California Orthopaedic Association
Sorting Out Apportionment Issues
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LC §4663 in Five Easy Steps

**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.”
LC §4663 in Five Easy Steps

**Step 4:** Dr. must explain basis for how and why

**Step 5:** Dr. must avoid the danger zones

Beware of BENSON Issues
Step 1 - Injury v. Disability

• Causation of *injury* affects **MT**
  (If cause of IW’s injury = 1% industrial, IW gets 100% MT needed to treat injury)

• Causation of *disability* affects **PD**
  (If cause of IW’s disability = industrial, IW gets PD% payout, less % of *apportionment* to non-industrial factors.)
Step 1 - Injury v. Disability

Parga v. City of Fresno, (NPD) 2011 CWC PD LEXIS 238

Dr stated, “that although it was the combination of the industrial wear and tear on the toe (from the work boots) and the diabetes which caused the amputation, IW’s diabetes was not causing disability at the time of his evaluation.”
Step 1 - Injury v. Disability

**Parga v. City of Fresno, (NPD) 2011 CWC PD LEXIS 238**

Doctor incorrectly based apportionment on causation of injury, **rather than causation of disability** when he found 50% PD industrial and 50% due to non-industrial diabetes.

WCAB found no apportionment to non-industrial factors and stated, “There is no impairment from the diabetes, nor was it causing disability at the time of the doctor’s evaluation.”
Step 2 - PD determination %

Step 2:

Doctor MUST make a determination that a specific % of the IW’s disability is caused by non-industrial factors and a specific % of the IW’s disability is caused by industrial factors.

It’s fine for 0% and 100% to be the two %s, but there must be a % for both industrial and non-industrial factors.
Step 2 - PD determination %


Dr stated, “100% of the Sean Gilbert's orthopedic PD is a direct result of the CT sustained throughout his career as a professional football player and 0% of the disability arose by other factors both before and subsequent to the industrial injury.”
Step 3 - Magic Words

Step 3:

Dr. must use the correct legal standard established in *Escobedo & Gatten*:

1. reasonable
2. medical
3. probability
Step 3 - Magic Words

Step 3:

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.”
Step 4 - Explanation

Step 4: The Doctor MUST explain the “how and why” behind his or her conclusion.
Step 4 - Explanation


**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.*
Step 4 - Explanation

Swanier v. Western Star Transportation, 2013
CWC LEXIS PD --

“Here, the MRI reports document degenerative changes and arthrosis as a likely result of IW’s previous non-industrial injury… We point out that IW’s ability to perform his job before his industrial injury is not the correct legal standard.

…Specifically, the doctor satisfactorily explained his finding of apportionment…in light of his clinical judgment and experience, based on his findings...his review of the MRI films and the history of IW’s previous injury.”
Step 5 - Avoid Danger Zones

“Danger, Will Robinson! Danger! Danger!
Step 5 - Avoid Danger Zones

Dr. must avoid all of the “danger zones”

“normal aging process”
“evolutionary process”
“age related issues”
Step 5 - Avoid Danger Zones

Vaira v. W CAB, (2007) 72 CCC 1586

3rd DCA stated, “To the extent Dr. Johnson based his apportionment of 40% of disability on petitioner’s age, this would appear to violate Govt Code Section 11135. The WCAB may not reduce petitioner’s benefits simply because she is older than another similarly situated worker.”
Step 5 - Avoid Danger Zones

Vaira v. WCAB, (2007) 72 CCC 1586

3rd DCA continued, “To the extent osteoporosis becomes more acute with age, we see no problem apportioning disability to that condition.”
Step 5 - Avoid Danger Zones

Additional danger zone:

**Apportioning to Risk Factors**
(as opposed to pathology)

*United Airlines v. WCAB, (Milivojevich)*, (2007) 72 CCC 1415

Dr. Anderson, “I would like to assure you that I agree with you that the apportionment of causation of disability to risk factors is not appropriate…. **Risk factors are characteristics that increase the possibility of disease or injury, but they are not the disease or injury itself.**"
Step 5 - Avoid Danger Zones

*United Airlines v. WCAB, (Milivojevich)*, (2007) 72 CCC 1415. WCAB held, “Dr. Anderson did not state that applicant personally suffered from an underlying pathology. Instead, Dr. Anderson found diagnostically that applicant had elevated serum cholesterol, which placed him at greater risk for pathological events, such as stroke and heart attack.”
Step 5 - Avoid Danger Zones

