

What is it?

Why is it important?

How do you address it?

Presented for California Orthopaedic Association
QME Report Writing Course
September 12, 2020
Pacifica Orthopedics - Huntington Beach, California

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What is it?

Apportionment

What is “permanent disability”?

- In California workers’ compensation law, permanent disability is described as “the irreversible residual of an injury.”
- A permanent disability is one “which causes impairment of earning capacity, impairment of the normal use of a member, or a competitive handicap in the open labor market.”
- Accordingly, permanent disability payments are intended to compensate workers for both physical loss and the loss of some or all of their future earning capacity.



What is “apportionment”?

Apportionment is the process of segregating the residuals of an industrial injury from those attributable to other industrial injuries, or to nonindustrial factors, in order to fairly allocate the legal responsibility.



What is “apportionment”?

There are two types of apportionment:

- Apportionment between **industrial and non-industrial** injuries or conditions.
- Apportionment between **multiple industrial injuries**.





Why is it important?

Apportionment

Why is apportionment important?

Employers must compensate injured workers **only for that portion of their permanent disability attributable to a current industrial injury**, not for that portion attributable to previous injuries or to nonindustrial factors.



Why is apportionment important?

- When an injured worker suffers multiple work-related injuries, apportionment can make a significant difference in the permanent disability compensation that is payable.
- Permanent disability benefits are awarded based upon a sliding scale which provides for greater compensation for more severe disabilities. Benefits increase exponentially, not linearly, for each additional percentage of permanent disability.



Why is apportionment important?

One 40% Permanent Disability Award

40% permanent disability award:

\$58,290.00

Two 20% Permanent Disability Awards

20% permanent disability award:

\$21,895.00

$\$21,895.00 \times 2 = \$43,790.00$



Why is apportionment important?

The California Labor Code **requires** a physician to address apportionment:

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





How do you address it?

Apportionment

How do you address apportionment?

- Apportionment of permanent disability must be based on causation.
- A physician is required to make an “apportionment determination” by finding the approximate percentage of the permanent disability which was caused by the direct result of the industrial injury and the approximate percentage of the permanent disability which was caused by other factors both before and subsequent to the industrial injury, including prior industrial injuries.

Labor Code § 4663



How do you address apportionment?

- If the injured worker 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. (Labor Code § 4664)
- However, permanent disability from a subsequent industrial injury can only be apportioned to a prior industrial injury if it is found that the permanent disability from the two injuries “overlaps”.
- So, when a physician is considering apportionment between successive industrial injuries, he or she must address whether there is any overlap of permanent disability between the two injuries.



How do you address apportionment?

- The **first step** in the apportionment process requires the physician to determine the extent to which the injured worker's permanent disability has been caused by the current industrial injury.
- The **second step** in the apportionment process requires the physician to determine the extent to which the injured worker's permanent disability has been caused by "other factors", including pre-existing conditions and prior or subsequent injuries, both industrial and non-industrial.



How do you address apportionment?

- Causation of permanent disability is **distinct** from causation of injury.
- Therefore, the percentage to which an injured worker's *injury* is causally related to his or her employment is not necessarily the same as the percentage to which an applicant's *permanent disability* is causally related to his or her injury.



How do you address apportionment?

Pursuant to Labor Code § 4663, permanent disability resulting from an industrial injury may be apportioned to a variety of pre-existing factors, including **pathology, asymptomatic prior conditions, and retroactive prophylactic work preclusions** (i.e., work activity limitations which could have reasonably been imposed on an injured worker due to a pre-existing condition).

Escobedo v. Marshalls, 70 Cal. Comp. Cas. 604, 617 (2005)(*en banc*)



How do you address apportionment?

To constitute substantial medical evidence on the issue of apportionment, a physician's report must:

- Be based upon “reasonable medical probability”
- Be based upon an current and accurate medical history and an adequate physical examination
- Be based upon correct legal theories
- *Not* be based upon “surmise, speculation, conjecture, or guess”
- Set forth the reasoning behind the physician's opinion, not merely his or her conclusions

Escobedo v. Marshalls, 70 Cal. Comp. Cas. 604, 620 (2005)(*en banc*)



How do you address apportionment?

