Coping With Apportionment Under SB 899

Pamela W. Foust
Workers' Compensation
Administrative Law Judge

An employer is only responsible for compensating the employee for permanent disability resulting from an industrial injury or injuries. Apportionment involves a segregation of the permanent disability caused by the industrial injury from the permanent disability that is due to factors that are not attributable to the industrial injury. The concept of apportionment applies to permanent disability only and not to any other benefit available under workers' compensation. The law specifically prohibits apportionment of temporary disability and medical treatment.

On April 19, 2004, Senate Bill 899 was enacted into law as urgency legislation taking effect immediately. Included in these reforms was a repeal of the statutes that formerly governed apportionment and new statutory provisions with some dramatic changes in the law. In contrast to the hundreds of reported decisions of appellate courts interpreting and clarifying the former apportionment statutes, there is not yet any such interpretation and clarification of apportionment under SB 899.

Labor Code § 4663

(a) Apportionment of permanent disability shall be based on causation.

> Prior to the enactment of Senate Bill 899, apportionment of permanent disability was based on disability and was a measure of the disability that an injured worker would have had if he had not sustained the industrial injury. Effective April 19, 2004, apportionment is now based on causation or, more properly, causation of permanent disability.

(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.

> Formerly there was no requirement that a doctor address the issue of apportionment in his report. Now, it is mandatory that apportionment be addressed in any report in which the doctor expresses an opinion on 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.

Statutory interpretation in General

It is a basic principle of law that if statutory language is clear and unambiguous there is no need for interpretation and a court must give effect to the statute's "plain meaning."

Dictionary Definitions of Statutory Terms

complete:	Having all necessary or normal parts, components, or steps; entire
apportionment:	The act of dividing and assigning according to a plan
determination	The act of making or arriving at a decision; the decision reached
cause:	The producer of an effect, result, or consequence; the one, such as a person, event, or condition, that is responsible for an action or result
approximate:	Almost exact or correct; very similar; closely resembling
direct:	Having no intervening persons, conditions, or agencies; immediate
result:	The consequence of a particular action; an outcome.

Possible Legal Interpretation of Statutory Terms

What is a complete report?

A report that is lacking necessary information cannot serve as the basis for a finding of fact since the missing parts could alter the conclusion. Therefore, the most reasonable definition of a "complete" report is one that constitutes substantial evidence and is sufficiently credible to serve as the basis for a finding of permanent disability.

What is an apportionment determination?

According to the statute, an apportionment determination is a medical opinion that segregates industrial and nonindustrial causes of the permanent disability and assigns to each a number representing a percentage of the whole.

What is an approximate percentage?

When applied to numbers, it seems fairly clear that the term "approximate" does not mean exact precision, but neither does it mean an "educated guess" or mere speculation. In our legal system in general, not confined to workers' compensation, the standard of proof in non-criminal cases is the preponderance of the evidence. The phrase that is most often used in

connection with medical opinions is a "reasonable medical probability." The term "reasonable" is not consistent with exact precision. Therefore, a good working definition of "approximate," absent any official indication to the contrary, might be "reasonable medical probability."

What is the <u>cause</u> of a permanent disability?

Unlikely possibilities

- birth
- that the employee worked for the employer
- that he went to work on the day of the injury
- that he didn't look where he was going

More likely possibilities

- trauma
- disease
- pathology
- risk factors
- emotional or physical stress
- toxic exposure

What is the <u>direct result</u> of an industrial injury?

Disability that is the result of an industrial injury is disability that is the consequence of the injury; that bears a causal relationship to the injury. The disability is the direct result of that injury if there is an unbroken progression from injury to disability without any intervening causes. It is difficult to predict what effect, if any, this wording may have on compensable consequence injuries.

What are <u>other factors both before and subsequent to the industrial injury</u>?

Other factors are any causes of the disability that do not bear a causal relationship to the direct result of the industrial injury whether they existed prior to the industrial injury or arose after the fact.

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

Although the physician is required to give specific reasons for an inability to make an apportionment determination, the statute presumes that another doctor will be successful in this regard. If the physician chooses to consult with other physicians, the implication is that

such consultation will enable him to make the required apportionment determination. If he refers the employee to another physician, then the referral doctor will make the "final determination." The reference to "another physician from whom the employee is authorized to seek treatment or evaluation," may mean a network doctor, if the applicant is compelled with treat within a network, or a panel QME.

It is unclear whether the term "final determination" is limited to the opinion on apportionment or whether it includes the opinion on permanent disability as well as apportionment. The latter seems more likely since original doctor's failure to make an apportionment determination would render his report "incomplete" on the issue of permanent disability.

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

Generally, doctors inquire about prior injuries and illnesses. This inquiry focuses on any previous nonindustrial physical or emotional limitations. The statute does not require the doctor to ask the question, but if he does, the employee is supposed to answer.

