

COA – April 2015

Sorting Out Difficult Apportionment Questions



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1. Apportionment Basics

LC §4663:

In order for a Dr's report to be considered complete on the issue of PD, the report must include an apportionment determination.

Dr. **shall** make an apportionment determination by finding what **approximate % of the PD** was caused by the direct result of injury AOE and COE and **what approximate % of the PD was caused by other factors** both before and subsequent to the industrial injury, including prior industrial injuries.

An appropriate determination can be 0% caused by non-industrial factors.

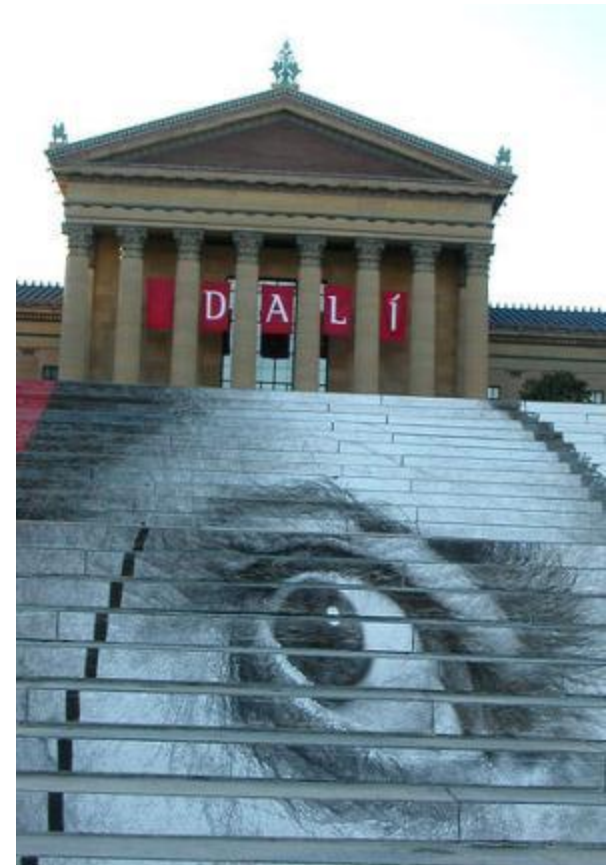


1. Apportionment Basics

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

Step 6: Beware of Benson
Issues



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



E.L. Yeager Constr'n v. WCAB
(*Gatten*), (2006), 71 CCC
1687

“Although the doctor does not state in his report that the apportionment is based on reasonable medical probability, he does do so in the deposition. This constitutes a sufficient basis for the apportionment.”

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. Apportionment to One Body Part...

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, nowhere 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. Apportionment to One Body Part...

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.”



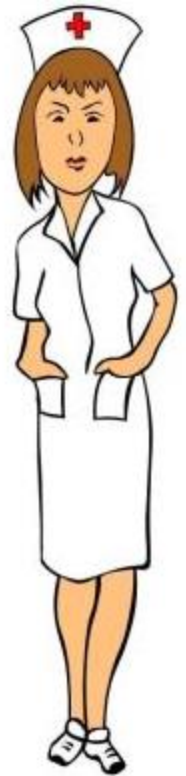
3. Apportionment & *Guzman*

Sanders v. WCAB (2012) 77 Cal Comp Cases 464 (writ denied)

“Dr. Carey described Applicant’s PD as class 3, moderate psychiatric impairment under the *AMA Guides*. Dr. Carey determined that Applicant’s global assessment factor (GAF) was 59, equivalent to an 18 percent WPI, and that 60 percent of Applicant’s impairment was due to non-industrial factors.

Trying to provide a more accurate WPI per *Guzman*, “Dr. Carey noted that a better way of describing Applicant’s impairment was by the eight work functions set forth in the 1997 Schedule for Rating Permanent Disabilities.”

Guzman holds, “even when a physician does not adhere to a strict application of the *AMA Guides*, the physician must still remain within the four corners of the *AMAGuides* to determine impairment.”



