

California Orthopaedic Association Apportionment Issues - Post SB863

By: Colleen S. Casey, Adam Dombchik &
Jake Jacobsmeyer - Copyright © 2014



DISCLAIMER

The following material and any opinions contained herein are solely those of the author and are not the positions of the Division of Workers' Compensation, Department of Industrial Relations, the WCAB or any other entity or individual.



The materials are intended to be a reference tool only and are not meant to be relied upon as legal advice.

Apportionment

The Basic Concept

“Apportionment is the process employed by the Board to segregate 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.”

[Brodie v W.C.A.B. 40 Cal.4th 1313 \(Cal Supreme Court\)](#)



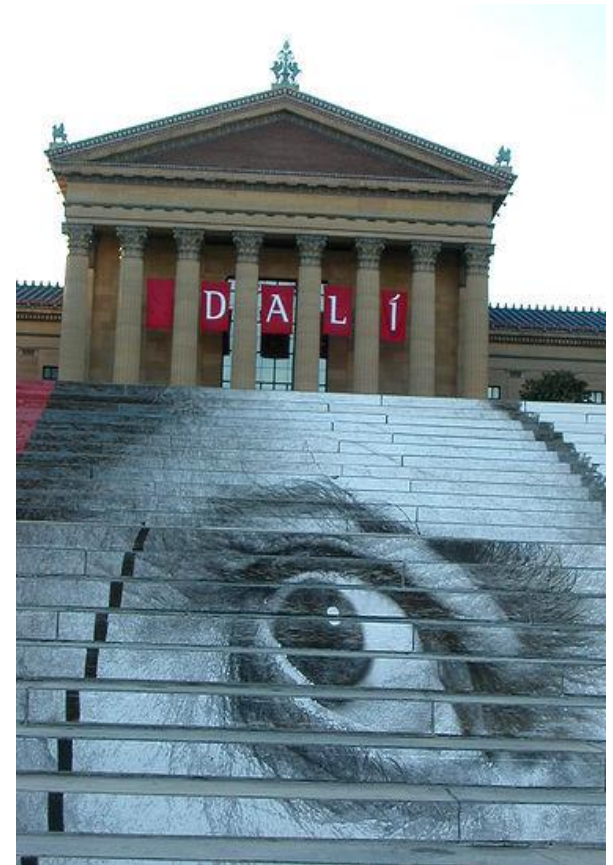
Review – Apportionment 101

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.”



Review – Apportionment 101

LC §4663 in Six Easy Steps

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

Step 5: Dr. must avoid the
danger zones

Step 6: Beware of Benson
Issues



Review – Apportionment 101

LC §4663 in Six Easy Steps

LC §4663:

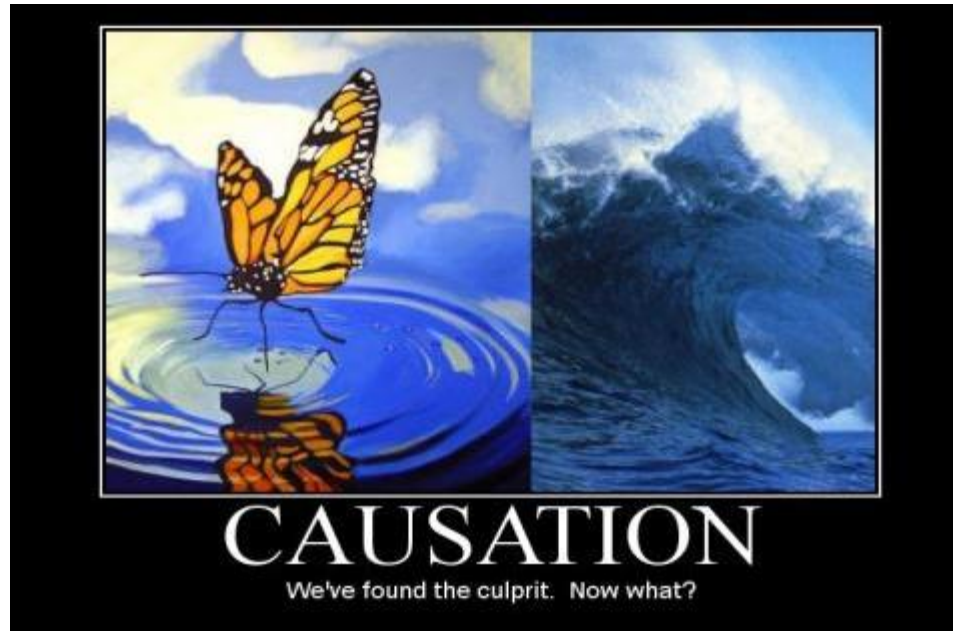
In order for a Dr's report to be considered complete on the issue of PD, the report must include an apportionment determination.

