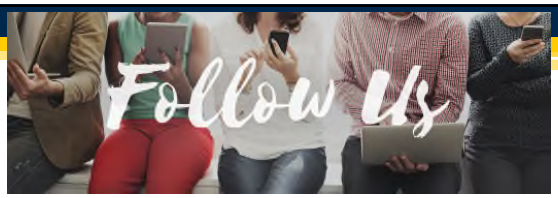
Apportionment Revisited

By Donald Barthel, Esq.
Law Offices of Bradford & Barthel, LLP



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Make sure you are:

10 CCR 2592.03 compliant

Apportionment

AKA

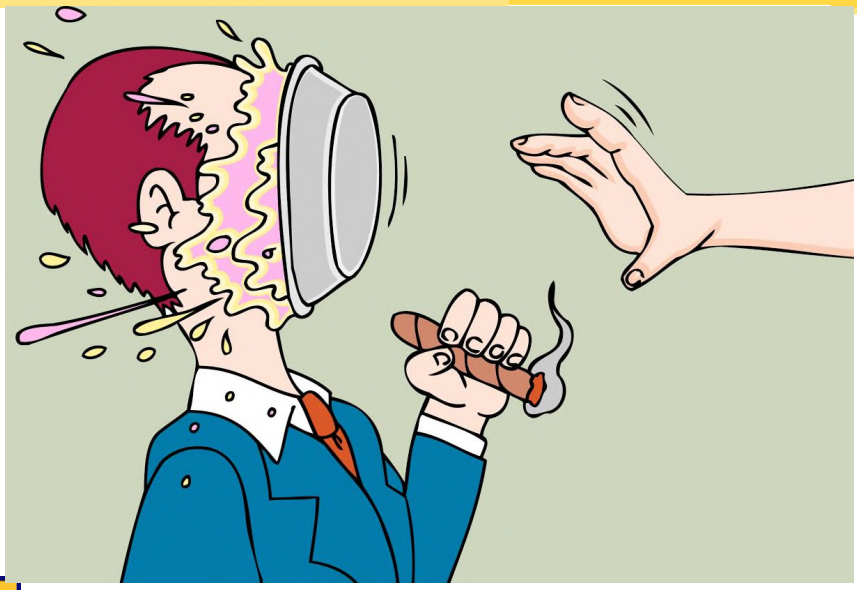
"Paying For Only Your Slice of the PD Pie"

OR

Apportionment

AKA

"How NOT To Be Hit By The Entire Pie"



What *is* "Apportionment"?

The employer is responsible only for that portion of PD *caused* by industrial injury.

Apportionment applies only to…

Permanent Disability [PD]

Cannot apportion:

- Temporary Disability [TD]
- Medical Treatment
- Vocational Rehabilitation/Vouchers
- Etc.

See Granado v. WCAB, 33 CCC 647

Death benefits apportioned to nonindustrial factors?

NOPE!

1. No Support in LC
2. Not "humanitarian"

Can you guess why?

The Changes

Labor Code 4663
Labor Code 4664

SB 899 Apportionment

- no new regs
- tons of case law

LC 4663

(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, 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. 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.

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

(e)Subdivisions (a), (b), and (c) shall not apply to injuries or illnesses covered under Sections 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.

HUH?

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The “Good News”?

It’s ALL “Good News”

Escobedo v. Marshalls (*En Banc*) (4/19/05)
WCAB's way of saying "Happy Birthday" SB 899?

Facts:

- Bilateral knee injury
- 10/28/02 specific to left; comp. consequence to right
- No pre-injury knee treatment
- Prior arthritis dx; no work restrictions
- Def QME apportioned 50%

"[T]here is a medically reasonable basis for apportionment given the trivial nature of the injury that occurred on October 18, 2002 and the almost immediate onset of right knee symptoms that occurred shortly after the left knee injury."

LC 4663(a) Apportionment of permanent disability shall be based on *causation*.