The key to providing an adequate opinion on the issue of apportionment is to explain “**how and why**” the various relevant injuries and conditions are or are not causing an injured worker’s permanent disability:

- If a physician opines that approximately 50% of an employee's back disability is directly caused by the industrial injury, the physician must explain **how and why** the disability is causally related to the industrial injury (e.g., the industrial injury resulted in surgery which caused vulnerability that necessitates certain restrictions) and **how and why** the injury is responsible for approximately 50% of the disability.
- 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 and why** it is causing permanent disability at the time of the evaluation, and **how and why** it is responsible for approximately 50% of the disability.

***Escobedo v. Marshalls*, 70 Cal. Comp. Cas. 604, 621 (2005)(en banc)**



How do you address apportionment?

- However, keep in mind that a physician is required to address the issue of apportionment in every case but is not required to find a basis for apportionment in every case:

“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.” (Labor Code § 4663(c))

- A physician cannot be compelled to make an apportionment determination by one of the parties and any such opinion that is not based upon reasonable medical probability will be rejected by the WCAB.

City of Cathedral City v. WCAB (Fields), 78 Cal. Comp. Cas. 696 (2013)(writ denied)



How do you address apportionment?

- If the injured worker has sustained **multiple industrial injuries**, a physician is required to address the issue of **apportionment of permanent disability between those injuries** “regardless of whether any particular industrial injury occurred before or after any other particular industrial injury or injuries.”
- However, if the physician determines that he or she “**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**” (“**inextricably intertwined**”), then the physician is **not required to make an apportionment determination** and the WCAB is required to issue an unapportioned permanent disability.

Benson v. WCAB, 74 Cal. Comp. Cas. at 126, 133 (2007)



How do you address apportionment?

Fact Pattern 1:

- Injured worker sustains a **specific industrial injury** to her left knee.
- Shortly after her injury, she experiences **onset of pain in her right knee**.
- She testifies that she had **never received any medical treatment to, or had any activity limitations due to**, her left knee before her industrial injury.
- However, she had been **diagnosed with osteoarthritis to her left knee 10 years before** her industrial injury.
- After her industrial injury, the injured worker has arthroscopic surgery to her left knee to repair a meniscal tear and is found to have **significant degenerative changes** in both knees.

Escobedo v. Marshalls, 70 Cal. Comp. Cas. 604 (2005)(en banc)



How do you address apportionment?

Fact Pattern 1: Physician's apportionment determination and supporting rationale:

- 50% of the injured worker's left knee disability is due to the specific industrial injury and 50% is due to the pre-existing arthritis
- "Ms. Escobedo's left knee residuals are directly related to the October 28, 2002 injury ... In my opinion, there is a **medically reasonable basis** for apportionment given **the trivial nature of the injury that occurred on October 28, 2002 and the almost immediate onset of right knee symptoms that occurred shortly after the left knee injury.** The Applicant has **obvious, significant degenerative arthritis in both knees and essentially worked in a fairly congenial environment.** Although denying any prior problems with her knees, **it is medically probable that she would have had fifty percent of her current level of knee disability at the time of today's evaluation even in the absence of her employment at Marshalls."**

Escobedo v. Marshalls, 70 Cal. Comp. Cas. 604, 608 (2005)(en banc)



How do you address apportionment?

