Lecture 3:
Causation and Apportionment for the Psychiatric Medical-Legal Evaluator

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1

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Introduction

Medical-legal evaluations in the workers' compensation arena may be conducted in any one of 42 disciplines according to the State of California, Department of Industrial Relations Division of Workers' Compensation (DWC). This presentation is directed toward evaluators in the specialties of psychiatry and psychology. Psychiatric workplace injuries arise both directly as a result of workplace injury and indirectly as the consequence of many other injuries.

2

2

Introduction

The medical-legal evaluation of psychiatric injuries occurring in the workplace is understood to be a complex undertaking, so much so that it has been assigned its own complexity factor for medical-legal billing purposes. An injured worker's psychiatric presentation at the time of the medical-legal evaluation can be expected to reflect the effects of the injury itself; however there will also be many other factors in evidence, such as the effect of chronic pain if the primary injury is physical; the financial consequences of loss of a job if the injury has caused the injured worker to be unable to return to the workforce; marital and family strain sometimes resulting in divorce and estrangement from children and family; and even substance abuse and legal woes.

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Introduction

Also at play may be stressors that are unrelated to the claimed injury including diagnosis of illness, death of a family member, or struggles being experienced by children or other loved-ones. Psychiatric injuries, probably more than any other injury evaluated in the workers' compensation system, are colored by every life experience. Because of this, the thorough and complete consideration and discussion of both causation and apportionment are crucial to the effective psychiatric medical-legal evaluator. Opinions and conclusions need to be well-reasoned and based on the facts in evidence, and demonstrate understanding of the current statutory environment.

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Two Discussions of Cause

- The medical-legal evaluator is tasked with investigating two different forms of causation. These are:
  - Causation of the injury; and
  - Causation of the permanent disability.

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Two Discussions of Cause (continued)

- Causation of the injury, also known simply as **causation**, begins with determining whether the particular injury being evaluated arose out of employment and occurred in the course of employment. This is also known as the injury arising AOE/COE and simply means that the injury must be caused by and happen on the job.
- In order to better understand this concept, a brief history is helpful. The California workers' compensation system is a no-fault system based on over 100 years of workers' compensation law in this country.
- As a no-fault system, the injured worker does not have the burden of proof that their employer was in any way responsible, negligent, or at fault for their injury. This is in contrast to claims in civil cases where there is a substantial burden of proof on the party bringing the suit.
- In our system of workers' compensation, the burden borne by the employee is to show that the injury did occur at work, while there was an employment relationship with the employer, and while the injured worker was undertaking some activity for the benefit of the employer.

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Two Discussions of Cause (continued)

- The second type of causation pertinent to the medical-legal evaluation is causation of the permanent disability. This is more commonly referred to as ***apportionment***. The apportionment determination deals with finding the cause or causes of any permanent disability that the patient may ultimately have as a result of the industrial injury or injuries being evaluated and portioning out cause or causes to industrial factors (including the injury being evaluated) and any other factors.

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Substantial Medical Evidence

- For the medical-legal evaluator, the ultimate goal is always to provide opinions and conclusions that meet the threshold of substantial medical evidence, which requires:
  - The opinions and conclusions be based on consideration of comprehensive medical histories, thorough physical examinations, and adequate contemplation of the medical records;
  - The medical opinions and conclusions be based on reasonable medical probability;
  - And the opinions and conclusions include the physician's reasoning behind them.

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Substantial Medical Evidence

With regard to this third point, the Judges and Commissioners of the Workers' Compensation Appeals Board hold to a rule of the California Supreme Court from a 1968 decision in *People v. Bassett*, which says:

> "The chief value of an expert's testimony….rests upon the material from which his opinion is fashioned and the reasoning by which he progresses from his material to his conclusion; it does not lie in his mere expression of conclusion;….***the opinion of an expert is no better than the reasons upon which it is based***."

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Substantial Medical Evidence

- Lastly, when providing the reasoning behind their opinions on causation and apportionment, it is critical that the medical-legal evaluator demonstrate a thorough understanding and appreciation of the distinction between these two types of causation; causation of the injury and causation of the permanent disability. Failure to demonstrate the understanding of this distinction can render the report inadmissible as lacking substantial medical evidence.

