

# THE “ANYTHING GOES” RULES OF APPORTIONMENT

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- 1983 - UC Santa Cruz: BA Cell Biology
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- 1995 - Qualified Medical Evaluator
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# THE “ANYTHING GOES” RULES OF APPORTIONMENTT



# APPORTIONMENT OF THE PERMANENT IMPAIRMENT



- Escobedo - ...”in the context of Apportionment determinations, the medical opinion must 1) disclose familiarity with the concepts of apportionment, 2) describe in detail **the exact nature of the apportionable disability**, and 3) set forth the **basis** for the opinion, so that the Board can determine whether the physician is properly apportioning under correct legal principles.”
- Principles:
  - Be CLEAR on the “nature of the disability/impairment.”
  - Set forth the “basis for the opinion”
- Concept: SUBSTANTIAL MEDICAL EVIDENCE



# APPORTIONMENT OF THE PERMANENT IMPAIRMENT



- SUBSTANTIAL MEDICAL EVIDENCE - DEFINITION

- *Garza v. WCAB* (1970) 3 Cal.3d 312, 35 Cal. Comp. Cases 500 (Supreme Court in Bank)
- *Zemke v. WCAB* (1968) 68 Cal.2d 794, 33 Cal. Comp. Cases 358 (Supreme Court in Bank)
- *West v. IAC* (1947) 79 Cal. App. 2d 711, 12 Cal. Comp. Cases 86
- *Henry GRANADO, Petitioner, v. WORKMEN'S COMPENSATION APPEALS BOARD, Haslett Warehouse and California Casualty Indemnity Exchange*
- *Escobedo v. Marshalls* (2007) 70 Cal. Comp. Cases 604



# APPORTIONMENT OF THE PERMANENT IMPAIRMENT



- *Garza* - any award, order or decision of the board **must be supported by substantial evidence** in the light of the entire record
- *Zemke* - an opinion that does not disclose its underlying basis and gives a bare legal conclusion does not constitute substantial evidence
- *West* - an expert opinion is no stronger than the facts upon which it is based.
- *Granado* - a mere legal conclusion does not form a basis for a finding



# APPORTIONMENT OF THE PERMANENT IMPAIRMENT



- *Bassett* - the chief value of an expert's testimony rests upon the material from which his or her opinion is fashioned and the reasoning by which he/she progresses from the material to the conclusion, and, it does not lie in the mere expression of the conclusion, thus, the opinion of the expert is no better than the reasons upon which it is based.



# APPORTIONMENT OF THE PERMANENT IMPAIRMENT



- *Conclusory Opinions vs. Substantial Opinions* -
- *Escobedo*: “In order to constitute substantial medical evidence, a medical opinion must be 1) predicated on “reasonable medical probability” ...
  - ...a medical opinion is **NOT** substantial medical evidence if it is based on:
    - Facts no longer germane
    - ~~Inadequate medical histories or examinations,~~
    - Incorrect legal theories
    - Surmise, speculation, conjecture, or guess.
    - Further, a medical report is **NOT** substantial evidence unless it sets forth the **reasoning** behind the physician’s opinion, not merely his or her conclusions.”





# APPORTIONMENT OF THE PERMANENT IMPAIRMENT



- THE “WINNING” APPORTIONMENT FORMULA (*Escobedo*)
  - Reasonable Medical Probability
  - “Relevant Facts” - What ARE Relevant Facts
  - Adequate History & Exam - What IS an Adequate History? What IS an Adequate Exam?
  - Must not be Speculative
  - How and Why Reasoning - What must have Reasons?



# APPORTIONMENT OF THE PERMANENT IMPAIRMENT



- LC 4663:
- (a) Apportionment of permanent disability shall be based on “causation.”
- (b) A physician who prepares a report addressing the issue of permanent disability due to a claimed industrial injury shall address in that report the issue of causation of the permanent disability.



# APPORTIONMENT OF THE PERMANENT IMPAIRMENT



- LC 4663:
- (c) In order for a physician's report to be considered complete on the issue of permanent disability, the report **must include** an apportionment determination. A physician shall make an apportionment determination by finding:
  - **1. 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,
  - **2. What approximate percentage** of the permanent disability was caused by other factors both before and subsequent to the industrial injury, including prior industrial injuries.



# THE QME'S CRYSTAL BALL



- LC 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.
- (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.
- i.e. - no "medical rehabilitation"



# APPORTIONMENT OF THE PERMANENT IMPAIRMENT



- **Conclusory** Portion of the Opinion: In my opinion, and within reasonable medical probability, XX % of the Permanent Impairment is due to the industrial injury, and XX% is due to “other factors.”



# THE QME'S CRYSTAL BALL



- **Substantial** Portion of the Opinion: “Reasons for this conclusions include:”

## Relevant Facts:

- **Mechanism of Injury** - see video “Mechanism of Injury Continuum”
- Response to Appropriate Medical Care
- Pre-Existing Conditions
- Prior Industrial Injury
- Adequate History:
- Adequate Examination:
- “How” and “Why” Reasoning
- No Speculation: The above opinion on the Apportionment “approximate percentages” is not based on guess, speculation, surmise or conjecture.



APPORTIONMENT APPROXIMATE PERCENTAGES

100/0	0/100	90/10	80/20	70/30	60/40	50/50	40/60	30/70	20/80	10/90	0/100
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Reasonable Medical Probability

100/0	60/40	40/60	0/100
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Relevant Facts

100/0	60/40	0/100
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Adequate History

100/0	0/100
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Adequate Examination

0/100
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Not based on Surmise, Speculation, Conjecture, or Guess

0/100







# UPCOMING SESSIONS

- 12/08/21 - STATS/TRENDS/AND DISTURBING FACTS IN CA. WORK COMP
- 12/15/21 - YOUR FINAL REPORT IS TERRIBLE AND YOU SHOULD NOT SIGN IT
- SPRING “QME SUCCESS UNIVERSITY” ZOOMINAR SERIES -
- **For More Information - [www.ezcontinuingeducation.org](http://www.ezcontinuingeducation.org):**
  - The Apportionment Black Belt - 6 hours QME Home Study Program
  - The Slippery Slope of Substantial Medical Evidence - 6 hours QME Home Study Program