Fact Pattern 1: The WCAB's opinion regarding apportionment:

“Dr. Ovadia's opinion meets the standards of section 4663 and that it is substantial evidence. That is, it appears that Dr. Ovadia based his opinion on an adequate medical history, examination, and facts ... Also, Dr. Ovadia's opinion is not speculative, and it sets forth the reasoning behind his conclusions. Further, he states his apportionment opinion in terms of reasonable medical probability. Moreover, he assesses the relative percentages of industrial and non-industrial causation based on the time of his evaluation of applicant. Finally, he makes his apportionment determination by finding the approximate percentage of permanent disability caused by "other factors," i.e., her preexisting degenerative arthritis in both knees. (Dr. Ovadia's finding that approximately 50% of applicant's permanent disability was caused by non-industrial factors necessarily implies a finding that 50% of her permanent disability was directly caused by the industrial injury.)”

Escobedo v. Marshalls, 70 Cal. Comp. Cas. 604, 622 (2005)(en banc)



How do you address apportionment?

Fact Pattern 1: The WCAB's opinion regarding apportionment:

“Dr. Ovadia's opinion meets the standards of section 4663 and that it is substantial evidence. That is, it appears that Dr. Ovadia based his opinion on an adequate medical history, examination, and facts ... Also, Dr. Ovadia's opinion is not speculative, and it sets forth the reasoning behind his conclusions. Further, he states his apportionment opinion in terms of reasonable medical probability. Moreover, he assesses the relative percentages of industrial and non-industrial causation based on the time of his evaluation of applicant. Finally, he makes his apportionment determination by finding the approximate percentage of permanent disability caused by "other factors," i.e., her preexisting degenerative arthritis in both knees. (Dr. Ovadia's finding that approximately 50% of applicant's permanent disability was caused by non-industrial factors necessarily implies a finding that 50% of her permanent disability was directly caused by the industrial injury.)”

Escobedo v. Marshalls, 70 Cal. Comp. Cas. 604, 622 (2005)(en banc)



How do you address apportionment?

Fact Pattern 2:

- Injured worker sustains a **specific industrial injury** to his lumbar spine resulting in a compression fracture at L2.
- Prior to this injury, the injured worker had **occasional back pain and had received two to three chiropractic adjustments for the pain in the preceding 10-year period.**
- A post-injury MRI revealed showed **disc desiccation at almost every level of his lumbar spine.**

***Yeager v. WCAB (Gatten)*, 71 Cal. Comp. Cas. 1687 (2006)**



How do you address apportionment?

Fact Pattern 2: Physician's apportionment determination and supporting rationale:

- 80% of the injured worker's lumbar spine disability is due to the specific industrial injury and 20% is due to the pre-existing degenerative disc disease.
- The degenerative disc disease had its onset years before the industrial injury.
- Apportionment was warranted based upon the documented, pre-existing degenerative disc disease the injured worker's history of on-going low back treatment prior to the industrial injury.

***Yeager v. WCAB (Gatten)*, 71 Cal. Comp. Cas. 1687, 1688-1689 (2006)**



How do you address apportionment?

Fact Pattern 2: WCAB's opinion regarding apportionment:

- “Dr. Akmakjian based his opinion of apportionment on the MRI, which clearly showed degenerative disc disease at almost every level of his lower spine and the fact that applicant was occasionally having minor back problems prior to the injury. 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.”
- “The 20 percent [apportionment percentage] that Dr. Akmakjian used is based on his subjective evaluation, but we cannot conclude that it is merely a random number that he settled upon. He himself noted that apportionment would have been greater if applicant had had more extensive treatment for his back.”

Yeager v. WCAB (Gatten), 71 Cal. Comp. Cas. at 1692-1693 (2006)



How do you address apportionment?

Fact Pattern 3:

- Injured worker sustains a **specific industrial injury** to his right knee.
- A **right knee x-ray taken within days after the industrial injury** revealed severe **osteoarthritis of the right knee**.
- Approximately 12 years prior to the industrial injury, the injured worker was involved in a **non-industrial motorcycle accident which resulted in a broken right tibia**.
- As a result of the industrial injury, the injured worker undergoes a **right full knee replacement**.

Williams v. WCAB, 74 Cal. Comp. Cas. 88 (2008)(writ denied)



How do you address apportionment?