  "A medical opinion is not substantial evidence if it is based on facts no longer germane, on inadequate medical histories or examinations, ***on incorrect legal theories***, or on surmise, speculation, conjecture, or guess." (*Escobedo v. Marshalls,* 2005)

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Causation

- California Labor Code §3600 provides the statutory basis for the discussion of causation
- Labor Code §3600 uses the word "injury", when in practice, compensation is obtainable for disability resulting from:
  - a single incident;
  - a disease;
  - an emotional disorder;
  - or a series of minor traumatic insults (cumulative trauma).

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Causation

- Labor Code §3600 (a) states, in pertinent part, that liability for compensation exists, without regard to negligence, against an employer for any injury sustained by their employees arising out of and in the course of the employment (AOE/COE). Employment does not need to be the sole cause rather it needs to be a ***substantial contributing cause.***
  - *"The employment need not be the sole cause of the injury; it need only be a substantial contributing cause." State Compensation Ins. Fund v. IAC (Wallin) (1959)*
  - *"All that is needed is proof of a reasonable probability." McAllister v. WCAB(1968)*
  - Further, In California law, the employer takes the employee as they find them. So while an injury occurring at work may aggravate or light-up a pre-existing, non-industrial condition, the fact that an injury occurred during the subject employment is enough to establish causation.

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Compensability

- For all injuries other than psychiatric, the determination of causation is concomitant with the determination of compensability. That is to say that if the medical evaluator determines that an injury has occurred in the course and scope of employment, the injury is also compensable and compensatory or monetary benefits are unlocked. These benefits are the right to medical care, the right to temporary disability benefits, the right to permanent disability benefits, awarding of death benefits in applicable cases, and the right to the Supplemental Job Displacement Benefit.
- However, for psychiatric injuries alone, the Labor Code requires another step in the process, whereby an industrially-caused psychiatric injury is further deemed to be compensable or non-compensable. So while the psychiatric medical-legal evaluator may determine that an injury occurred in the course and scope of the employment and thus establish causation; the determination of compensability for that work-related injury requires further consideration and discussion. The discussion of compensability of psychiatric injuries is governed by Labor Code §3208.3, which will be discussed in detail later in the presentation.

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Types of Injury

- When considering causation, there are three types of injuries you may encounter as a psychiatric medical-legal evaluator. These are:
  - Specific Injury
  - Cumulative/Continuous Trauma Injury
  - Compensable Consequence Injury

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Specific Injury

- Division of Workers' Compensation (DWC) definition: "An injury caused by one event at work."
- Examples of specific psychiatric injuries would be:
  - Psychiatric injury resulting from experiencing a bank robbery while working as a teller;
  - Psychiatric injury resulting from a single incidence of a supervisor treating the injured worker in an aggressive or harassing manner.
- The important considerations for a specific injury are:
  - That the injured worker is describing a single event; and
  - That the evaluator believes it medically reasonable that the injured workers' presenting complaints arose from that described event.

Consider whether there is a medically reasonable correlation between the described complaints and the described injury.

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Specific Injury

For instance:

- An injured-worker presenting with fear of returning to the workplace and isolating at home immediately following exposure to an irate customer who threatened to wait for the worker at their car after hours would be consistent with a specific injury, with that single event being the inciting event in the psychiatric injury.
- An injured worker describing stress caused by a supervisor giving them a written write-up in their personnel file because they refused a customer's request when that refusal was in accordance with company policy but caused the customer to become angry and file a complaint with the home office would be consistent with a specific injury, with the write-up being the inciting event.

Specific injuries would be expected to produce a set of symptoms or a particular presentation within a medically reasonable timeframe from the injury.

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Continuous/Cumulative Trauma Injury

- Division of Workers' Compensation (DWC) definition: "an injury that was caused by repeated events or repeated exposures at work".
- Examples of continuous trauma psychiatric injuries would be:
  - Psychiatric injury resulting from harassment by a supervisor occurring over a period of time;
  - Psychiatric injury resulting from being pressured to work faster or meet unrealistic deadlines and/or production quotas when this pressure is stressful to the injured worker.
- Important considerations for causation:
  - The injured worker's description of the factors surrounding the exposure or trauma;
  - Their history of the development of the symptoms or complaints as a result of the exposure or trauma;
  - The specific complaints or presentation arising from the exposure or trauma;
  - The evaluation findings.
- All arriving at the diagnosis.