*United Airlines v. WCAB, (Milivojevich), (2007) 72 CCC 1415.*

WCAB continued, “Dr. Anderson is apportioning to a risk factor for injury as the *cause* of applicant's injury and not to his *disability*. Additionally, Dr. Anderson's opinion is not framed in terms of *reasonable medical probability*, and he has not adequately explained the exact nature of the apportionable disability and *how and why* the disability is causally related to the industrial injury."
Step 5 - Avoid Danger Zones

Pathology is not a risk factor. It may be appropriate to apportion to pathology under certain circumstances.

See *Costa v. WCAB (Ralph’s Grocery)*, (2011 Cal. Wrk. Comp. LEXIS 25.)

IW had a pre-existing asymptomatic pathology (spinal stenosis). The doctor concluded that this pathology increased the IW’s level of PD, and therefore apportioned 20% to this non-industrial factor.
Step 5 - Avoid Danger Zones

LaRue v. WCAB, (2011) 76 CCC 575; 2011 CWC LEXIS 72

A’s doctor did not comment on IW’s pre-existing scoliosis and it’s impact on the industrial injury. He just noted that IW had no symptoms prior to the industrial injury. But that’s not the standard.

D’s doctor did apportion to the scoliosis. The WCAB finding for defense stated, “apportionment to pathology, asymptomatic prior conditions, and retroactive prophylactic work preclusions is proper, if based on substantial evidence.”
Step 5 - Avoid Danger Zones

Dr. must avoid additional danger zones such as:

“idiopathic condition”

“It would be fair…”
Benson Issues

_Benson v. WCAB_ (2009) 73 CCC 113 (1st DCA) On 6.3.03, Ms. Benson, a file clerk, reached for a plastic bin and felt a pain in her neck.

AME said:
50% = specific injury of 6.3.03
50% = CT ending on 6.3.03.
Doctor’s Option #1:
“A physician evaluating a case involving successive industrial injuries might determine that all of the resulting PD is solely attributable to one of the successive injuries.” (Benson, at p. 16)
Benson Issues

Doctor’s Option #2:

“A Dr. may determine that it is medically reasonable to assign a % cause of the overall disability to each injury (e.g., 50/50, 75/25, 90/10), resulting in multiple (non-combined) awards for each injury's portion of the permanent disability.” (Benson, at p.16)

See *Lambert v. WCAB*, (2010) 75 CCC 1441, where doctor’s determination following “Option #2” was found to constitute substantial evidence.
Benson Issues

Doctor’s Option #3:
If the doctor is unable to “parcel out degree to which each injury is causally contributing” to the PD. *(Benson, at p. 18)*

*Lester v. WCAB*, (2nd DCA writ denied.) 2011 CWC LEXIS 162. Argument didn’t work for IME who changed his mind with no new medical evidence.
Benson Issues

Doctor’s Option #3:
If the doctor is unable to “parcel out degree to which each injury is causally contributing” to the PD. *(Benson, at p. 18)*

*Cal Ind v. WCAB (Marquez),* (3rd DCA writ denied. Costs awarded to IW.) 77 CCC 82; 2011 CWC LEXIS 199.

Doctor’s position worked for WCJ, but not for WCAB who overturned the WCJ’s finding and stated that *Benson* made it clear that the doctor “is required to make a separate determination of causation for each industrial injury.”
Benson Issues

**Trap for the Unwary** - Dr. must make an apportionment determination on EACH injury. If there is more than one injury per Benson, there must be an apportionment determination on each or the report may be tossed.

“The doctor did not address the approximate percentage of permanent disability attributable to each of applicant's two industrial injuries. Because he failed to "offer an opinion on apportionment of each separate injury," his report is not "substantial medical evidence to justify an award of permanent disability."

Benson Issues

Trap for the Unwary #2 - LC §4663(c):

“In order for a Dr's report to be considered complete on the issue of PD, the report must include an apportionment determination. A Dr shall make an apportionment determination by finding what approximate % of the PD was caused by the direct result of injury AOE/COE and what approximate % of the PD was caused by other factors both before and subsequent to the industrial injury, including prior industrial injuries.”

Practice Tip: Depo questions may arise on this analysis as it relates to Benson issues.
Benson Issues

LC §4663(c):

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