Fact Pattern 3: Physician's apportionment determination and supporting rationale:

- 50% of the injured worker's right knee permanent disability was due to the prior motorcycle accident, which resulted in severe right knee arthritis; 40 percent of the disability was due to the specific industrial injury; the remaining 10% was due to cumulative trauma after the specific industrial injury.
- The right full knee replacement was necessitated by the pre-existing severe osteoarthritis.

Williams v. WCAB, 74 Cal. Comp. Cas. 88, 89-90 (2008)(writ denied)



How do you address apportionment?

Fact Pattern 3: WCAB's opinion regarding apportionment:

- The physician's apportionment determination was **not speculative** even though he noted that: "[t]here are no high quality, peer reviewed, scientific studies that I'm aware of that assist [physicians] in arriving at approximate percentages for questions like this."
- Apportionment to the injured worker's severe right knee osteoarthritis was warranted even though the degenerative components of the knee had been removed as part of the full knee replacement surgery because the arthritis necessitated the surgery.

Williams v. WCAB, 74 Cal. Comp. Cas. at 90, 93 (2008)(writ denied)



How do you address apportionment?

Fact Pattern 4:

- Injured worker sustains a **specific industrial injury** to his left ankle and undergoes surgery.
- Post-surgery recovery is **complicated by the injured worker's pre-existing non-industrial diabetes** which results in the development of osteomyelitis and a Charcot joint and, ultimately, a **left below-the-knee amputation**.

Bridgestone Firestone v. WCAB (Fussell), 76 Cal. Comp. Cas. 1326 (2011)(writ denied)



How do you address apportionment?

Fact Pattern 4: Physicians' apportionment determination and supporting rationale:

- The injured worker's treating physician stated that 100% of the injured worker's left leg permanent disability was apportioned to his specific industrial injury and its sequelae, including Applicant's prolonged non-ambulatory period "due to failed open reduction internal fixation of left trimalleolar fracture with a neuropathic joint and severe varus deformity."
- However, he subsequently changed his opinion and apportioned 60% of the injured worker's left leg permanent disability was apportioned to his specific industrial injury , and 40 percent was due to "non-industrial non-compliance with activities of daily living" (failure to wear ankle brace and to follow activity limitations)
- Panel QME apportioned 20% of the injured worker's left leg permanent disability to the pre-existing non-industrial diabetic polyneuropathy and Charcot joint.

***Bridgestone Firestone v. WCAB (Fussell)*, 76 Cal. Comp. Cas. at 1328, 1330 (2011)(writ denied)**



How do you address apportionment?

Special situations where apportionment is legally impermissible: [Safety officer presumptions](#): Labor Code §§ 3212, 3212.1, 3212.2, 3212.3, 3212.4, 3212.5, 3212.6, 3212.7, 3212.8, 3212.85, 3212.9, 3212.10, 3212.11, 3212.12, 3213, and 3213.2.

- Example 1: “Duty belt presumption”: Labor Code § 3213.2: Low back injury is [presumed to be work-related](#) for certain designated safety officers if they have been employed in a position [requiring they wear a full “duty belt” \(“Sam Brown Belt”\)](#) for at least 5 years.
- [Where this presumption applies, apportionment to any non-industrial factors is legally prohibited.](#)

City of Irvine v. WCAB (Gianni), 78 Cal. Comp. Cas. 157 (2013)(writ denied)



How do you address apportionment?

Special situations where apportionment is legally impermissible: [Safety officer presumptions](#): Labor Code §§ 3212, 3212.1, 3212.2, 3212.3, 3212.4, 3212.5, 3212.6, 3212.7, 3212.8, 3212.85, 3212.9, 3212.10, 3212.11, 3212.12, 3213, and 3213.2.

- Example 2: “Heart trouble presumption”: Labor Code § 3212: Heart disease is [presumed to be work-related](#) for certain designated safety officers if [it manifests itself during employment or up to 5 years after employment ceases](#).
- [Where this presumption applies, apportionment to any non-industrial factors is legally prohibited.](#)

City and County of San Francisco v. WCAB (Smith), 71 Cal. Comp. Cas. 1595 (2006)(*writ denied*)



How do you address apportionment?

