Addressing the Avoidance of Bias Within the Workers’ Compensation System

DWC Annual Education Conference 2018

What Stakeholders Can Do To Identify & Prevent Bias Within the Workers’ Compensation System
Everyone has a role to play in identifying & preventing bias

- All stakeholders in a workers’ compensation claim should be on the lookout for potential bias:
  - Attorneys
  - Claims adjusters
  - Workers’ Compensation Judges
  - Medical treatment providers
  - Med-legal evaluators (AMEs and QMEs)
  - Interpreters
  - Etc.

The Frontline Defense: Attorneys & Adjusters

- Attorneys and adjusters have access to med-legal evaluations before the WCJ sees them
- If it appears from your review of the med-legal evaluation that:
  - The report contains statements indicating potential bias; or
  - The impairment rating is not supported by substantial medical evidence; or
  - There is impermissible apportionment to causation or risk factors…
- You can write to the doctor, voice your objection, and request that the doctor explain the basis for their opinion, or seek a new evaluation
- This will help to ensure that any potential bias is addressed promptly, and that the parties can evaluate the case and proceed based on the best available medical evidence, avoiding unnecessary expense and delay
- If the issue of potential bias is not cured at the discovery phase, attorneys should promptly notify the WCJ of any evidence of potential bias
The Backstop: Workers’ Compensation Judges

• WCJs also have a role to play
• When determining whether a report constitutes substantial evidence, WCJs will consider:
  • Any allegation(s) of potential bias raised by the parties;
  • Whether the doctor conducted an adequate and comprehensive exam of the injured worker before making impairment decisions; and
  • Whether apportionment is proper (i.e., apportionment to causation of permanent disability, not injury, and based on actual medical evidence, not risk factors or assumptions)

Addressing Potential Bias In Med-Legal Evaluations
Apportionment: What the Law Requires

• Labor Code section 4664(a): “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.”

• Labor Code section 4663(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.”

Substantial Medical Evidence Is The Legal Standard

• To constitute substantial evidence, a physician must conduct and adequate and comprehensive exam of the injured worker before making impairment decisions

• A medical report is not substantial evidence unless it sets forth the reasoning behind the physician’s opinion, not merely his/her conclusions

• An appropriate rating under the AMA Guides should take into account all identified impairments, not only the primary body part or organ system impacted


• The physician must address the worker’s:
  • History and symptoms
  • Results of the medical exam
  • Results of tests and diagnostics
  • Diagnosis
  • Anticipated clinical course
  • Need for further treatment
  • Residual functional capacity
  • Ability to perform activities of daily living
  • Etc.
What Is Permissible Apportionment?

- Apportion to causation of permanent disability, i.e., what portion of the final disability, if any, was caused by factors other than the work injury?
- Apportion to causation of injury?

- **YES.**

- **NO.** This is not correct under the statute. (See Cal. Lab. Code section 4663(c.).)

Caution of Injury vs. Causation of Disability: *Anderson v. Jaguar/Landrover of Ventura*

- Cite: (panel decision) 2012 WL 4788501
- Worker suffered shoulder injury and underwent surgery
- He suffered a stroke as the result of surgical complications
- In his report, the QME apportioned to preexisting diabetes and hypertension
- The QME's apportionment was in error because there was no evidence that these preexisting conditions caused any of the workers’ disability
- Rather, the permanent disability was entirely the result of the stroke, which was clearly industrial because it occurred in the court of treatment for the shoulder
What Is Permissible Apportionment?

- Apportion to “risk factors”, e.g., age, gender, race, lifestyle, obesity, etc.?
  - **NO.** 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 the worker’s permanent disability.
  - Risk of injury is not the same as cause of disability.
  - **YES.**

- Apportion to actual medical evidence of any preexisting or nonindustrial injury or condition that may be related to age or gender?

The Problem With Apportioning To Risk Factors

- Apportioning to categorical risk factors and assumptions deriving from those factors is a **two-level mistake**
  - **First:** Focuses on risk or cause of injury rather than cause of disability
  - **Second:** Focuses on risk rather than actual evidence of cause as to the individual worker
- Risk factors cannot and do not cause permanent disability
Apportionment & Risk Factors

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 workers’ permanent disability…

…[T]he 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 the 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 statement about risk factors, or based on assumptions or stereotypes about classes of workers, are not substantial medical evidence.


Risk Factors vs. Substantial Medical Evidence: 
*Ricken v. County of Riverside*

- Cite: (panel decision) 2015 WL 9212650
- Worker sustained injury to cardiovascular system in the form of hypertension while employed as a sergeant
- He was awarded 14% permanent disability
- Based on the findings of the PQME, 50% of the workers’ disability was apportioned to obesity, positive family history, diet, stress, lack of physical activity, and sleep apnea
- The Board reversed, stating that the PQME’s report and testimony on the issue of apportionment were not substantial evidence because the PQME never explained how any of the workers’ risk factors was a cause of disability
- The Board explained, “A risk factor is not pathology and does not cause permanent impairment.”
Vaira v. WCAB

- Worker sustained specific injury to her back.
- AME concluded worker suffered a compression fracture to her spine, and further opined that her age and preexisting osteopenia or osteoporosis of her spinal column contributed to her disability. He apportioned 40% of her disability to her preexisting conditions and 60% to the industrial injury.
- Worker stipulated to 64% permanent disability before apportionment. The WCJ adopted AME's apportionment of 40% to preexisting conditions. Worker filed several petitions for reconsideration based on several issues, including that of apportionment to her age and osteoporosis.
- Court of Appeal remanded for the WCAB to take further evidence on the issues, as it was unclear whether: (1) the AME was asked to limit his apportionment to factors contributing solely to industrial disability, rather than to industrial injury; and (2) the AME apportioned disability to age per se rather than to one or more physical or mental conditions associated with age that contribute to her disability.
- As the court explained, “the WCAB may not use risk factors of injury in apportioning disability.”
- However, “[r]educing permanent disability benefits based on a preexisting condition that is a contributing factor of disability is not discrimination. When the WCAB determines a preexisting 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.”

