Apportionment Fundamentals

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Labor Code section 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) ..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..

Brodie v. WCAB (2007) 40 Cal.4th 131

- Prior to SB 899, apportionment "based on causation was prohibited." (*Id*. at p. 1326.)
- Rather, "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." (*Id*. at p. 1328.)

Escobedo v. Marshalls (2005) 70 CCC 604

- Physician must apportion to causation of PD, not causation of the injury.
- Apportionment can be based on any "other [non-industrial] factor," either pre- or post-injury.
- Apportionment can be made to pathology and asymptomatic prior conditions. Prior disability or modified work is not required.

Escobedo cont.

- "Thus, to be substantial evidence on the issue of the approximate percentages of permanent disability due to the direct results of the injury and the approximate percentage of permanent disability due to other factors, a medical opinion must be framed in terms of **reasonable medical probability, it must not be speculative, it must be based on pertinent facts and on an adequate examination and history, and it must set forth reasoning in support of its conclusions.**
- Must explain **how and why** the approximate percentage of the disability is causally **related to the industrial injury**, and **how and why** the approximate percentage of disability is causally **related to non-industrial factors**.

Escobedo cont.

- For example, 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 and how and why the injury is responsible for approximately 50% of the disability. And, 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 cont. Burden of Proof

- Under section 4663, the applicant has the burden of establishing the percentage of permanent disability directly caused by the industrial injury, and the defendant has the burden of establishing the percentage of disability caused by other factors.

What about Labor Code section 4663 (c)(2)?

- **(2)** If the physician is unable to include an apportionment determination in the 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.**

Example #1
Not substantial

Falade v. Durando Home, 2018 Cal. Wrk. Comp. P.D. LEXIS 65

- Specific injury to low back.
- Parties used an AME.
- AME: "With regard to the issue of causation and apportionment under labor code 4663 and 4664…in all medical probability, would be 20% attributable to underlying pathology on a non-industrial basis with the remaining portion attributable to the progression of the industrial injury occurring on August 6, 2009."

Falade cont.

- "the apportionment analysis failed to adequately set forth the reasoning behind …[the] opinion that 20% of the permanent disability for the lumbar spine was due to underlying pathology on a non-industrial basis. The undersigned found the apportionment analysis did not comply with *Escobedo*…"

Falade cont.

- Defendant filed a petition for reconsideration.
- "AME did not provide a sufficient rationale for his 20% apportionment to non-industrial pathology, since he did not discuss the nature of that pathology or how he reached the 20% figure."
- The WCAB then cites to *Escobedo*.

Example #2
Close call

Williams v. The Boeing Company, 2012 Cal. Wrk. Comp. P.D. LEXIS 396; Sweeney dissent

- Applicant brought bilateral hip CT claim.
- Worked for 24 years.
- PTP found 15% of the PD non-industrial.
- Judge found the apportionment opinion not substantial evidence. PD award 72%.
- Split WCAB reversed the judge. Apportionment substantial evidence. 66% PD award.

Williams cont.

- "X-rays of the bilateral hips performed…revealed severe bilateral hip osteoarthritis.
- "The *Escobedo* decision allows apportionment of disability or impairment to pre-existing degenerative pathology provided with evidence of degenerative pathology led to some impairment or disability prior to the industrial trauma in question **or <u>would have progressed</u>** to a disabling state or caused impairment of the patient's activities of daily living by this time **<u>absent</u> the effects of the patient's work injury." [Emphasis added.]**

Williams cont.

- "Based on the **severity of the degenerative joint disease** at the hips, I believe the patient **would have had some limited bilateral hip mobility and some difficulty with weight bearing activities** by this time **absent the effects of the work-related continuous trauma.** In my opinion, 85% of the patient's bilateral hip disability and impairment has been caused by the aggravating effects and consequences of the work-related continuous trauma injury from 1986 to December 07, 2009 and **15% has been caused by the natural progression of the underlying degenerative process affecting the bilateral hips**. Apportionment of the bilateral hip disability should be made accordingly." [**Emphasis added**.]
- Sweeney: Doctor gave no explanation regarding why the degenerative changes reflected in the medical records or diagnostic imaging were not industrially caused.

Example #3
Better

Person v. California Department of Corrections and Rehabilitation, 2019 Cal. Wrk. Comp. P.D. LEXIS 389

- Corrections officer fell and suffered a knee contusion.
- QME found that officer had underlying degenerative joint disease in knee.
- Assigned 66.6% nonindustrial apportionment.
- Judge found apportionment valid.
- WCAB on recon upheld the judge.

Person cont.

