Although the law requires apportionment of the causation of the worker’s permanent disability (i.e., what portion of the final disability, if any, was caused by factors other than the work injury), occasionally physicians may make the mistake of apportioning the causation of the injury.

See, e.g.: ¹


¹ These decisions are all unpublished panel and/or writ denied decisions. They are not citable, but are illustrative of how these types of issues have arisen and been addressed by the WCAB.
This is more likely to occur when the injury is either a cumulative trauma or an event such as a heart attack or stroke, i.e., an injury that is not the result of a typical workplace accident.

**Doctors are not lawyers,** and this distinction between causation of the *injury* and causation of the *disability* may not be immediately clear to them in the atypical case.

The *Anderson* case is a good example. The worker suffered a shoulder injury at work, underwent surgery for the injury and suffered a stroke as a result of the surgical complications. The stroke (i.e., the injury) was clearly industrial. In his report, the QME apportioned to pre-existing factors of diabetes and hypertension, which he asserted increased the risk of stroke. This was error, because doctor was apportioning to pre-existing health conditions that may have contributed *to the injury* (i.e., the stroke), but there was no evidence that these pre-existing conditions caused any of the worker’s *disability*. Rather, the permanent disability was entirely the result of the stroke, which was indisputably industrial.

If a medical-legal report appears to apportion causation of the injury, rather than of the disability, it is not substantial medical evidence. It is important, however, to review the report in full and in context; while the language concerning apportionment may not always be phrased with precision (these are doctors not lawyers), the full report may indicate whether a correct apportionment determination was in fact made.

WCAB cases make clear that it is not substantial medical evidence for an evaluating physician to apportion based on “risk factors.” A factor that may increase the *risk* of a particular kind of injury or condition is not evidence that the factor actually *caused* a portion of an individual worker’s permanent disability. Risk of injury is *not* the same as cause of disability. Stated another way, a “risk factor” is a statistical probability. It is not “the . . . injury itself.” It is not a pathology. A “risk factor” cannot and does not cause permanent disability.
A “risk factor” cannot and does not cause permanent disability.

See, e.g.:

Apportioning to risk factors is actually a two-level mistake. It focuses on the risk or cause of injury (rather than cause of disability), and it focuses on risk rather than actual evidence of cause in a particular case. Apportionment must be based on actual evidence as to the individual worker, not based on categorical risk factors and assumptions based on those factors.

This issue is addressed in the *The Physician’s Guide to Medical Practice in the California Workers’ Compensation System* (Fourth Edition, 2016), as follows:

**Apportionment of Disability**

This section should describe the degree to which any permanent disability is due to pre-existing conditions or underlying disease. Apportionment is a legal concept and applies only to permanent disability. It is never applied to medical treatment, temporary disability, or death benefits. **Apportionment can be based only on causation of permanent disability. It is not correct to base apportionment on personal risk factors, asymptomatic disease, or pathology.** The physician is being asked to determine the portion of the disability that would have existed without the current injury.

Apportionment should be addressed if there are applicable pre-existing conditions or underlying disease, or if it is indicated in the causation section that the injury is an aggravation of an existing condition or previous injury. The evaluator should explain the portions of the findings that affect their opinion on apportionment. The existence of underlying disease or pre-existing injury does not automatically justify apportionment to those factors, but the issue should be addressed.

(Chapter 12, Writing the Medical-Legal Report, p. 72; available at the following web address: [http://www.dir.ca.gov/dwc/medicalunit/toc.pdf](http://www.dir.ca.gov/dwc/medicalunit/toc.pdf)).
There have been accusations in some cases of discrimination on the basis of age or other factors based on statements in medical reports about age or gender (or lifestyle, obesity, genetics, etc.) as a “risk factor” for a particular injury or condition. In other cases, medical evaluators may have referred to gender-based or gender-related risk factors such as menopause or pregnancy, leading to concern that workers may have suffered a reduction in benefits based on gender.

As noted above, apportionment of causation of the injury (i.e., determining that the injury was more likely to happen due to specified factors) is impermissible, and apportionment to risk factors rather than to evidence of actual cause, including to gender or age-based risk factors, is also impermissible.

Discrimination within the workers’ compensation system on the basis of any protected category, including gender, as well as age, race, religion, and national origin, is unlawful and impermissible.

Counsel, medical providers, and other practitioners should be alert and sensitive to this issue at all times, and should raise the issue and act accordingly if any language suggestive of gender or age-based discrimination, or discrimination based on any other protected category, appears in a medical report. A workers’ permanent disability compensation should never be reduced as a result of discrimination.

**Ethical Requirements**

(c) All QMEs, regardless of whether the injured worker is represented by an attorney, shall with respect to his or her comprehensive medical-legal evaluation:

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(3) Render expert opinions or conclusions without regard to an injured worker's race, sex, national origin, religion or sexual preference.***

(4) Render expert opinions or conclusions only on issues which the evaluator has adequate qualifications, education, and training. All conclusions shall be based on the facts and on the evaluator's training and specialty-based knowledge and shall be without bias either for or against the injured worker or the claims administrator, or if none the employer.

(Cal. Code Regs., title 8, §41(c)(1).)
It is important, however, to recognize the distinction between apportionment to a gender or age-based risk factor, which is not permissible, and apportionment to an actual medical condition that a worker may have, as established by the medical evidence in a particular case, and that may be an actual cause of a portion of that worker’s permanent disability.

For example, apportionment to age as a risk factor is not permissible, but apportionment to pre-existing arthritis, as evidenced in the medical records of the worker, is permissible, even though arthritis is an age-related condition. Apportionment to gender or menopause as a risk factor for industrial carpal tunnel syndrome is not permissible, but apportionment to actual pre-existing and/or non-industrial carpal tunnel syndrome, as established in the worker’s own medical history, is permissible, even though carpal tunnel syndrome may be more common among post-menopausal women. In these cases, apportionment to these pre-existing conditions, even if age or gender-related, is not discrimination; it is a medical determination as to the actual cause of the disability.

See, e.g.:

- **Allen v. Workers’ Comp. Appeals Bd.** (2008) unpublished 2 Cal. WCC 1457, 73 Cal. Comp. Cases 1631 [apportionment proper because it was based on specific medical conditions established by the worker’s records, “not simply to her being sixty years old”];
- **Kos v. Kimes-Morris Construction** (October 2, 2007) 2007 WL 5434475 (panel decision) [apportioning to age-related degenerative conditions is not age discrimination because the evidence establishes these conditions as a cause of a portion of the permanent disability];
- **Vaira v. W.C.A.B.** (California Travel and Tourism Com’n) (Cal. Ct. App., Dec. 3, 2007) 1 Cal. WCC 1119, 2007 WL 4227253, 72 Cal. Comp. Cases 1586, Cal. App. Unpub. LEXIS 9750 (panel decision) [“Reducing permanent disability benefits 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. The injured worker is being compensated only for the disability caused by the industrial injury.”]

**AND REMEMBER**

The Guiding Principle Is Substantial Medical Evidence

The question to be answered in any apportionment determination is that set forth in Labor Code section 4663 (“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 . . .”), and the answer to this question must be based on the actual medical evidence as to each individual worker. Determinations on the wrong issue, or based on an inadequate medical examination, or based on statements about risk factors, or based on assumptions or stereotypes about classes of workers, are not substantial medical evidence.