HOLDING: Factors to which we can apportion?:

1) disability that could have been apportioned pre-SB 899 (HUH?)
2) pathology
3) asymptomatic prior conditions
4) "prophylactic work preclusions"

- Even if a report "addresses" causation of PD and makes an "apportionment" determination by finding the "approximate percentage" of industrial and non-industrial PD, report can't be used unless "substantial evidence"

- What's "substantial evidence"?
- Is it really a "SWAG"?
- "Scientific Wild-Assed Guess, see, e.g., L.C. 4663 & EBM" (2005 Labor Code, p. 1390)
- No!

Answer: "reasonable medical probability"

Needed: "reasoning behind the physician's opinion, not merely his or her conclusions."

- "I'd split it 50-50" ain't gonna do it!!!

- "[T]here 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."

NICE QUOTE!

"The language [in 4663(c)] stating that apportionment may be based on 'factors both before and subsequent to the industrial injury' does not limit what non-industrial factors may be considered…thus, this language appears to require apportionment based on *any* 'other [non-industrial] factor,' either pre- or post-injury."

(p. 15, italics and underline ***in original text!!!***)

How often docs get Escobedo wrong?

Let's discuss…

Benson

This "Benson"?

No, silly!

This "Benson"…

Benson v. The Permanente Medical Group; Athens
WCAB *en banc* (12/13/07)

Facts:

- neck injury = 62%
- apportioned: 50% to CT; 50% to specific
- CT & specific P&S at same time

Holding:

31% + 31% =

= $24,605 + $24,605
= $49,210

Not 62% = $67,016,25

Save: **$17,806.25!!!**

Reason: LC § 4750 is gone!

LC § 4663(c): the employer "shall only be liable for the percentage of [PD] directly caused by the injury."

POTENTIAL LOOPHOLE!

"[T]here may be limited circumstances…where the evaluating physicians cannot parcel out, with reasonable medical probability, the approximate percentage to which each successive injury causally contributed to the employee's overall [PD]. Under these circumstances, a combined award of [PD] may still be justified."

"may still be justified"?
NOT mandatory!
What about LC § 4663?

LC § 4663

(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, 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. **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.

Is your doctor suddenly **STUPID**?

"I'm sure—to a reasonable medical probability…about:

Causation
AOE/COE
Medical Treatment needs
QIW/Work Restrictions
Etc, etc, etc…"

"Apportionment"?

"No idea…too speculative!"

QUACK, QUACK!

There IS a DEFENSE ANSWER!

LC 5701:

"The appeals board may…direct any employee claiming *compensation to be examined by a regular physician…"*

Death benefits apportioned to nonindustrial factors?

NOPE!

1. No Support in LC
2. Not "humanitarian"

Multiple apportionment determinations?

ISSUE: which is more "persuasive"?

Multiple determinations by same doctor!?!?

May be "substantial evidence", so long as based on correct rules

Vieira v. Berkeley Oakland Support System, 2014 Cal. Wrk. Comp. P.D. LEXIS 252

FUN (misery?) WITH MATH!

FACTS: 2 defs = 2 AMEs

AME 1: 50% apportionment (obesity & pre-existing)
AME 2: 0% apportionment

HOLDING:
1. neither opinion "entirely convincing"
2. valid portions in both reports
3. AWARD: apportion 20% (obesity & pre-existing)

HOW?

"range of evidence"

City of Petaluma v. WCAB (Lindh)

F:

- public safety officer
- 3-6 (really?!) blows to head during canine training
- "shortly" after initial =severe headaches
- several hours= 1-2 days
- approx month later, lost vision in l. eye

City of Petaluma v. WCAB (Lindh)

PTP says cause = non-aoe/coe underlying preexisting, asymptomatic vascular condition

QME=

(1) non-aoe/coe vasospastic condition

+

(2) blow to head (aoe/coe)

=

"stroke" in eye

City of Petaluma v. WCAB (Lindh)

QME: can't know if pre-existing condition would result in "stroke" but for blow

BUT

blindness may have occurred without the trauma

City of Petaluma v. WCAB (Lindh)

QME:

- 85% = pre-existing vasospastic
- 15% = blow

Stip'd=

- 40% PD (without apportionment)
- 6% PD (with apportionment)

WCJ says apportionment ain't "substantial evidence"

WCAB agrees:

…."[QME]'s opinion establishes that applicant's preexisting hyperreactive type personality and his asymptomatic and…preexisting systemic hypertension and vasospasm were mere risk factors that predisposed him to having a left eye injury, but the actual injury and its resultant disability (i.e., the left eye blindness) were entirely caused by industrial factors."

