APPORTIONMENT PEARLS OF WISDOM (PART 1)

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About us

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WHAT ARE THE GREATEST CHALLENGES OF DOING A MEDICAL LEGAL EVALUATION?

Why is apportionment such a hot topic?

Our Mission

- Obtain accurate history

- Focused but thorough examination

- Review available medical records

- Provide analysis on key issues including:

  - Diagnoses

  - Causation of injury

  - Disability status

  - Extent of impairment

  - Causation of Permanent Disability (Apportionment)

  - Future medical care needs

  - Work limitations

Why is Apportionment so difficult?

- Medical disconnect

- Legal definition

- Key points

MEDICAL DISCONNECT

Physicians are comfortable and trained to focus on diagnosis, prognosis, and treatment – not causation analysis

Not typically concerned about what caused the problem, unless it affects the treatment and prognosis

Labor Code §4663

- **Shall** be based on causation.

- **Shall** be addressed in any report addressing PD.

- 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.

Labor Code §4664

- **Shall** be based on 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.

- 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.

- (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.

Legal Definitions: Labor Codes

Key Point #1

Distinction between **impairment** and **disability**

◦ **Impairment**: a significant deviation, loss, or loss of use of any body structure or body function. It's a medical evaluation of the extent of physical or mental damage caused by an injury or illness.

◦ **Disability**: not solely a medical determination. It considers how the impairment affects an individual's ability to perform ADLs and participate in work and social situations – i.e. the restrictions and limitations an individual experiences due to their impairment. (Case law definition: Loss of the use of a member or function of a member and inability to compete in the open labor market)

Key Point #2

Burden of proof

◦ Causation of **Injury:** Applicant

◦ Causation of **Permanent Disability (Apportionment):** Defendant

Key Point #3

It's our best **approximation**, not an exact science

The Cookie analogy

Cookie = Total Permanent Disability

Macro Ingredients = Contributing Causal Factors

Apportionment = Estimate how much each ingredient contributes to "the Cookie"

Understanding Disability & Apportionment: The Cookie Analogy

	Sugar Cookie One known cause	100%
	Chocolate Chip Cookie Pre-existing degeneration 10% chip / 90% base	10%
	Chocolate Chip Raisin 2 pre-existing + 1 injury 10/10/80	Moderate
	Snickerdoodle Swirl Blended / subtle causes 5–10% swirl	Complex
	Fudge Swirl Cookie Blended but strong factor 30% fudge / 70% base	Complex

The Wine Glass analogy (Scenario 1)

Perfect wine glass, washed 1000 times.

One day, you tap it against your teeth, and it breaks.

The glass is no longer whole; it can no longer carry wine.

How much of the "permanent disability" was related to what factor(s)?

How much did each factor contribute to the breaking of the glass?

Those factors need to be considered in your apportionment analysis.

The Wine Glass analogy (Scenario 2)

Perfect wine glass, washed 1000 times.

One day, you drop it off a 2-story balcony.

How much of the injury was due to it being washed versus it falling?

Causation of permanent disability?

The Wine Glass analogy (Scenario 3)

Flawed wine glass, washed 1000 times.
On day 1001, you take it out of the dishwasher, and it's cracked.
It was functional up until the 1001 use.
What caused the crack? (Causation of injury)
What is the cause of permanent disability?
Why can't the glass carry wine anymore?
Was it the flaw in the first place or the 1001 wash?
A combination of the two?

The Wine Glass analogy (Scenario 4)

Wine glass has a small hole and can only hold 70% of a full glass.

Washed 1000 times.

One day, you drop it off a 2-story balcony.

Did the hole play a role?

Did the washes play a role?

Did the fall off the balcony play a role?

How much of a role did each factor play?

What is the cause of permanent disability?

Complexity of Applicant's History

Each case is **FACT** specific

What are the considerations in your analysis?

Symptomatic vs. asymptomatic pathology

Prior industrial and/or non-industrial injuries or illnesses

Pre-existing disability

Genetic predispositions (e.g., City of Jackson v. WCAB (Rice) — apportionment to genetics upheld if it is a contributing causal factor of permanent disability)

Pre-existing Conditions

Comorbidities

Lifestyle (hobbies, recreational activities, social activities)

Natural progression of any condition or disease

Non-Industrial Contributing Factors

Subsequent industrial and/or non-industrial injuries

Treatment complications

Post-injury developments

Pertinent Case Law

Case	Key Takeaway
Escobedo v. Marshalls (2005)	Apportionment must be based on **substantial medical evidence**
Brodie v. WCAB (2007)	Clarified the shift to causation-based apportionment under SB 899
Hikida v. WCAB (2017)	No apportionment if disability is solely caused by industrial medical treatment
Justice v. WCAB (2020)	Narrowed Hikida — apportionment allowed if disability is partially caused by non-industrial factors
City of Jackson v. WCAB (Rice)	Apportionment to genetic factors upheld
Benson v. WCAB (2008)	Each distinct industrial injury be separately compensated based on its individual contribution to a permanent disability
City of Petaluma v. WCAB (Lindh) (2019)	If there is a contributing causal factor (could be a risk factor) that it must be considered with regards to apportionment.