Jackson v. WCAB (Rice)

- Cite: (2017) 11 Cal.App.5th 109
- QME concluded that employee's disability – neck, shoulder, arm, and hand pain – was caused by cervical degenerative disc disease, and that the disease, in turn, was caused in large part by heredity and genetics
- 49% of causation of permanent disability was apportioned to employee's personal history, including but not limited to the genetic cause of degenerative disc disease
- WCJ agreed with the QME's apportionment, but the Board did not
- The Board concluded that the QME could not assign causation to genetics because that is an "impermissible immutable factor[.]"
- Citing Escobedo, the Court of Appeals reversed the Board's decision…
The Jackson Court’s Reasoning

“Precluding apportionment based on ‘impermissible immutable factors’ would preclude apportionment based on the very factors that the legislation now permits, i.e., apportionment based on pathology and asymptomatic prior conditions for which the worker has an inherited predisposition…

The Board’s ruling indicates that it believes ‘genetics’ is not a proper factor on which to base causation. However, since 2004 it has allowed apportionment based on such a factor, even though it may not have used the term ‘genetics.’”

(pp. 915-916)

Takeaway: Apportionment of causation of permanent disability may be properly based on genetic and/or inherited conditions where there is actual medical evidence of the same.

Allen v. WCAB

- Worker sustained a CT injury to her back while working as a bookkeeper
- The AME opined that her disability was 40% and that 20% was due to non-industrial pathology, arthritis and stenosis
- The WCJ and the Board found that the AME’s conclusions were based on substantial medical evidence
- Allen petitioned for writ of review
- The Court of Appeals concluded that although the AME mentioned Allen was 60 years old, and that her age was a “factor” in her preexisting pathology, the AME explained that arthritis was common among individuals her age but added that “in this case I think it was more advanced than usual”

Takeaway: Apportionment was proper because it was based on specific medical conditions established by the worker's health records, “not simply to her being sixty years old”
**Kos v. WCAB**

- Cite: (2008) 73 Cal. Comp. Cases 529
- Worker developed back and hip pain while working as an office manager
- Med-legal evaluator found that her prolonged sitting at work “lit up” her preexisting “multilevel degenerative disease”
- 75% of the worker’s disability was apportioned to degenerative disc disease
- The ALJ concluded that there was no basis for apportionment
- The Board reversed, stating that in degenerative disease cases, it is incorrect to conclude that the worker’s permanent disability is necessarily entirely caused by the industrial injury without apportionment


- Cite: (2007) 72 Cal.Comp.Cases 1415
- Worker suffered an industrially-related stroke for which he was awarded 91% permanent disability pursuant to a F&A
- Worker filed timely Petition to Reopen for New and Further Disability. The WCJ issued an F&A granted the Petition and finding that he had become 100% PTD as a result of his stroke. Based upon AME’s opinion regarding apportionment, the WCJ apportioned 40% of employee’s increased permanent disability to his high cholesterol
- WCAB reversed and held that AME’s apportionment determination was not substantial evidence as it was based on applicant’s risk factors for injury rather than on causation of his disability
- Takeaway: **Apportionment was improper because the AME did not state that applicant personally suffered from an underlying pathology**
Discrimination & Apportionment Based On Age Or Gender-Related Factors

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

The Law Requires Impartiality

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:

(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., tit. 8, §41(c)(1).)

IMPARTIALITY

All evaluators—whether a QME, an AME, or a treating physician—are asked to provide medical opinions that are fair, impartial, and based on their best medical judgment. Specifically, evaluators are required to treat all injured workers in the same way—that is, not to discriminate against or be biased against anyone because of race, sex, national origin, religion, or sexual preference or because of whether the worker is represented by an attorney.

(The Physician’s Guide to Medical Practice in the California Workers’ Compensation System, at p. 102.)
Recap

• Apportionment to causation of permanent disability for conditions that are related to age, gender, or other personal characteristics may be appropriate in certain circumstances, provided there is evidence of an actual medical condition applicable to that person as determined through an evaluation
  • Example: Apportionment to preexisting arthritis, as evinced in the medical records of a worker, is permissible.
  • Example: Apportionment to actual preexisting and/or non-industrial carpal tunnel syndrome, as established in the worker's own medical history, is permissible. However, apportionment to gender or menopause as a risk factor for industrial carpal tunnel syndrome is not permissible.
  • Mere assumptions about age, gender, or other personal characteristics are not sufficient. Substantial medical evidence is the standard.

Apportionment: Substantial Evidence Checklist

1. Does the medical report address apportionment?
2. Does the medical report determine the approximate percentage, if any, of factors other than the work injury that caused or contributed to the worker's level of permanent impairment or disability (not the causes of the injury)?
3. Does the medical report address causation of the permanent impairment based on an evaluation of the worker's own actual medical history and condition (and not based on assumptions or “risk factors” related to personal characteristics)?
THANK YOU