Among Industrial Injuries*

- ***Benson v. W.C.A.B.***

- ***Issue raised***

- ***Combine PD into single PD award (62%)***
- ***Separate PD awards of 31%***

- ***WCJ awarded 62%***

- ***W.C.A.B. reversed and awarded two  
31% awards***



## *Apportionment Between/Among Industrial Injuries*

- ***Benson v. WCAB.:***

- Labor Code § 4663 requires a physician to allocate PD between multiple work injuries.

- “...plain language of the new statutory scheme requires apportionment to each cause of a permanent disability, including each distinct industrial injury.*

- ...specifically requires a physician to determine what percentage of disability was caused by each industrial injury, regardless of whether any particular industrial injury occurred before or after any other particular industrial injury or injuries.*“



## *Apportionment Between/Among Industrial Injuries*

- ***Benson v. W.C.A.B. (Cont)***
  - ...*”We agree with the Board that a system of apportionment based on causation requires that each distinct industrial injury be separately compensated based on its individual contribution to a permanent disability.”*



**We Agree!**

## *Apportionment Between/Among Industrial Injuries*

- ***Benson v. WCAB***

- *We also agree that there may be limited circumstances, not present here, when the evaluating physician cannot parcel out, with reasonable medical probability, the approximate percentages to which each distinct industrial injury causally contributed to the employee's overall permanent disability.*
- *In such limited circumstances, when the employer has failed to meet its burden of proof, a combined award of permanent disability may still be justified.*

## *Apportionment Between/Among Industrial Injuries*

- ***Applying Benson v. W.C.A.B.***

- *Cannot use the “limited circumstanc language in Benson to avoid consideration of apportionment.*



- *Consideration of allocation between/among industrial injuries is required unless physician cannot parcel out the effects of each injury*

- *Term “inextricably interwoven” is not used in Benson! Consider “medically parcel out”*

## *Apportionment Between/Among Industrial Injuries*

- ***Applying Benson v. W.C.A.B.***
  - *Proposed Analysis to allocate between injuries*
  - *Requires physician have an adequate history and record review of the factors which allow decision*
    - *How Traumatic was each injury?*
    - *How long the employee miss work for the injury*
    - *Did the employee have restrictions on activity post injury*
    - *Did injury case new or different symptoms or DX*
    - *Did the injury result in surgery or significant different treatment*

## *Apportionment Between/Among Industrial Injuries*

- *Applying Benson v. W.C.A.B.*
  - *Which injury is the most significant?*
  - *Rank the injuries in terms of significance based on factors obtained in history and record review*
  - *Consider the relative significance of injury relative to other injuries*
    - *Equal in severity?*
    - *Twice as significant?*
    - *Minor significance?*
    - *No significance?*



## *Apportionment Between/Among Industrial Injuries*



- ***Applying Benson v. W.C.A.B.***
  - *Weigh each factor as to each injury and assign an approximate % of causation*
  - *Remember PRECISION is not required. Statutory requirement is “approximate %”*
  - *Can’t decide?*



## *Apportionment Between/Among Industrial Injuries*

- ***Applying Benson v. W.C.A.B.***
  - *If you can't decide if one or more of the injuries is more significant than the other, they are not inextricably intertwined!*
  - *The injuries are equal in causation to each other.*
  - *Consider the limited circumstances when the exception does apply.*



## *Apportionment Between/Among Industrial Injuries*

- *State Fund v W.C.A.B. (Dorsett)*
  - *Applicant sustained specific & CT injury.*
    - *AME opined equal contribution*
    - *AME also concluded absent specific CT claim likely would not exist*
    - *2nd Injury “compensable consequence” of 1st*
  - *WCJ & W.C.A.B. bought concept – not 2 separate and distinct injuries*
  - *Court of Appeal reversed rejecting “inextricably intertwined”:*
    - *“...based on the testimony of the AME, the successive injuries can be rated separately and Dorsett’s joint and several award of 100 percent permanent disability must be annulled”*





## *Apportionment Between/Among Industrial Injuries - EXCEPTION*

- ***Zurich North American (administered by Broadspire), insurer for Holt, Rinehart & Winston (subsidiary of Harcourt), Petitioner v. Workers' Compensation Appeals Board, (Gwendolyn Driver), Respondents (2013) 2013 Cal. Wrk. Comp. LEXIS 54 Writ of Review Denied.***
  - **When neither treating physician nor agreed medical evaluator could parcel out, with reasonable medical probability, approximate percentages to which each of applicant's injuries contributed to her permanent disability, and WCAB found that their opinions constituted substantial evidence.**

## *Apportionment Between/Among Industrial Injuries - EXCEPTION*

- ***Zurich North American v. Workers' Compensation Appeals Board, (Gwendolyn Driver), (2013)***
  - Applicant suffered industrial injuries to her knees and back on 10/3/2002, to her neck and back from 10/2001 to 3/18/2002, and from 9/5/2002 to 6/20/2003, and to her knees, wrists, upper extremities, neck, and back from 10/2001 to 6/30/2003.
  - AME concluded “It is, indeed, not possible to determine which body part is causing what precise portion of the patient's disability. It is not possible to determine which dates of injury caused which portions of her overall disability, as the parts of body overlap and the various disabilities interact with each other. The human body is not a machine and functions as a whole. The left knee affects the right knee, and vice versa. The knee affects the lumbar spine, the lumbar spine affects the knee. The cervical spine affects the upper extremities and the wrists, hands, and elbows also affect the cervical spine. It is clear that the patient is factually totally disabled according to *Labor Code Section 4662*.”

## *Apportionment Between/Among Industrial Injuries - EXCEPTION*

- ***Zurich North American v. Workers' Compensation Appeals Board, (Gwendolyn Driver), (2013)***
  - Treating physician “Accordingly, I agree with Dr. Alban that the patient is 100% totally disabled and unable to compete in the open labor market. I agree that her disability is the result of her lumbar spine, cervical spine, left knee, bilateral hand, wrist and elbow disability in combination, and that the degree of disability resulting from each body part and date of injury cannot be separated out. The patient is 100% disabled as a result of the combination of her disability”
  - Treating physician “To further explain with regard to distinguishing which of the patient's several injuries resulted in what portion of her total permanent disability, the following is noteworthy. ...” “The relationship between the 01/16/01 injury and the October 2001 - March 18, 2002 CT cannot be apportioned. ...”
  - **The doctor then launched into pages of explanation as to how he came to the conclusion that he could not medically parcel out the industrial permanent disability between the multiple injuries.**

## *Apportionment Between/Among Industrial Injuries - EXCEPTION*

- ***Zurich North American v. Workers' Compensation Appeals Board, (Gwendolyn Driver), (2013)***
  - Treating physician “**This patient suffered two specific injuries to multiple body parts which were in turn subjected to additional periods of insult as the patient continued to work. Each injury contributed to the patient's current permanent condition, that of total permanent disability, and no exact measurement can be assigned to how each injury added its particular insult. It can only be said that without each injury the patient's condition would not be as it is today. Not only do the various parts of body and dates of injury inter-react, but together the sum of the disability created is greater than would be expected by the simple addition of the various disabilities affecting each part of body. I have consulted with other physicians, who agree that it is impossible to apportion between the various dates of injury without speculating.**”

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Apportionment:  
Further Questions?  
Comments?