WCJ says apportionment ain't "substantial evidence"

"[A]n opinion that bases apportionment upon the percentage to which non-industrial risk factors contributed to causing the injury is not substantial evidence that legally justifies apportionment."

IW claimed

1) case law allowing apportionment all involved "degenerative conditions" (that is, there was some "progressive disease")
2) b/c condition might have never become symptomatic, no apportionment is allowed

DCA says…WRONG!

DCA says…

"More importantly, the post-amendment cases do not require medical evidence that an asymptomatic preexisting condition, in and of itself, would eventually have become symptomatic. Rather, what is required is substantial medical evidence that the asymptomatic condition or pathology was a contributing cause of the disability. "

"the new approach to apportionment is to look at the current disability and parcel out its causative sources—nonindustrial, prior industrial, current industrial—and decide the amount directly caused by the current industrial source"

camel + straw = bad back = ok!

"Under the current law, the salient question is whether the disability resulted from both nonindustrial and industrial causes, and if so, apportionment is required…Whether or not an asymptomatic preexisting condition that contributed to the disability would, alone, have inevitably become manifest and resulted in disability, is immaterial."

Lindh has wide, Wide, WIDE potential

Think about (and smile!)…

- Diabetes
- Cardiovascular
- Pulmonary disease
- DDD
- Macular degeneration
- Emphysema
- Arthritis

etc, Etc, ETC!

Want some better news?

SCt rejected CAAA's writ!

Escobedo

Brodie

E.L. Yeager

Acme Steel

City of Jackson (Rice)

&

don't forget: City of Jackson

What did City of Jackson say?

Apportionment involving "immutable factors"
"heredity, genomics, and other personal history factors"
CAN be substantial evidence

- test is not immutability
- test = whether there is substantial medical evidence to support apportionment
- family genetic discovery not essential
- research will do the trick!

Allowed apportionment to DDD
(who's got DDD!?!)
(more about City of Jackson later)

100 percent disabled per LC 4662

Hirschberger v. Stockwell Harris Woolverton and Muehl

F: psych aoe/coe aggravated Parkinson's = 100% PD

per LC 4662(a)(4) =

[" An injury to the brain resulting in permanent mental incapacity."]

I: apportionment to nonindustrial Parkinson's?

H: no

R: LC 4662 perm total not subject to apportionment

Apportioning PD arising out of aoe/coe treatment

In Estrada v. Edge Sales and Marketing
2018 Cal. Wrk. Comp. P.D. LEXIS 451

F:
- 100% back
- 2-level fusion aoe/coe
- developed deep-vein thrombosis requiring several surgeries

AME: 1/3 PD apportioned to pre-existing pathology

I: apportionment?
H: no
R: PD arising directly from unsuccessful medical treatment is not apportionable even if need for medical treatment was necessitated by both industrial and nonindustrial factors

Hikida v. WCAB

(2017) 12 Cal.App.5th 1249 (published)

I:
whether ER is entirely responsible for treatment and PD arising "directly" from unsuccessful medical intervention without apportionment even where the need for the surgery or medical intervention was necessitated by both aoe/coe and non-aoe/coe factors?

Hikida

F:

- long term IW
- injuries to cervical and T spine, UEs, CTS, psych, etc, etc
- 5/10 stopped working for CT surgery
- result: CRPS
- AME (ortho) CTS = PD 90% aoe/coe; 10% non-industrial = 100% PD (all due to failed CT surgery)

H (WCJ): PD = 90% industrial , 10% nonindustrial.

H (WCAB) affirmed

R: nonindustrial apportionment appropriate b/c CRPS was caused by surgery to treat a conditional which 10% non-industrial (see CA St's Brodie)

Hikida

H (WCJ, on remand): 98% PD, 90% industrial and 10% non-industrial

Court of Appeal says…

Hikida

I: "…whether an employer is responsible for both the medical treatment and disability arising directly from unsuccessful medical intervention, without apportionment."