What exactly is Substantial Medical Evidence?

Evidence that a reasonable mind could accept as adequate to support a conclusion.

Be framed in terms of **reasonable medical probability** based on pertinent facts including adequate examination and history set forth reasoning in support of its conclusions.

Must not be erroneous, no longer germane, or based upon an inadequate history or examination, surmise, speculation, or **conjecture** (Place v. WCAB (1970) 35 CCC 525).

What exactly is Substantial Medical Evidence?

Substantial medical evidence refers to medical opinion that is:

o   Based on factually **accurate** history

o   Supported by medical reasoning, and

o   Rooted in established medical principles or literature

What exactly is Substantial Medical Evidence?

In the context of apportionment, substantial medical evidence **must**:

o   Clearly explain **how and why** permanent disability is apportioned between industrial and non-industrial causes.

o   Include a rational basis for the percentage assigned to each contributing causal factor.

o   Be internally consistent, **non-speculative**, and legally sufficient to support a finding under Escobedo v. Marshalls and related case law.

What exactly is Substantial Medical Evidence?

It's not enough for a physician to simply state a percentage—there must be a **detailed explanation** that connects the dots between the injury, the medical findings, and the legal standard.

Case Law Breakdown

What exactly is Substantial Medical Evidence?

"The term 'substantial evidence' means evidence which, **if true, has probative force on the issues. It is more than a mere scintilla, and means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion...It must be reasonable in nature, credible, and of solid value."** (Braewood Convalescent Hosp. v. Workers' Comp. Appeals Bd. (Bolton) (1983) 34 Cal.3d 159, 164 [48 Cal.Comp.Cases 566]

What exactly is Substantial Medical Evidence?

A medical opinion must be framed in terms of reasonable medical probability, it must be based on an adequate examination and history, it must not be speculative, and it must set forth reasoning to support the expert conclusions reached. (E.L. Yeager Construction v. Workers' Comp.Appeals Bd. (Gatten) (2006) 145 Cal.App.4th 922, 928 [71 Cal.Comp.Cases 1687]; Escobedo v. Marshalls (2005) 70 Cal.Comp.Cases 604, 620-621 (Appeals Bd. en banc).

What exactly is Substantial Medical Evidence?

"Medical reports and opinions are not substantial evidence if they are known to be erroneous, or if they are based on facts no longer germane, on inadequate medical histories and examinations, or on incorrect legal theories. Medical opinion also fails to support the Board's findings if it is based on surmise, speculation, conjecture or guess." (Hegglin v. Workmen's Comp. Appeals Bd. (1971) 4 Cal.3d 162, 169 [36 Cal.Comp.Cases 93].)

Physician's Role in Apportionment - Recap

What physicians shall address:

- **Approximate** percentage of disability caused by industrial vs. non-industrial factors

- Reasoning (**how and why**) based on medical probability

Common Pitfalls

- Speculative percentages

- Failure to distinguish impairment vs. disability

- Aggregating contributing causal factors (must segregate)

- Not addressing the how and why ("show your work") – conclusory opinions

- If multiple QMEs, cannot rely on someone else's apportionment analysis (avoid "pass-through" apportionment)

Common Pitfalls (Continued)

- Relying on advocacy letters to influence your opinions – you need to review the history with the Applicant and the medical records

- Including age, gender, race, and nationality in the analysis

- If AMA guides is rebutted by Vocational expert may need to re-address apportionment as to the cause of work restrictions instead of the cause of whole person impairment

- Failure to address compensable body parts separately from the original injured body parts

And how to avoid them!

- Your report must be organized

- Create at timeline of events

- Point out discrepancies in the medical history and medical records

- You may have to provide opinions based on different sets of facts

- Write to the Trier of Fact

- Show your work

WCAB decisions

- Vega

- Abhat

Case Studies

THANK YOU

STAY TUNED FOR THE ANNOUNCEMENT OF PART 2!

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