- “It is my opinion that Mr. Person suffered a Left Knee Contusion (direct trauma) during the …Ground Level Fall. It is my opinion that Mr. Person has pre-existing Patellofemoral Degenerative Joint Disease in his left knee. It is my opinion that the … Ground Level Fall aggravated the pre-existing Patellofemoral Degenerative Joint Disease in Mr. Person's left knee.”
- “Referring to the footnote on Table 17-31 on page 544, an individual who suffered a direct trauma, has complaints of patellofemoral pain, and had crepitation on physical examination, but without joint space narrowing on x-rays qualifies for 2% Whole Person or 5% Lower Extremity Impairment.”

Person cont.

- "**Absent the pre-existing Patellofemoral Degenerative Joint Disease** in Mr. Person's left knee, the …**Left Knee Contusion would have given rise to 2% Whole Person Impairment**. **Conversely, absent the …Left Knee Contusion, Mr. Person's left knee would have pre-existing impairment due to the presence of the Patellofemoral Joint Disease**. Therefore, based on reasonable medical probability, **33.4% of his left knee impairment as calculated above from patellofemoral degenerative joint disease (2 out of 6% WPI**) is apportioned to the July 16, 2017 Left Knee Contusion; **the remaining 66.6% of his left knee impairment as calculated from patellofemoral degenerative joint disease (4 out of 6%)** is apportioned to pre-existing non-industrial conditions." [**Emphasis added**.]

City of Jackson v. WCAB (*Rice*) (2017) 11 Cal.App.5th 109

- Apportionment may be properly based on genetic/heritability if it is supported by substantial medical evidence.
- For example, apportionment may be based on pathology and asymptomatic prior conditions which is evidenced by diagnostic testing, for which the worker has an inherited predisposition.

City of Petaluma v. WCAB (*Lindh*) (2018) 29 Cal. App. 5th 1175

- A police officer was engaged in training wherein he was hit in the head several times.
- Subsequently he lost vision in one eye.
- It was also discovered he had underlying blood circulation condition that may have contributed to the blindness. At the time of the injury, it was asymptomatic.
- The QME ultimately stated that it was **unlikely the applicant would have lost his vision in the eye but for the underlying condition.** The QME apportioned 85% to the non-industrial risk factor deemed a contributing cause to the overall disability.
- The Judge in the case found the apportionment not valid because it was using purely risk factors.
- The WCAB on reconsideration agreed with the Judge.

Lindh cont.

- The defendant filed a petition for writ of review with the First District Court of Appeal. Therein, the Court reversed the Judge and the WCAB and held plainly that post SB 899:
- "[T]he salient question is whether the disability resulted from both nonindustrial and industrial causes, and if so, apportionment is required." (*Id*. at. p. 1193.)

Hikida v. WCAB (2017) 12 Cal.App.5th 1249

- The applicant underwent a carpal tunnel release. Post-surgery the employee developed complex regional pain syndrome (CRPS).
- The Agreed Medical Evaluator (AME) in the case found the employee 100% disabled because of the CRPS, which was opined to be a direct consequence of the failed surgery. However, the AME found 10% non-industrial apportionment to an underlying cause of the carpal tunnel syndrome.

Hikida cont.

- COA Holding: Defendant was liable for disability directly traceable to an unsuccessful industrially based medical intervention, without apportionment.
- In reaching that conclusion, it cited to (amongst other cases) the California Supreme Court case of *Granado v. WCAB (1968) 69 Cal. 2d. 399,* which previously held that medical treatment is not apportionable.
- Building on that, in part, the *Hikida* Court held the adverse consequences of industrially provided medical treatment cannot be apportioned. Therefore, the PD consequences could not be apportioned.

County of Santa Clara v. WCAB (*Justice*), 2020 Cal. App. LEXIS 461.

- The applicant brought a claim for injury to the knees and ultimately underwent knee replacement surgery.
- The medical-legal evaluator found the applicant had underlying "market osteoarthritis." The medical-legal evaluator went onto find 50% of the overall disability was related to the applicant's underlying non-industrial factors.
- The judge in the case rejected the apportionment determination on the basis the *Hikida* case did not allow it because the PD resulted from the medical treatment. (Knee replacement results under the AMA Guides.)

Hikida/AMA Guides conundrum

- Judge: “[T]he surgeries were quite successful. While by no means curative, the surgeries appear to have significantly increased [Justice's] ability to walk and engage in weight-bearing activities. Under the pre-2005 [Permanent Disability Rating Schedule (PDRS)] one suspects that the surgeries would have significantly decreased [her] work limitations and increased her ability to engage in gainful activity, resulting in a lower [permanent disability] rating. Since the current PDRS is based not upon functional capacity but upon diagnosis, the surgery has resulted in an impairment rating substantially higher than it was pre-surgery. The only real cause of this change in impairment rating was the surgery…” (*Id*. at p. 5.)

Justice cont.