H: yes (GULP!); "….an employee is entitled to compensation for a new or aggravated injury which results from the medical or surgical treatment of an industrial injury, whether the doctor was furnished by the employer, his insurance carrier, or was selected by the employee."

Hikida-you-not!

Hikida

R: PTD was caused not by her carpal tunnel syndrome but by the CRPS that was caused by treatment ER provided.

"…the Legislature did not intend to transform the law requiring employers to pay for all medical treatment caused by an industrial injury *including* the foreseeable consequences of such medical treatment."

"Nothing in [SB 899] had any impact on the reasoning that has long supported the [ER's] responsibility to compensate for medical treatment and the consequences of medical treatment without apportionment."

Hikida

R:

"[I]n enacting the new regime of apportionment based on causation," the Legislature did not intend to transform the law requiring employers to pay for all medical treatment caused by an industrial injury, including the foreseeable consequences of such medical treatment."

Why Hakida is W-R-O-N-G!

Let's take a closer look at this:

1. EEs are entitled to comp. for new or aggravated injury resulting from treatment of an industrial injury (South Coast Framing, Inc. v. WCAB (2015) 61 Cal.4th 291, 300).
2. treatment costs related to injuries aoe/coe are not apportioned nonindustrial causal factors. (Labor Code §4600)
3. ER must pay for all of EE's treatment (Granado v. WCAB) (1968) 69 Cal.2d 399)
4. TD is not apportioned (California Ins. Guarantee Assn. v. WCAB (Hernandez) (2007) 153 Cal.App.4th 524
5. treatment and TD are non-PD benefits

But…

Per S Ct, prior to SB 899 there was no apportionment where an injury aggravated/accelerated an industrial injury (*Brodie v. WCAB 2007*) 40 Cal.4th 1313

SB 899 changes in apportionment law ***"were intended to reverse the[] features of former §§4663 and 4750"*** barring apportionment related to aggravation and acceleration.

Brodie v. WCAB (2007) 40 Cal.4th 1313, 1327

Hikida

Hikida conflicts with S. Ct's Brodie analysis

IF the carpal tunnel syndrome was 10% non-aoe/coe, THEN some of the CRPS should also be nonindustrial

Hikida...also conflicts with WCAB:

Costa v WCAB (2011)
76 CCC 261 (writ denied)

F:
- specific lumbar
- prior nonindustrial severe asymptomatic stenosis
- decompression surgery at multiple levels
- surgery disaster: paralyzed, loss of bowel/bladder control
- 100% PD, 20% due to non-industrial stenosis

H: apportionment valid

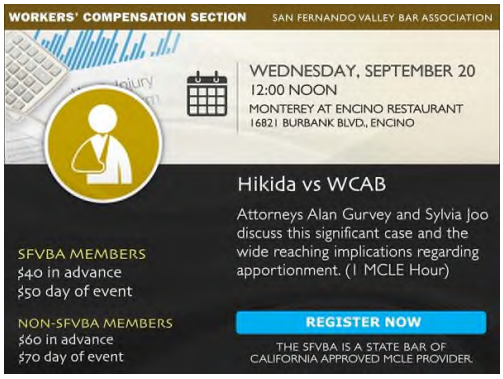
R: stenosis made PD worse than it otherwise would have been

Need more proof?

There are LOTS of cases allowing apportionment where surgery and resulting PD were caused by aoe/coe and non-aoe/coe factors

Gunter v. WCAB (2008) 73 Cal.Comp.Cases 1699 (writ denied)
Malcom v. WCAB (2008) 73 Cal Comp.Cases 1710 (writ denied)
Williams v. WCAB (2009) 74 Cal.Comp.Cases 88, at 94
Campos v. The Vons Companies 2010 Cal.Wrk.Comp.P.D. LEXIS 402
Shadoan v. San Diego Community College 2015 Cal.Wrk.Comp.P.D. LEXIS 448
Gallegos v. Groth Brothers Chevrolet 2016 Cal.Wrk.Comp. P.D. LEXIS 455

Why worry about *Hakida*?



CAAA has already scheduled multiple seminars! Winter Convention—over 1,000 attendees—spent entire hour discussing

How far reaching might this be?