Dr. **shall** make an apportionment determination by finding what **approximate % of the PD** was caused by the direct result of injury AOE and COE and **what approximate % of the PD was caused by other factors** both before and subsequent to the industrial injury, including prior industrial injuries.

An appropriate determination can be 0% caused by non-industrial factors.



Step 1 - Injury v. Disability



- Causation of injury affects Medical Treatment
If cause of IW' s injury = 1% industrial, IW gets 100% Medical Treatment needed to treat injury. Involves AOE/COE analysis.
- 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 incorrectly apportioned 50% PD to the IW's non-industrial diabetes.

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 1 - Injury v. Disability



Neither Medical Treatment nor TD is apportionable:

If at least a portion of the cause for MT = industrial, the IW get 100% of MT needed to treat industrial injury.

Granado v. WCAB, (1968) 33 CCC 647.

The court in *Granado* stated, “If medical treatment reasonably necessary to relieve from the industrial injury were apportionable, a worker, who is disabled, may not be able to pay his share of the expenses and thus forego treatment.”

Step 1 - Injury v. Disability

Contribution is not = Apportionment

Apportionment deals with the allocation of industrial and non-industrial factors regarding an IW's permanent disability.

Contribution deals with allocation of liability between responsible parties. (See LC 5500.5 and *Nat'l Union Fire Ins v. WCAB (Nunez)*, (2011) 76 Cal Comp Cases 588 & *Royal Globe Ins. Co. v. IAC (Lynch)*, (1965) 30 CCC 199.)

Law does not mandate that allocation be the same for both contribution and apportionment.



Step 1 - Injury v. Disability

Law does not mandate that apportionment % determination for one body part be applied to all industrially injured body parts.

Jackson v. County of Los Angeles, (2013) 2013 Cal Wrk Comp PD LEXIS 558

“It is settled law that the defendant has the burden of proof on apportionment...

Nevertheless, even if there is legal apportionment of the applicant's back disability, nowhere in the apportionment mandates of the *Escobedo* case or LC 4663 does it indicate that apportionment of one part of body necessarily flows to each and every injury claimed.”



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 to determine 0% non-industrial and 100% industrial and vice versa, but there must be a % designated for both industrial and non-industrial factors.

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



Step 4: “how and why” Get the facts right

“...the WCJ’s decision to allow Martinez an unapportioned award for the CT claim rests on a misinterpretation of Dr. Levine’s opinion about the causes of Martinez’s 100% disability and a failure to acknowledge that Dr. Levine’s view that there was no specific injury was wrong, a circumstance that removed overlap and apportionment from his medical reporting. “

Southern California Edison v W.C.A.B. (Martinez) 78 Cal. Comp. Cases 825

Step 4 - Explanation

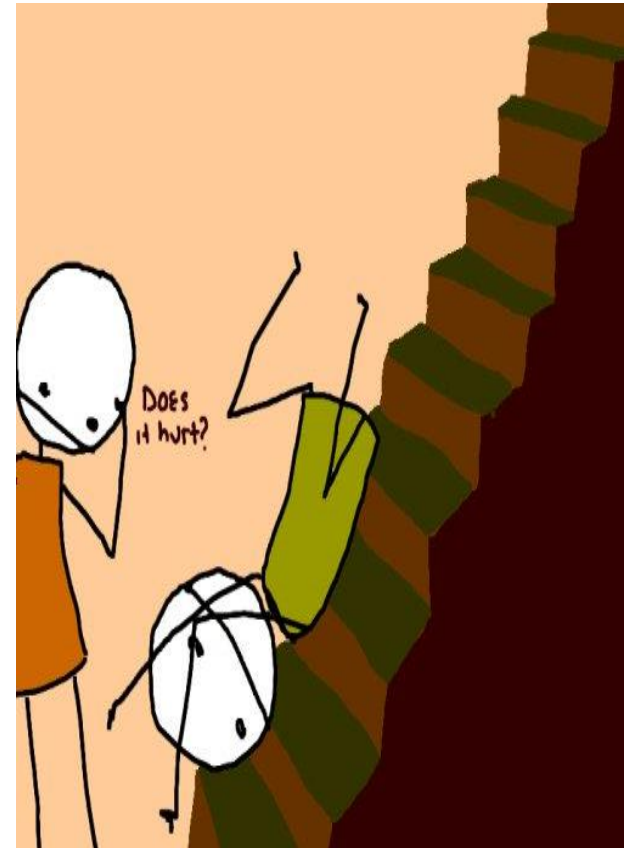
**Where to find evidence to support no basis,
or a basis for apportionment, and to what degree?**