17

17

Continuous/Cumulative Trauma Injury

Again, consider whether there is a medically reasonable correlation between these factors.

For instance, an injured-worker presenting with complaint that they were exposed to repeated and daily verbal abuse by their supervisor, being called worthless, useless, stupid and other derogatory terms, causing them to be less efficient in the performance of their job duties and constantly fearful that they would be fired, would be consistent with a continuous trauma psychiatric injury where the harassment over time is the inciting event for the psychiatric injury.

18

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Continuous/Cumulative Trauma Injury

- For the purposes of determining the date of injury, a continuous trauma injury is said to have occurred when there is the coming together of effects of an injury and knowledge that these effects are work related. This is governed by Labor Code §4512, which reads:
  - The date of injury in cases of occupational diseases or cumulative injuries is that date upon which the employee first suffered disability therefrom and either knew, or in the exercise of reasonable diligence should have known, that such disability was caused by his present or prior employment.
- As can be expected, the psychiatric medical-legal evaluator will encounter the continuous trauma injury more frequently than the specific injury.

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Compensable Consequence Injury

- Neither the DWC nor the Labor Code provide a definition for compensable consequence injury. This type of injury; however, has been defined by case law, which states, "where a subsequent injury is the direct and natural consequence of an original industrial injury, the subsequent injury is considered to relate back to the original injury and it generally is not treated as a new and independent injury." In the case of a compensable consequence injury, it is the relationship to the original injury that establishes causation rather than the AOE/COE standard.
- Compensable consequence injuries can be specific injuries or continuous trauma injuries; with psychiatric injuries, the vast majority will be continuous trauma injuries.

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Compensable Consequence Injury

Examples of psychiatric compensable consequence injuries would be:

- An injured worker experiencing acute stress and anxiety after being the victim of a crime while attending a physical therapy appointment for an industrial orthopedic injury – specific compensable consequence psychiatric injury;
- An injured worker developing depression as a result of chronic pain from an industrial orthopedic injury – continuous trauma compensable consequence psychiatric injury;

The important considerations for a compensable consequence psychiatric injury will focus on the correlation between the primary injury and the development of the psychiatric complaints, with an appreciable link evident between the development of the compensatory psychiatric injury and the original or primary injury.

The patient's history should be supported by the medical records if possible.

21

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Compensable Consequence Injury

For instance, an injured worker becoming depressed, reclusive and angry after suffering a back injury that led to an unsuccessful back surgery and chronic pain, loss of their job and loss of ability to participate in recreational activities, church activities, family and social activities would be indicative of a compensable consequence psychiatric injury where the primary orthopedic injury is the inciting event for the development of the psychiatric injury.

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Compensable Consequence Injury

The psychiatric medical-legal evaluator should understand that for compensable consequence injuries, there is no new date of injury to be determined.

- Recall the stated definition of the compensable consequence injury, which in pertinent part states, "the subsequent injury is considered to relate back to the original injury and it ***generally is not treated as a new and independent injury***."
- Thus, the date of injury for a compensable consequence injury is the same as the original date of injury.

Returning back to the example above of the injured worker becoming reclusive and angry after suffering a back injury that led to an unsuccessful back surgery and chronic pain, the date of the development of the psychiatric symptoms is not the date of injury for the compensable consequence psychiatric injury; the correct date of injury for the compensable consequence psychiatric injury is the date of the primary orthopedic injury that was the inciting event for the development of the psychiatric injury.

As with the cumulative trauma psychiatric injury, the compensable consequence psychiatric injury will be encountered quite often by the psychiatric medical-legal evaluator.

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In all Cases

Regardless of the type of injury being evaluated, a well-reasoned opinion on causation will link:

- the mechanism of injury;
- to the presenting complaints and/or clinical presentation;
- include relevant notations from a comprehensive history encompassing the injury itself, family history, social history and developmental history;
- include relevant notations from the medical records;
- incorporate any pertinent findings from the mental status examination and/or any psychological testing;
- and arrive at the diagnosed condition.