- Will it apply in situations where a claimant has become opioid dependent as a result of treatment?
- Cases of adverse medication reactions?
- What about internal scarring? Weight gain? HBP?
- Cases where surgical infections and other surgical complications lead to dire circumstances?

City of Jackson v W.C.A.B. (Rice) (5/17, 3rd DCA)

FACTS:

- 29 y/o police officer
- cervical pain, surgery
- QME: 17% aoe/coe on Job A (w/City)
  - 17% aoe/coe on Job B (w/City)
  - 17% prior activities
  - 49% personal history ("genetic issues")

Rice

Dr. Blair:

1. *"...to a reasonable degree of medical probability that genetics has played a role in Mr. Rice's injury," (even though can't test for genetic factors)*
2. *medical study says "heritability [is] . . . 73 percent in the cervical spine. . . . [S]moking, age, and work are only a small percentage of disc disease and most of it is familial."*
3. *2nd study says heritability in disc degeneration = 75%*
4. *3rd study = 73%*
5. *4th article states " '[t]win studies demonstrate that degeneration in adults may be explained up to 75 percent by genes alone.' "*
6. *4th studys says "environmental factors" = little or not at all*
7. *erring on IW's favor, 49% apportionment = "lowest level that could reasonably be stated..."*

Rice

WCAB says,

Not "substantial evidence"

REASONS:

- apportionment to genetic factors resulted in an allocation of disability to *impermissible immutable factors*
- must apportion to "*specific identifiable factors*"

3rd DCA says,

"ARE YOU KIDDING"
(not really)

SBB 899 allows apportionment to "other factors"
Case law says "other factors" include DDD, asymptomatic prior conditions, etc.

How do genetics differ?

They don't!

"...We perceive no relevant distinction between allowing apportionment based on a preexisting congenital or pathological condition and allowing apportionment based on a preexisting degenerative condition caused by heredity or genetics."

Using medical literature is helpful!

QME's decision was supported by:

- significant,
- unrebutted medical literature
- that found DDD was influenced by genetic factors
- and only minimally to environmental factors such as work activity

"Dr. Blair's reports meet all of the requirements of Escobedo. Dr. Blair expressly stated that confidence in her opinion was predicated on reasonable degree of medical probability. Dr. Blair gave the reasoning behind her opinion--the published medical studies--and even named the studies and the pages relied upon. Her opinion disclosed familiarity with the concept of apportionment. Labor Code section 4663 states that apportionment is based on causation, and that '[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...' (Lab. Code, § 4663, subd. (c).)"

Upshot?

Google before you depose!

Let's get a little crazy....
...check out the VOLUMES of research confirming conditions are, inter alia, from

- genetics
- historical factors
- environment factors

- . "Our study identifies three novel genome-wide significant associations with chronic back pain, and suggests possible shared genetic mechanisms with other traits such as cartilage, osteoarthritis, lumbar disc degeneration, depression, and height/vertebral development."

Unhappy with Apportionment Determination?

POA?

1) doing nothing: maybe your doc
=
most persuasive "substantial medical evidence"

2) obtain supplemental:
bolster apportionment determination;
rebut opposing doc's percentage apportionment

3) depo doc(s): bolster/rebut

Not "substantial evidence" if relies on

1. facts no longer germane
2. inadequate medical histories
3. inadequate medical exam
4. incorrect legal theories (*Escobedo*)
5. surmise, speculation, conjecture or guess

AVOID "mere conclusions"

Escobedo v. Marshalls (2005) 70 CCC 604, 621 (appeals board *en banc*); *E.L. Yeager Construction v. WCAB (Gatten)* (2006) 71 CCC 1687, 1691. See *Bates v. WCAB* (2012) 77 CCC 636 (writ denied)

Doc's explanation not adequate?

WCJ may allow parties to obtain supp.

Thomas v. Long Beach Unified Schools, 2012 Cal. Wrk. Comp. P.D. LEXIS 317

No one has "substantial [apportionment] evidence"?
WCAB may require record "further development"

Pini v. WCAB (2007) 73 CCC 160 (writ denied);

Example: report has contradictory info re apportionment
report doesn't explain contradiction

=

further development of record

(MAYBE!)

Yeager Const. vs. WCAB (Gatten)
11/28/06 - 4th App. Dist.