1. History of ADL limitations, if any
2. Diagnostic testing
3. Clinical examination
4. Medical records, inclusion or absence thereof
5. History of job description(s), i.e. physical requirements
6. Consider timeline of injuries and medical treatment
7. Consider impact of prior injuries or conditions on ability to work (i.e. time off due to injury or condition)
8. Consider “prior” *AMA Guides* impairment, if any

Step 4 - Explanation

Escobedo v. Marshalls, (2007) 72 CCC
336

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**.

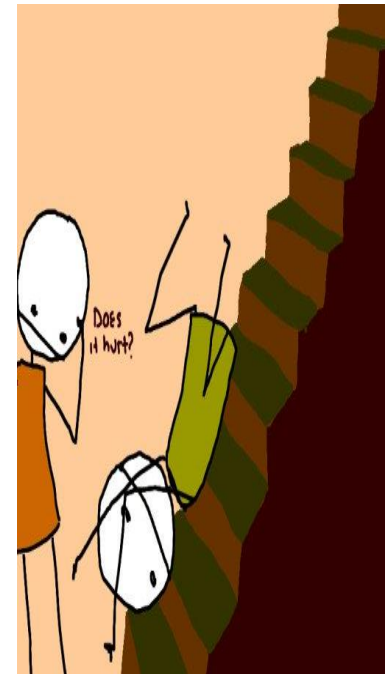


Step 4 - Explanation

Swanier v. Western Star Transportation, 2013
CWC LEXIS PD 29 (NPD)

“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 4 - Explanation

Thomas v. Long Beach Unified Schools, 2012

Cal Wrk Comp PD LEXIS 317, Doctor did not adequately explain “how & why.”

“IW's obesity has played a significant role in the development of her extensive degenerative arthritis. 50% of her PD is apportioned to the degenerative joint disease affecting the cervical, thoracic, lumbar spine and bilateral shoulders.

This PD would be present absent her industrial exposure... The remaining 50% is apportioned to her work-related injuries.



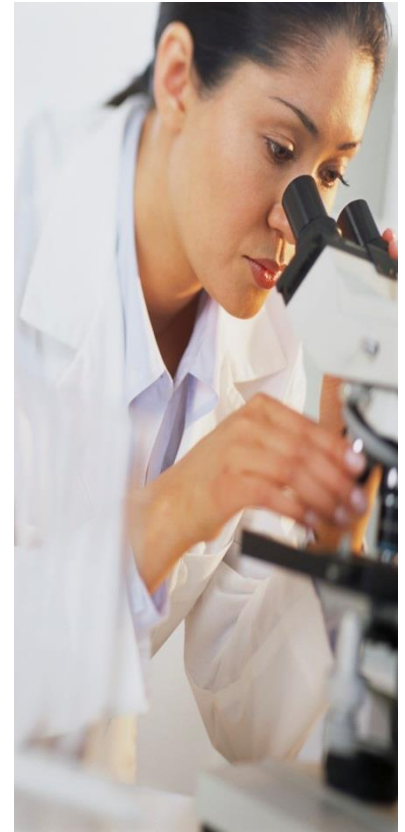
Step 4 - Explanation

Domay v. UCLA, 2012 Cal Wrk Comp PD LEXIS 122

AME adequately explained “how & why:”

“IW suffered a prior injury to the low back in a snowboarding accident in 1999, three years prior to the industrial accident of 3/22/2002.

AME, Dr. Newton, reviewed the contemporaneous LLU Medical Center records relating to the 1999 nonindustrial event, including the MRI showing a fracture at L2 and a small disc bulge at L4–5. His AME report dated 1/20/2011 reviewing those records explains his analysis and the how and why he reached an approximation of apportionment parceling out the causative sources of IW's current disability.”



Step 4 - Explanation

Anderson v W.C.A.B. (72 CCC 389):

AME adequately explained “how & why:”

“W.C.A.B. accepted apportionment of 30% neck and 20% of UE to non-work related causes

Labor Code § 4663 only requires
Approximate percentage of causation.