Possible Application to Medical Reports

Which reports should contain an apportionment determination?

Prior to interpretation and clarification by the Appeals Board or the Court of Appeal, apportionment should be addressed in each and every report in which the doctor finds permanent disability whether or not there is a factual basis for apportionment. Furthermore, all potential causes should be identified and addressed whether or not the doctor believes that such an apportionment would be "fair." This includes potential causes such as pathology and hereditary factors which were not proper subjects of apportionment prior to SB 899.

How should the apportionment determination be expressed?

The doctor is supposed to "divide the causation pie" into two parts, on an "approximate" percentage basis, stating what approximate percentage of the disability was caused by the industrial injury and what approximate percentage was caused by factors other than the industrial injury. This is necessary even if there is no factual basis for apportionment in which case the doctor should say that 100 percent of the disability is the direct result of the injury and 0 percent is due to other factors.

What if it would be speculative to try to estimate the relative percentages?

The statute makes no exception for the situation in which the doctor is presented with an impossible task. Either the doctor makes an apportionment determination or his report cannot

be used to determine permanent disability. Therefore, in order to provide a usable opinion on permanent disability, the doctor may have to speculate concerning the percentages of causation. Since doctors are also required to give reasons for their opinions, the only honest reason may be a need to comply with the statute. In this situation, there is no reason why the doctor could not assign percentages and then state that the percentages are speculative and that it would be impossible to make a more precise determination.

If an apportionment determination is speculative, is it substantial evidence?

Probably not, since the standard of proof is still a "reasonable medical probability." However, the report will still be substantial evidence of permanent disability since the statute only requires that the doctor make an apportionment determination; not that his apportionment determination be capable of forming the basis for an award.

Although the statute only requires that two percentage figures be provided – one for the industrial injury and one for other factors, it would be preferable for the doctor to assign a separate percentage to each individual nonindustrial cause. The Appeals Board or the Courts of Appeal may eventually determine that some of the factors are not appropriate or that a speculative percentage is not acceptable. The correct apportionment could then be calculated without the need for a supplemental report.

Can the doctor be paid for a report that does not contain an apportionment determination?

The answer to this question is difficult to predict. If the doctor is a QME and the only disputed issues are permanent disability and apportionment, probably not. Even if the report constitutes substantial evidence of other disputed medical issues such as need for further medical treatment, if a referral doctor then makes the "final determination," the defendant may not be held liable for payment of two reports. If the doctor is a treating physician, payment would probably depend on whether the report was otherwise in compliance with requirements for a treatment report.

Labor Code § 4664

This new Labor Code section has little if anything to do with medical issues that require the opinion of a medical expert to determine. It is unlikely that doctors will have to be concerned with any of the provisions of this statute.

(a) The employer shall only be liable for the percentage of permanent disability directly caused by the injury arising out of and occurring in the course of employment.

This is no different from the pre-SB 899 law which provided: *"The employer shall not be liable for compensation to such an employee for the combined disability, but only for that portion due to the later injury, as though no prior disability or impairment had existed."*

(b) If the applicant has received a prior award of permanent disability, it shall be conclusively presumed that the prior permanent disability exists at the time of any subsequent industrial injury. This presumption is a presumption affecting the burden of proof.

This is not a medical issue that requires a medical opinion to determine. If the injured worker has a prior award of a certain percentage of permanent disability, that percentage will simply be included in the judge's rating instructions and subtracted out of the recommended rating by the rater.

(c) (1) The accumulation of all permanent disability awards issued with respect to any one region of the body in favor of one individual employee shall not exceed 100 percent over the employee's lifetime unless the employee's injury or illness is conclusively presumed to be total in character pursuant to Section 4662. As used in this section, the regions of the body are the following:

(A) Hearing.

(B) Vision.

(C) Mental and behavioral disorders.

(D) The spine.

(E) The upper extremities, including the shoulders.

(F) The lower extremities, including the hip joints.

(G) The head, face, cardiovascular system, respiratory system, and all other systems or regions of the body not listed in subparagraphs (A) to (F), inclusive.

(2) Nothing in this section shall be construed to permit the permanent disability rating for each individual injury sustained by an employee arising from the same industrial accident, when added together, from exceeding 100 percent.

This is not the concern of a physician either. If there is evidence of prior awards, they can be totaled up by either the rater or the judge in order to determine whether the current award is in compliance with the statute.

Letting doctors be doctors and lawyers be lawyers

Doctors are supposed to be medical experts; not legal experts. If the new apportionment rules have the lawyers and judges baffled, how is the doctor supposed to come up with the right answer? To the greatest extent possible, doctors should request that the referring attorneys ask them specific questions where apportionment is an issue and particularly where complex apportionment issues are involved.