FACTS:

- back injury
- Prior 10 years: occ back pain
- 2-3 chiro adjustments
- Doctor apportions 20% to DDD:
  - 1997 MRI = DDD = "wear & tear phenomenon"

Holding:

WCJ/WCAB - apportionment not "substantial evidence"

Court of Appeals: REVERSES!

What is needed?

"Substantial Evidence"

- Framed in terms of "reasonable medical probability"
- Based on facts, exam and history
- With reasoning provided for conclusions

Doctor met the burden:

- Used "reasonable medical probability" language
- Relied on MRI and prior history of occ. prior problems

PERFECTION NOT REQUIRED!

"[T]he 20 percent figure that [the IME] used is based on his subjective evaluation, but we cannot conclude it is merely a random number. He...noted apportionment would have been greater if applicant had more extensive treatment..."

Yeager no DDD fluke

"[I]t would be incorrect to conclude that, in degenerative disease cases, an applicant's permanent disability is necessarily entirely 'directly caused' by the industrial injury, with no possible apportionment to non-industrial causation:

1. if the injury was the 'straw that broke the camel's back;'
2. if, but for the industrial injury, it is not clear when, or if, the degenerative condition would have progressed to cause disability; or
3. if the degenerative condition was asymptomatic or largely asymptomatic before the injury occurred."

Kos v. WCAB (2008) 73 CCC 529 (writ denied)

"[T]he fact that applicant might not now have disability, but for her industrial injury, is no longer a proper test for the validity of an apportionment opinion. The relevant question is what percentage of her current disability is directly caused by her industrial injury and what percentage is caused by other factors."

Kos v. WCAB (2008) 73 CCC 529 (writ denied)

What do apportionment and Petitions to Reopen have to do with each other?

LC 5410; LC 5803 - LC 5804: 5 years post injury, may claim new and further

...may get more PD

Vargas v. Atascadero State Hospital (en banc)

F:

- original award: 67% w/out apportionment
- petition to reopen
- before F&A issued, SB 899 went to effect
- WCJ reopened record for evidence re apportionment

WCAB says, "Judge, you did the right thing!"

1. new apportionment rules apply to increased PD in any petition to reopen pending as of 4/19/04
2. new apportionment law can't be used to recalculate original award/order in terms of:
   a. PD
   b. amt of apportionment, if any
3. to the extent there is *increased* [PD], "any such increased [PD] will be subject to apportionment under the new law…

Proof/development of the record

Caires v. Sharp Healthcare
2014 Cal. Wrk. Comp. P.D. LEXIS 145 (Panel)

H:
evidentiary necessity requires physicians w/an area of specialization—esp. psych—to make their own apportionment determinations

Rubio

E & J Gallo Winery v. WCAB (Rubio) (2008) 73 CCC 1206 (unpub)

Facts:

- injury #1: prior 11% PD award = upper back
- injury #2: current injury = left shoulder

Rubio

WCJ awarded 15% PD; ***no*** apportionment

WCAB agrees!

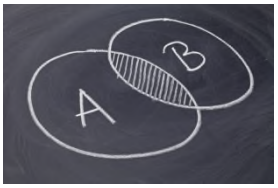
Rubio

Reasoning:

1. no evidence rec'd prior 11% PD "award": LC 4664…(b) If the applicant has *received a prior award* of permanent disability…

Rubio

Reasoning:
2. even if prior "award" existed, ER didn't prove overlap



Note:
- PD for shoulder = ROM + arthroplasty + pain
- PD for back = no lost ROM; no shoulder surgery

Can 4664 Apportionment Defense Really Work?

Phillips

Facts:

•1987 *right* knee = 50% = work restriction:

between: very heavy work = 15%
semi sedentary = 60%

•med reports confirmed split

stip = 50% (right knee)

Phillips

Facts

- 1987 *right* knee = 50%
- 2005 left knee = sedentary = 70%

WCJ says, **100%**

Phillips

Apportionment?

YES!

Award?

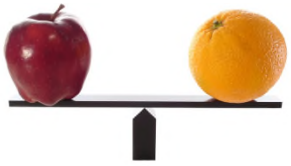
50%

Why?