AME explained the “how and why” to support his opinion on apportionment

Dr. opinion was adequate even though it was not precise and required some intuition and medical judgment. This did not mean the conclusions are speculative where the physician stated the factual bases for his determinations based on his medical expertise.”



Step 5 - Avoid Danger Zones



“Danger, Will Robinson! Danger! Danger!”

AVOID using terms like:

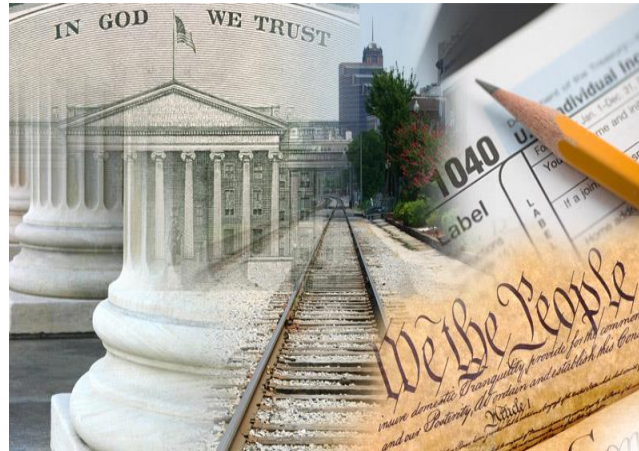
“normal aging process”

“age related issues”

“It would be fair...”

“risk factors”

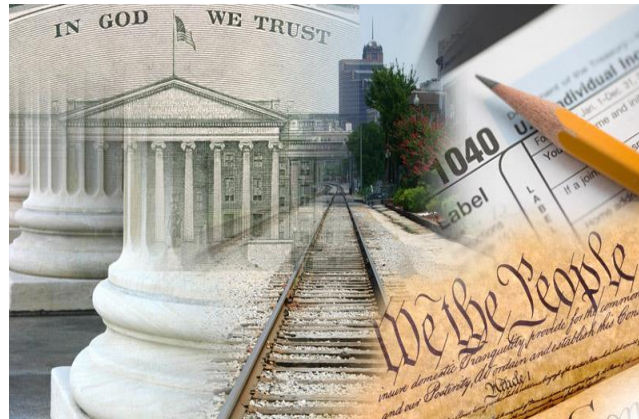
Step 5 - Avoid Danger Zones



Vaira v. WCAB, (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**.”

Also: *Slagle v W.C.A.B.* 77 CCC 467:

WCAB agreed that neither AME nor the WCJ apportioned to age. Rather, they apportioned to the degenerative changes objectively demonstrated in Applicant’s medical records 26

Step 5 - Avoid Danger Zones

Drs may not apportion to risk factors. 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.

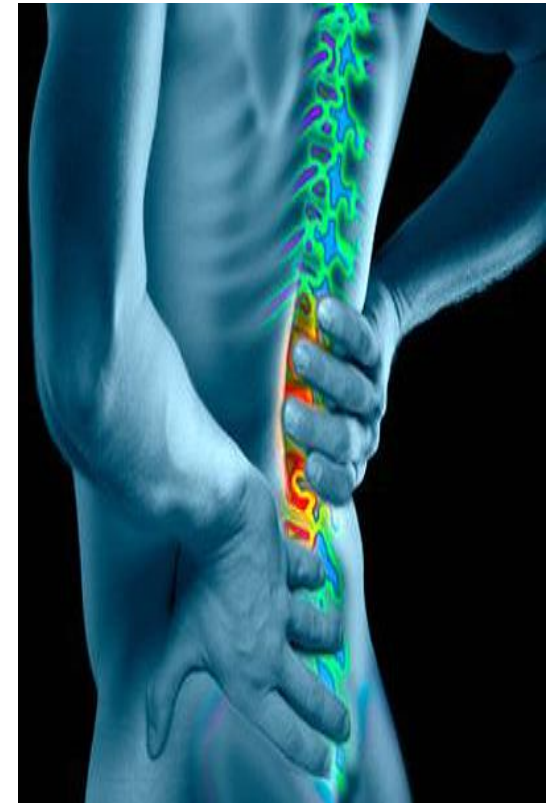


Step 5 - Avoid Danger Zones

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

A's doctor did not comment on IW's pre-existing scoliosis and its 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 apportioned to the scoliosis. WCAB held in favor of defense stating, **“apportionment to pathology, asymptomatic prior conditions, and retroactive prophylactic work preclusions is proper, if based on substantial evidence.”**