We are all exposed to psychiatric stressors in our everyday life, and certainly some people have even been exposed to more significant and possibly psychiatrically injurious events in their lifetime. When evaluating claims of work-related psychiatric injuries the psychiatric medical-legal evaluator's reasoning behind their opinions and conclusions is the key. Remember, "the opinion of an expert is no better than the reasons upon which it is based."

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Compensability and Labor Code §3208.3

As discussed earlier in the presentation, while the psychiatric medical-legal evaluator may determine that an injury occurred in the course and scope of the injured worker's employment thus establishing causation, that determination alone does not unlock the door to benefits for the injured worker in relation to that psychiatric injury. In order to unlock workers' compensation benefits for a psychiatric injury, the injury must also be deemed compensable; the discussion of which is governed by Labor Code § 3208.3, which through its various sections expresses what is described as the legislative intent to set a "higher threshold of compensability" for psychiatric injuries in the workers' compensation arena.

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Compensability and Labor Code §3208.3

California Labor Code §3208.3 begins by stating (emphasis added):

> "A psychiatric injury shall be deemed compensable if it is a ***mental disorder*** which ***causes disability or need for medical treatment"***, and it is diagnosed "using terminology and criteria of the American Psychiatric Association's Diagnostic and Statistical Manual of Mental Disorders, Third Edition-Revised, or the terminology and diagnostic criteria of other psychiatric diagnostic manuals generally approved and accepted nationally by practitioners in the field of psychiatric medicine."

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Compensability and Labor Code §3208.3

But who deems an injury compensable? Clearly, this sounds like a determination to be made by a Judge or other Trier-of-Fact.

There is a very real confusion among some medical-legal evaluators as to where the medical testimony ends and the legal determinations begin, and perhaps this issue is never demonstrated more clearly than with the issue of compensability.

Ultimately, because compensability is an award of benefits, the decision to grant such benefits is beyond the scope of the medical-legal evaluation. However, it is still the job of the medical-legal evaluator to provide the information necessary to support the making of that determination, and therefore it is necessary for the psychiatric medical-legal evaluator to be familiar with the various bars and defenses against a finding of compensability for claims of workplace psychiatric injury.

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Compensability and Labor Code §3208.3

Moving though the various subsections of Labor Code §3208.3, we can see how the "higher threshold of compensability" is accomplished. These subsections discuss compensability of the psychiatric injury in the context of:

- Predominant and Substantial Cause
- Length of Employment
- Post-Termination Claims
- Good Faith Personnel Actions

Let's look at each in further detail.

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Predominant and Substantial Cause

First and foremost, in order to be compensable, a workplace psychiatric injury must arise from a defined percentage of actual workplace events. Labor Code §3208.3(b) establishes two thresholds of this workplace causation to be used in determining compensability.

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Predominant and Substantial Cause

Predominant Cause

- The principal threshold for compensability of a psychiatric injury is predominant cause.
- Labor Code §3208.3(b)(1), specifically states, "In order to establish that a psychiatric injury is compensable, an employee must demonstrate by a preponderance of the evidence that actual events of employment were "***predominant as to all causes combined*** of the psychiatric injury" (emphasis added).
- Predominant as to all causes combined means greater that 50%.
- Preponderance of the evidence is defined by Labor Code §3202.5, as, "evidence that, when weighed with that opposed to it, has more convincing force and the greater probability of truth. When weighing the evidence, the test is not the relative number of witnesses, but the relative convincing force of the evidence. "
  - Again, the quality of the medical opinion is key, and the concept of "substantial medical evidence" is once more demonstrated.

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Predominant and Substantial Cause

Substantial Cause

- A secondary threshold for compensability of a psychiatric injury is substantial cause.
- Labor Code §3208.3(b)(2), specifically states, "Notwithstanding paragraph (1), in the case of employees whose injuries resulted from being a victim of a violent act or from direct exposure to a significant violent act, the employee shall be required to demonstrate by a preponderance of the evidence that actual events of employment were a substantial cause of the injury.
- For purposes of this subsection, substantial is defined as meaning at least 35-40%.
- Again, preponderance of the evidence is defined by Labor Code §3202.5, as evidence that when weighed with that opposed to it, has more convincing force and the greater probability of truth. When weighing the evidence, the test is not the relative number of witnesses, but the relative convincing force of the evidence.
- What constitutes a "violent act" for the purposes of determining compensability is not expressly or implicitly defined in the Labor Code.