- COA: “Where there is unrebutted substantial medical evidence that nonindustrial factors played a causal role in producing the permanent disability, the Labor Code demands that the permanent disability ‘shall’ be apportioned.” (*Id*. at p. 16.)
- “There is no case or statute that stands for the principle that permanent disability that follows medical treatment is not subject to the requirement of determining causation and thus apportionment, and in fact such a principle is flatly contradicted by sections 4663 and 4664.” (*Id*. at p. 18.)

Justice/Hikida reconciled

- "Understood in context [Labor Code sections 4663/4664], the *Hikida* court's conclusion that there should be no apportionment makes sense only because the medical treatment in Hikida resulted in a new compensable consequential injury, namely CRPS, which was entirely the result of the industrial medical treatment. It was this new compensable consequential injury that, in turn, led entirely to the injured worker's permanent disability." (*Ibid*.)

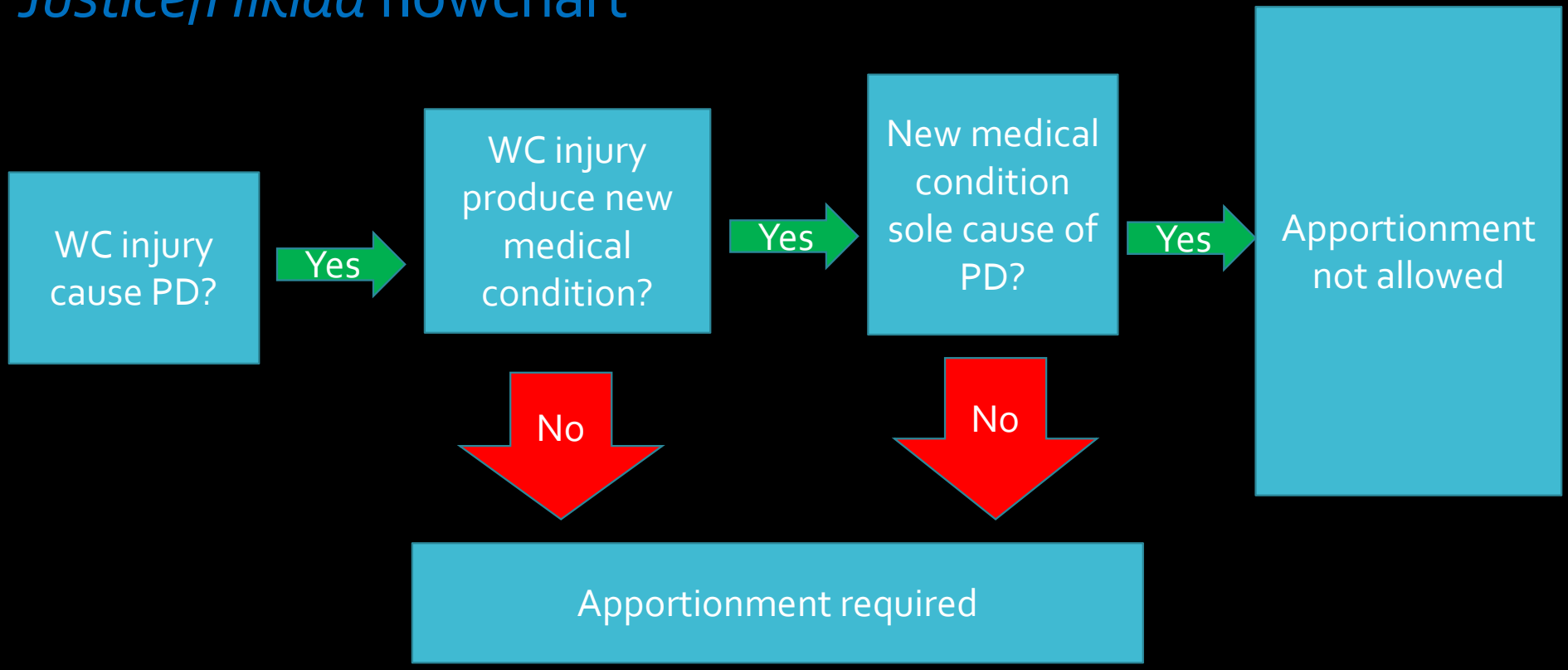
Justice Cont.

- "Although parts of the *Hikida* opinion can be read to announce a broader rule that there should be no apportionment when medical treatment increases or precedes permanent disability, it is clear that the rule is actually much narrower. Put differently, *Hikida* precludes apportionment only where the industrial medical treatment is the sole cause of the permanent disability." (*Id*. at p. 19.)

Questions for the AME/QME

- Whether:
- (1) there was a new condition brought on by the medical treatment and
- (2) whether it is the sole cause of the PD.

Justice/Hikida flowchart



Benson v. WCAB (2009) 170 Cal.App.4th 1535

- Each distinct industrial injury must be separately compensated based on its individual contribution to a permanent disability. There may be limited circumstances when the evaluating physician 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.