Special situations where apportionment is legally impermissible: [Safety officer presumptions](#): Labor Code §§ 3212, 3212.1, 3212.2, 3212.3, 3212.4, 3212.5, 3212.6, 3212.7, 3212.8, 3212.85, 3212.9, 3212.10, 3212.11, 3212.12, 3213, and 3213.2.

- Example 3: “Cancer presumption”: Labor Code § 3212: Cancer is [presumed to be work-related](#) for certain designated safety officers if it [manifests itself during employment or up to 5 years after employment ceases](#) and it is established the injured worker was exposed during employment to an IARC-recognized carcinogen.
- Where this presumption applies, apportionment to any non-industrial factors is [legally prohibited](#).

City of Los Angeles v. WCAB (Darling), 70 Cal. Comp. Cas. 1147 (2005)(writ denied)



How do you address apportionment?

Special situations where apportionment is legally impermissible: “Presumed permanent total disability” (Labor Code § 4662)

- 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, permanent total disability shall be determined in accordance with the fact.

- Where this presumption applies, apportionment to any non-industrial factors is legally prohibited.

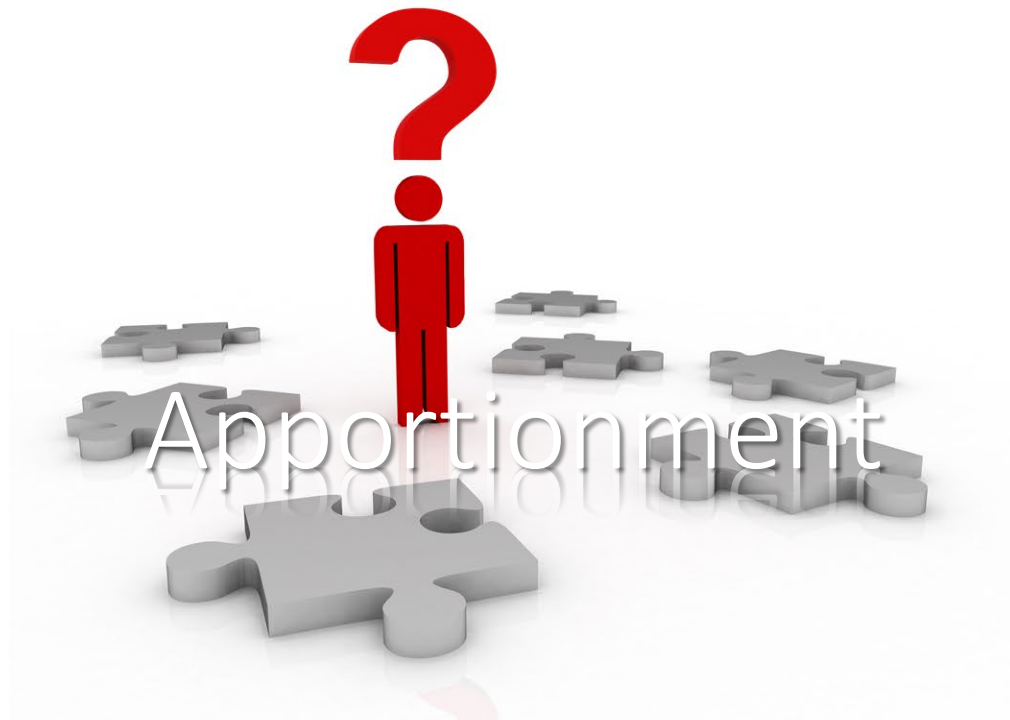
State of California v. WCAB (Edwards), 77 Cal. Comp. Cas. 1032 (2012)(writ denied)





QUESTIONS?

Apportionment



THE END

Thank you