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Predominant and Substantial Cause

- Some guidance comes from a panel decision from the WCAB in *Larsen v. Securitas Security Services*:
  - In this case, the injured worker was hit by a car in the course and scope of his employment, suffering physical injury as well as consequent psychiatric injury.
  - The defense asserted that being hit by a car was not a "violent act" because it was not "an act of a criminal or quasi-criminal nature perpetrated against the applicant".
  - The WCAB disagreed, concluding that "for purposes of Labor Code §3208.3(b), a 'violent act' is not limited solely to criminal or quasi-criminal activity, and may include other acts that are characterized by either a strong physical force, extreme or intense force, or are vehemently or passionately threatening, noting that there was no language in Labor Code § 3208.3(b) limiting the definition of a "violent act" to either criminal or quasi-criminal conduct perpetrated against an applicant.

While subsection (b) of Labor Code §3208.3 establishes these two thresholds of cause, there are additional limitations on the compensability of psychiatric injuries.

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Length of Employment and Post-Termination

In subsections (d) and (e) of Labor Code §3208.3, compensability of a workplace psychiatric injury is further restricted by the setting forth of a minimum period of employment necessary for compensability, and by barring compensability for claims of psychiatric injury when the claim is filed after notice of termination of employment or layoff, including voluntary layoff if the injury is claimed to have occurred prior to the notice of termination or layoff.

- For subsection (d) specifying a minimum period of employment, the subsection sets forth that:
  - "No compensation shall be paid pursuant to this division for psychiatric injury related to a claim against an employer unless the employee has been employed by the employer for at least 6 months."
  - For purposes of this section, the term of employment does not need to be continuous.
  - Exception to the requirement is made for psychiatric injuries suffered as the result of a "sudden and extraordinary" employment condition.

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Length of Employment and Post-Termination

- For subsection (e) and the post-termination defense, the subsection defines several exceptions to this barring of compensability, which can be raised by the injured worker when:
  - "Sudden and extraordinary" events of employment were the cause of the injury;
  - The employer had notice of the psychiatric injury prior to the notice of termination or layoff;
  - There are medical records that show evidence of treatment of the psychiatric injury prior to the notice of termination or layoff;
  - There has been finding of sexual or racial harassment by a Judge;
  - The date of injury comes after the notice of termination or layoff, but prior to the date of the actual termination or layoff;
  - A notice of termination or layoff is not followed by termination or layoff within 60 days.

Both of these subsections have in common the concept of "sudden and extraordinary events of employment"; another broad and ill-defined term. Let's look a bit deeper into this term.

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Sudden and Extraordinary

Taking a further turn in the winding road of compensability for claims of psychiatric injury, deep into Labor Code §3208.3 comes yet another broad and somewhat ill-defined term that the medical-legal evaluator must understand when evaluating workplace injuries; the "sudden and extraordinary" event of employment or employment condition.

- Once again, we look to case law to define the term "sudden and extraordinary" for the purposes of this statue. Two cases are instructive.
- An older case, *Wal-Mart v. WCAB* helps to define what does ***not*** constitute "sudden and extraordinary" and is considered to be a benchmark case.
- In this case, the Court noted that the mere fact that an injury was accidental did not make it a sudden and extraordinary employment condition.
- The court ruled that the sudden and extraordinary language was limited to the type of events that would naturally be expected to cause psychic disturbances even in a diligent and honest employee; it was not the significance of the injury that was to be considered but the sudden and extraordinary nature of the event.