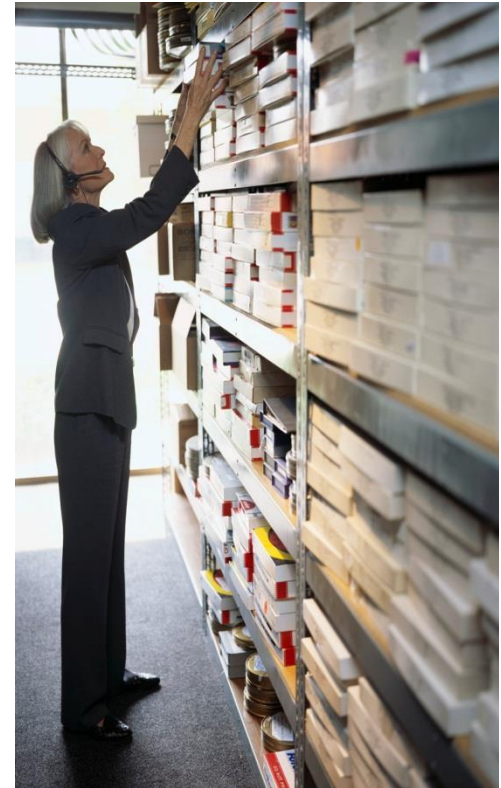
Step 6 - Benson Issues

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.



Step 6 - Benson Issues



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)

100% to CT ending 6.3.03 - 62% PD = \$67,016

Step 6 - 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.

50% - CT ending 6.3.03	- 31%	= \$24,605
50% - SI of 6.3.03	- 31%	= <u>24,605</u>
Total		<u>\$49,210</u>



Step 6 - 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.

Can't “parcel out degree” = \$67,016

Step 6 - 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.”

Step 6 - Benson Issues

Doctor's Option #3:

- Applicant sustained specific & CT injury.
- AME opined equal contribution & also concluded absent specific injury, CT claim likely would not exist

- Applicant attorney argued 2nd Injury was “compensable consequence” of 1st & W.C.A.B. awarded combined 100% PD award

- Court of Appeal reversed combined Award:
“based on the testimony of the AME, the successive injuries can be rated separately and Dorsett’s joint and several award of 100 percent permanent disability must be annulled”

State Fund v W.C.A.B. (Dorsett), (2011) 76 CCC 1138



Step 6 - 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.”

See Haynes v. South Point Academy School, (2008) 2008 CWC PD Lexis 80.



Step 6 - 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.



Step 6 - 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.”



Distinguish 4663 from Benson

Make sure that you have distinguished between LC §4663 & Benson:



LC §4663:

In order for a Dr's report to be considered complete on the issue of PD, the report must include an apportionment determination.

Dr. shall make an apportionment determination by finding what approximate % of the PD was caused by the direct result of injury AOE and COE and what approximate % of the PD was caused by other factors both before and subsequent to the industrial injury, including prior industrial injuries.

Distinguish 4663 from Benson

Make sure that you have distinguished
between LC §4663 & Benson:

Radman v. WCAB, (2013) 79 CCC 91; 2013 Cal
Wrk Comp LEXIS 205

IW had a SI on 8/12/96 and a CT ending 8/17/98
resulting in PD in the form of ortho injuries
and fibromyalgia.

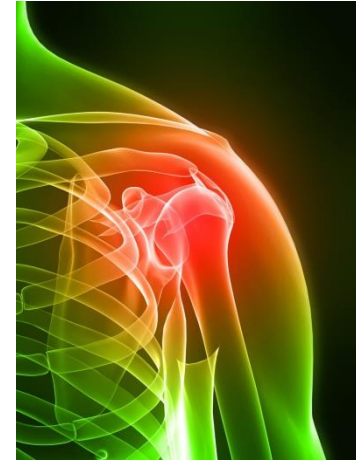
Dr. stated that IW = 100% PD because the two
injuries were “inextricably intertwined.”
(Benson issue)

Dr. stated 10% of PD attributed to non-industrial
degenerative disc disease. **(LC 4663 issue)**



Distinguish 4663 from 4664

LC 4664 (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???



Distinguish 4663 from 4664

Minvielle v. County of Contra Costa
(2010) 75 CCC 896; 2010 CWC
Lexis PD 144; 38 CWCR 7 (writ
denied)

Can't subtract 1997 PDRS rating
from 2005 PDRS rating.
Defense failed in its burden of
proving LC 4664 apportionment.

But what about a LC 4663
apportionment determination?



Apportionment & LC 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, PTD shall be determined in accordance with the fact.”