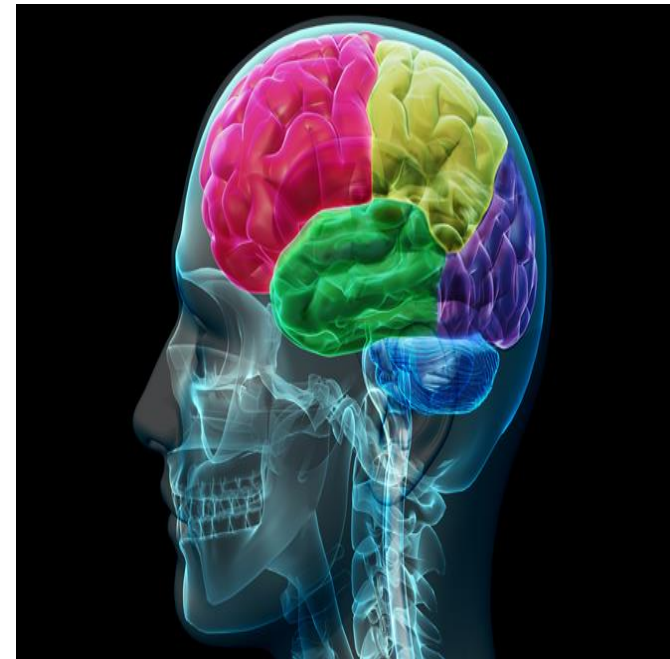
4. Apportionment & LC 4662

Labor Code amended by AB 1847 effective 1.1.2015:

LC 4662: (a) Any of these shall be conclusively presumed to be total in character:

- (1) Loss of both eyes or the sight thereof.
- (2) Loss of both hands or the use thereof.
- (3) An injury resulting in a practically total paralysis.
- (4) An injury to the brain resulting in incurable mental incapacity or insanity.

(b) In all other cases, permanent total disability shall be determined in accordance with the fact.



4. Apportionment & *LC 4662*



LC 4662 prior to 2014:

“Any of the following permanent disabilities shall be **conclusively presumed** to be total in character:

- (a) Loss of both eyes or the sight thereof.
- (b) Loss of both hands or the use thereof.
- (c) An injury resulting in a practically total paralysis.
- (d) An injury to the brain resulting in incurable mental incapacity or insanity.

In all other cases, PTD shall be determined in accordance with the fact.”

4. Apportionment & *LC 4662*



Apportionment does not apply to the first four situations which are **conclusive presumptions** of 100% PD.

Case law has determined that apportionment may apply in cases where PTD is determined “in accordance with the fact.”

Corbitt v. Media Quest 2012 Cal Wrk Comp PD LEXIS 45, the panel deemed “in accordance with the fact” to be a **rebuttable presumption** of 100% PD.

4. Apportionment & *LC 4662*

See also *Sutter Medical Foundation v. WCAB (Moulthrop)*, (2014) 79 CCC 1570



“Dr. Weiss acknowledges that, as a result of IW’s pain and her reduced ability to function, she is unable to work at the present time.

Mr. Rehm concludes that IW’s chronic pain and her need for heavy doses of opioid medications present significant barriers to re-employment.

After reading all of these opinions together, and in consideration of IW’s testimony at trial regarding her inability to function from a physical standpoint, there is substantial evidence to support the conclusion that applicant is precluded from employment in the open labor market.

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5. Apportionment re IW's Employability



1st DCA case of *Acme Steel v WCAB*,
(*Borman*), (2013) 78 Cal Comp Cases 751

“Here, the WCAB ignored substantial medical evidence presented by Dr. Schindler, as summarized above, showing that Borman's 100 percent loss of hearing could not be attributed solely to the current cumulative trauma...

“... In sum, the WCAB's failure to apportion the hearing loss portion of the current cumulative trauma is contrary to the law, and, as a consequence, the award must be annulled.”

5. Apportionment re IW's Employability

Duplessis v. Network Appliance, 2014 Cal. Wrk. Comp. P.D. LEXIS 316.