100% - 50% = 50%

Phillips v. WCAB (2008) 73 CCC 402 (writ denied)

Can you subtract apples from oranges…and HOW?



Prior award - based on pre-2005 PDRS (subj., obj, work restrictions)

New injury - rated via AMA *Guides* (2005 PDRS)

Can we apportion via 4664?

Minvielle v. County of Contra Costa (2008) 36 CWCR 199 (panel decision)

F: '92 back rated via 1997 PDRS
'04 injury rated via 2005 PDRS (AMA Guides)

H: no overlap (injuries rated via different schedules)

Minvielle

All is not lost!

Remanded to see if possible to rate '92 injury via 2005 PDRS

Robinson

Facts:
2004 back = (1997 PDRS, ROM)
2005 back = (2005 PDRS)

LC 4664 work:
AME was asked to describe PD for each injury using the AMAs…and HE DID!!!

1. 2004 doi = wpi (using Guides' ROM)
2. 2005 doi = wpi (using Guides' ROM)

Thus, can use subtraction

LC 4663 work:
AME says 20% = nonindustrial factors

Robinson

HOLDING:

can apportionment per:

(a) LC 4663, ***and***
(b) LC 4664

Vaira v. WCAB

3rd App Dist

Vaira vs WCAB

Facts:

- 73 y/o bent over "to pick up some brochures"
- Compression fx
- AME – 64% PD
- Apportionment: 40% to age/pre-existing osteoporosis

AME

"With regards to causation and apportionment, it is my opinion that [applicant] certainly does have risks secondary to the aging process and the pre-existing osteopenia or osteoporosis…these two conditions lumped together would be responsible for 40% of her new current level of disability…"

AME depo

"[H]er age predisposed her to the injury, the osteoporosis, and possibly other factors…you put these together, and…she was pretty significantly at risk."

Is this "legal" apportionment?

Is it "discrimination" on the basis of "age"?

Maybe…
Maybe not!

"To the extent [the AME] based his apportionment on…age, this would…violate…11135. The WCAB may not reduce petitioners [PD] simply because she is older…"

…or male
…or female
…or straight
…or gay
…etc.

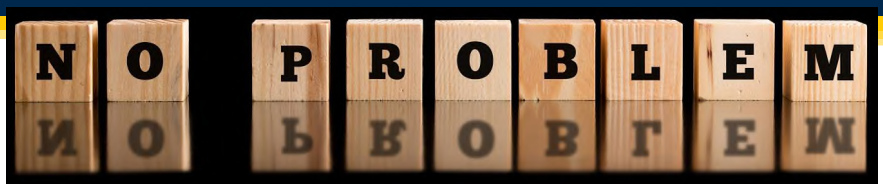
HOWEVER

"To the extent osteoporosis or some other…condition that might contribute to a work-related disability arises or becomes more acute with age, we see no problem with apportioning [PD] to that condition."

"[I]n such cases, apportionment is not to age but to a disabling condition."

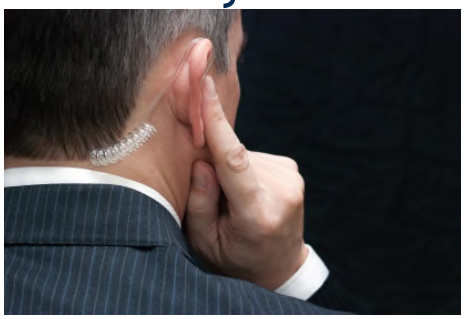
What if this causes a "disparate impact"?

What's "disparate impact"?



"Reducing [PD] based on a pre-existing condition that is a contributing factor of disability is not discrimination. When the WCAB determines a pre-existing condition contributes to a given disability, and apportions accordingly, this is merely a recognition that a portion of the disability exists independent of the industrial injury."

Here's the Dirty Little Secret



"Such apportionment is

not

discrimination…"

Lesson

Make sure doctor uses correct language!

Apportion to "age"? → **NO**

Apportion to a condition

(that just happens to be age-related)?

Donald Barthel, Esq.
Bradford & Barthel, LLP
2518 River Plaza Drive
Sacramento, California 95833
(916) 569-0790
dbarthel@bradfordbarthel.com