Mills v. American Medical Response, 2019 Cal. Wrk. Comp. P.D. LEXIS 84

- Applicant suffered specific injuries and CT. (4 claims total).
- Ortho AME apportioned PD 70% to one injury, and 30 % to two other injuries evenly. (15% each).
- Internal AME: “I can’t do Benson on this guy.” “The adverse effect of the orthopedic injuries on the impairments I rated are identical, and so there is no way to dissever one injury and its impact on GERD from another.”
- WCJ issued single joint award.
- Defendant filed recon.

Mills cont.

- WCAB: “Applicant entitled to single joint award where there is not unanimity that it is appropriate to apportion between dates of injury.”
- WCAB cites to *Alea North American Ins. Co. v. WCAB* (*Herrera*) (2019) 84 Cal. Comp. Cases 17 (W/D);
- See also *Northrop Grumman Systems Corp. v. WCAB* (*Dileva*) (2015) 80 Cal. Comp. Cases 749 (W/D)(Note Lowe dissent); *City of Cathedral v. WCAB* (*Fields*) (2013) 78 Cal. Comp. Cases 696 (W/D)

Aguirre v. Best Foods Baking Company, 2010 Cal. Wrk. Comp. P.D. LEXIS 522

- Applicant had two dates of injury.
- Pain management (PM) AME said chronic pain syndrome rendered applicant 100% disabled.
- PM AME said cannot parcel out causative source amongst multiple dates of injury.
- However, said that chronic pain condition "likely" caused by the injury where applicant hit their head.
- WCJ found no apportionment, issued 100% award.
- WCAB reversed, said apportionment opinion was incomplete, and ordered development of the record. Said PM AME should consult the ortho AME regarding apportionment and cited to Labor Code section 4663(c).

Other examples

- *Langley v. 101 Casino*, 2019 Cal. Wrk. Comp. P.D. LEXIS 293; Comm. Lowe dissent; Where 2 medical-legal evaluators could apportion, but 3rd couldn't because it would require "speculation", then that doctor should consult others to make determination.
- See also, *Fuentes v. World Variety Produce*, 2015 Cal. Wrk. Comp. P.D. LEXIS 280. Split panel. Majority (Comm. Lowe and Zalewski) ordered development of the record for the AMEs to consult other doctors so they could make an apportionment determination. There, AMEs said they "cannot" apportion between the injuries, and it would be "speculative" to make an apportionment determination.)

Northrop Grumman Systems Corp. v. WCAB (*Dileva*) (2015) 80 Cal. Comp. Cases 749 (W/D)(Lowe dissent)

- "Turning to apportionment of applicant's psychiatric disability, the WCJ must make a determination of what percentage of an applicant's permanent disability was directly caused by the industrial injury and what percentage of disability was caused by other factors based on substantial medical evidence. (*Escobedo v. Marshalls* (2005) 70 Cal.Comp.Cases 604 (Appeals Board en banc).)

Cont.

- Labor Code section 4663(c)states that "In order for a physician's report to be considered complete on the issue of permanent disability, the report must include an apportionment determination. . . .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. . .The physician shall then consult with other physicians or refer the employee to another physician. . .in order to make the final determination." (Lab. Code §4663(c).)

Cont.

- "… Labor Code sections 5701 and 5906 authorize the WCJ and the Board to obtain additional evidence, including medical evidence, at any time during the proceedings. (See also *Lundberg v. Workmen's Comp Appeals Bd*. (1968) 69 Cal.2d 436 [33 Cal.Comp.Cases 656, 659]; *King v. Workers' Comp. Appeals Bd*. (1991) 231 Cal.App.3d 1640 [56 Cal.Comp.Cases 408, 414]; *Raymond Plastering v. Workmen's Comp Appeals Bd. (King)* (1967) 252 Cal.App.2d 748 [32 Cal.Comp.Cases 287, 291].) Before directing augmentation of the medical record, however, the WCJ or the Board must establish as a threshold matter that specific medical opinions are deficient, for example, that they are inaccurate, inconsistent or incomplete. (*Tyler, supra*, 62 Cal.Comp.Cases at p. 928; *McClune v. Workers' Comp Appeals Bd*. (1998) 62 Cal.App.4th 1117 [63 Cal.Comp.Cases 261, 265

Summary

- Apportionment to causation of permanent disability.
- Parcel out any factors causing permanent disability (pre-existing, post injury, symptomatic, asymptomatic.)
- Anything goes. (Genetics, risk factors.)
- Must explain “how and why.”
- Defendant’s burden.
- Hikida/Justice framework for new injuries/conditions created by medical treatment.
- *Benson*.
- Exceptions to *Benson*.
- Framework for development.