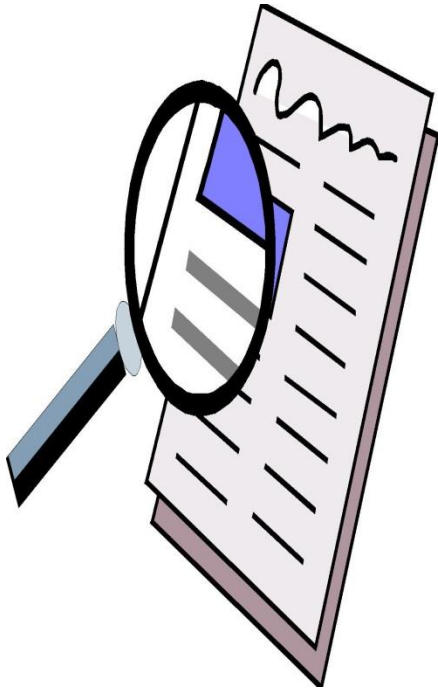
The WCJ writes, “IW argues that **to charge VR experts with determining apportionment is inconsistent with the law.**

Of course it is.

However, in order to support an award of 100% disability, which is what IW seeks here, I believe a VR expert must provide a conclusion, based on substantial evidence, that one industrial injury, standing alone, has produced that effect on the applicant's employability.... Such a conclusion is not altogether uncommon, but was understandably elusive in this case, **as multiple injuries, according to the AME, combined to yield the current result.”**



5. Apportionment re IW's Employability



NEW - 8 CCR 35.5 (2): “If the evaluator declares the IW P&S for all conditions and that the injury has caused PPD, the QME **shall** complete the Physician’s Return-to-Work & Voucher Report (DWC-AD Form 10133.36) and serve it on the claims administrator together with the medical report.”

The form can be found at:

http://www.dir.ca.gov/dwc/DWCPropRegs/SJDB_Regs/Form10133.36.pdf

Physician's Return-to-Work & Voucher Report

For injuries occurring on or after January 1, 2013

The Employee is P&S from all conditions and the injury has caused permanent partial disability

Employee Last Name _____ Employee First Name _____ MI _____ Date of Injury _____

Claims Administrator: _____ Claims Representative _____

Employer Name: _____ Employer Street Address: _____

Employer City: _____ State _____ Zip Code _____ Claim No. _____

The Employee can return to regular work

The Employee can work with restrictions: 1-2 hours 2-4 hours 4-6 hours 6-8 hours None

Stand	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Walk	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Sit	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Bend	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Squat	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Climb	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Twist	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Reach	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Crawl	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Drive	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Reach	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>

R/L/Bilat Hand(s) (circle): Grasp

R/L/Bilat Hand(s) (circle): Push/Pull

Lift/Carry Restrictions: May not lift/carry at a height of _____ more than _____ lbs. for more than _____ hours per day.

Other Restrictions:

If a Job Description has been provided, please complete: Job Description provided of: Regular Modified Alternative Work

Job Title: _____ Work Location: _____

Are the Work Duties compatible with the activity restrictions set forth in the provided job description? Yes No, explain below

Physician's Name _____ Role of Doctor (PTP, QME, AME) _____

Physician's Signature _____ Date _____

5. Apportionment re IW's Employability

Completion of Physician's Return-to-Work & Voucher Report (**DWC-AD Form 10133.36**) is critical to the parties' selection of occupational variant, as well as many other issues.

This form is the trigger for an IW to obtain a SJDB voucher.

It may also allow IW to receive money from the newly created "Return to Work Fund" per SB863.



5. Apportionment re IW's Employability

For DOI > 1.1.2013:

8 CCR §10133.31 – 10133.34:

- IW may be entitled to \$6000 SJDB voucher if no offer of RTW. **(Can't settle SJDB in C&R.)**
- CS must send form to employer who must offer RTW within 60 days after receipt by the CS of Form DWC-AD 10133.36.
- Voucher may be used for a variety of educational and occupational expenses, including purchase of computer equipment (value up to \$1,000.)
- Unlike in the past with VR, employer not be liable for compensation for injuries (compensable consequences) incurred by the employee while utilizing the voucher.
- May trigger IW's ability to access "RTW Funds."



6. Addition v. CVC

Athens Administrators, administrator for East Bay Municipal Utility District v. WCAB, Richard Kite, (1st DCA writ denied)
2013 Cal. Wrk. Comp. LEXIS 34

QME effectively rebutted the Combined Values Chart (CVC) by explaining how it was more accurate to add the WPIs rather than combine.

See also NPD of *Lotspike v. J Jill, Travelers*,
2013 Cal Wrk Comp PD LEXIS 564.