Apportionment & LC 4662

Apportionment does not apply to the first four situations which are **conclusive presumptions** of 100% PD.

Case law has determined that apportionment may apply in cases where PTD is determined “in accordance with the fact.”

Is this standard subject to a conclusive presumption or rebuttable presumption?

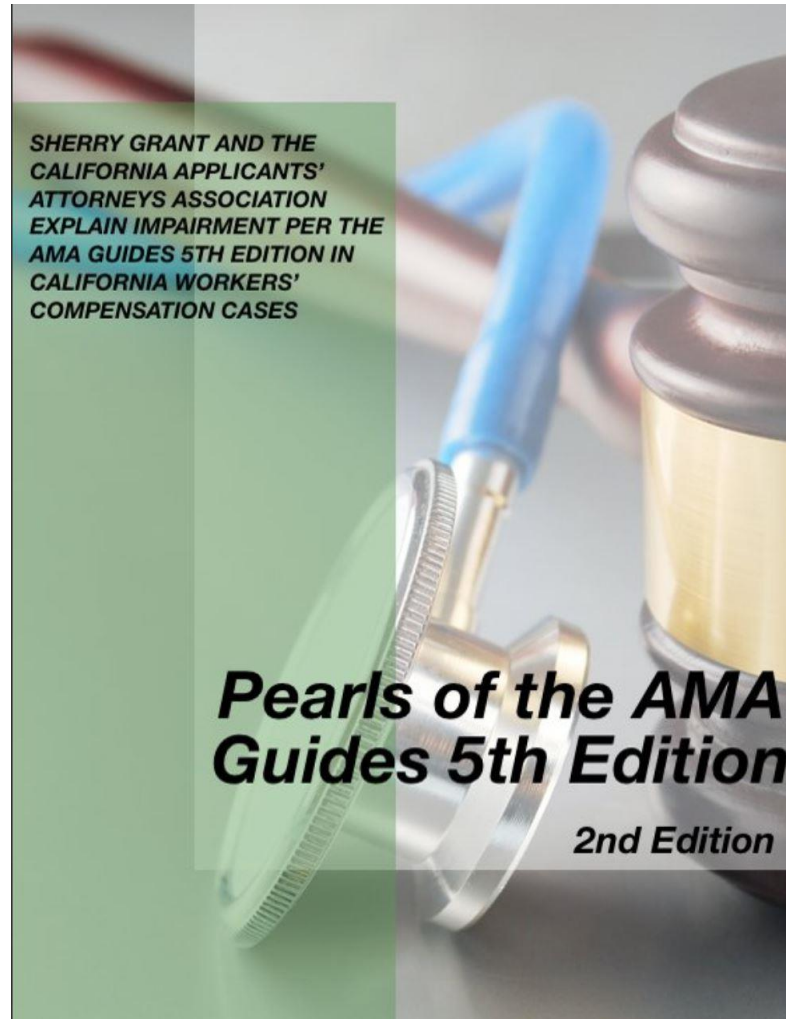




**KEEP
CALM
THE
END
IS NEAR**

Additional Educational
Resource
offered by Adam Dombchik

Additional Impairment Rating Resource



Additional Impairment Rating Resource

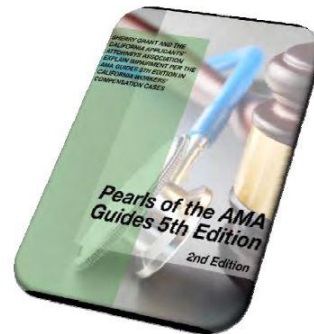
Pearls of the AMA Guides 5th Ed.



www.caaa.org/pearls

Get the #1 supplemental resource to the Guides!

Click here for a Pearl



Pearls is a must have for Californian:
Physicians **Claims Professionals** *Attorneys*
Judges

- Over 100 pearls of wisdom on impairment ratings.
- Comprehensive practice tips.
- Links to critical source materials on the internet.
- Highlight text.
- Search Keywords.
- Take & save notes.
- Email select pages.

Price: \$149.99
Device: Available on iPad and Mac.
Category: Law
Published: Jan 10, 2014
Seller: CALIFORNIA APPLICANTS' ATTORNEYS
Length: 272 Pages
Language: English
Version: 1.0

Requirements: This book was designed for iPad and some features may not work as intended with a mouse or trackpad. To view this book on an iPad, you must have iBooks 3 or later and iOS 5.1 or later. Mac computers must have the latest OS X installed (Mavericks).