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Sudden and Extraordinary

- In support of the opinion, the Court reviewed the legislative intent of LC §3208.3:
  - Labor Code §3208.3 was enacted in 1989 containing provisions governing and to some extent limiting benefits for psychiatric claims.
  - Subsection (d) was enacted in 1991 with an apparent purpose of "limiting questionable claims for psychiatric injuries resulting from routine stress during the first six months of employment."
  - Originally, subsection (d) also included the language, "Nothing in this section shall be construed to mean that there shall not be compensability for any psychiatric injury which is related to any physical injury in the workplace"; ***however, the language was deleted in 1993.***
  - The Court ***stressed that the Legislature had not only created a qualification respecting physically-generated psychiatric injuries in subsection (d) but had then deleted it.***
  - Since subsection (d) did currently contain an exception for psychic injuries resulting from a "sudden and extraordinary employment condition," while previously it had contained an exception for physical injuries which was deleted, it could be concluded that the legislature in the current version of subsection (d), declined to apply the exception to physical injuries; therefore the Court was unable to automatically conclude that a physical injury would constitute a sudden and extraordinary employment condition.

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36

Sudden and Extraordinary

- Supplementing this is a very recent case from 2016; *Travelers Casualty and Surety Co. v. WCAB (Dreher)*, which has similar undertones.
  - In this case, the Appellate Court rejected the applicant's argument that his injury, which involved significant physical injury including a fractured pelvis, was "unexpectedly catastrophic" and therefore was an extraordinary employment condition.
  - The Court ruled that the statute "does not include the nature of the injuries resulting from an incident as a basis for the exception. Had the Legislature intended to include the nature of the injury as a factor in the definition of a sudden and extraordinary employment condition, it knew how to do so…"
  - Further, the Court ruled that the injury was not caused by an "an uncommon, unusual or totally unexpected event."

These cases give some clues into what might be construed as "sudden and extraordinary" employment conditions. It is interesting that these sections allow exception for "sudden and extraordinary" circumstances, but do not specifically delineate an exception for being the victim of or being exposed to violent acts, which begs the question as to whether all violent acts would be subsumed within the "sudden and extraordinary" exception. But, is being exposed to a bank robbery while working as a teller an "uncommon, unusual or totally unexpected event"?

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It should be noted at this point that as a medical-legal evaluator, you will not always be apprised of the various legal pleadings in the cases you are asked to evaluate.

Claims of psychiatric injury are still made in cases where the injured worker has not been employed for more than 6 months or has been terminated before they filed their claim. You cannot assume that an available defense has been raised, and the parties to the case are seeking your best medical opinions within your specialty.

You should therefore focus on the facts of the case and describe the events of the injury thoroughly and completely so that the parties can make appropriate decisions for the case based on the medical evidence you provide.

While you need to understand the legal standards governing the claim of injury in the workers' compensation system, and while this understanding should guide every part of your medical-legal evaluation, as a medical-legal evaluator you will not be asked to, nor should you ever, make legal determinations. Your job is to perform a comprehensive and in-depth history, carefully review all provided medical records, and perform a complete psychiatric evaluation including necessary psychological testing, and then provide well-reasoned and well-supported medical determinations such that the parties can plead their respective legal opinions in court.

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Good Faith Personnel Action

Under subsection (h) of Labor Code §3208.3, compensability is barred for claims of psychiatric injury when the injury was caused by personnel actions undertaken by the employer in a lawful and non-discriminatory manner, and in good faith.

- Under this section, the burden of proof rests with the party asserting the defense.
  - For instance, if an employee files a claim of psychiatric injury stating that they were depressed due to being written up for trivial and immaterial infractions, the employer may choose to assert the defense that these were in actuality lawful and good faith personnel actions taken against an employee who was in violation of company rules or procedures.
  - In this case, it would then be up to the employer to prove this defense.
- Clearly the determination of what constitutes legal, non-discriminatory, and good faith in the context of this section is outside the purview of the medical evaluator's areas of expertise. However, it is critical that the evaluator understand the scope of this defense in order to recognize workplace events that might be subject to this defense as they are related by the injured worker during the interview.

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Good Faith Personnel Action

- Impartiality is important in medical-legal evaluations and the psychiatric medical-legal evaluator must understand the effect of over-inclusion or under-inclusion so as not to unwittingly breach impartiality and thus jeopardize their own credibility and reputation.
  - To be over-inclusive as to what constitutes a personnel action will have the effect of strengthening the defense;
  - To be under-inclusive as to what constitutes a personnel action will have the effect of weakening the defense.
- Again, we look to case law to clarify the Labor Code. In *Larch v. Contra Costa County*, "personnel action" is held to be "conduct by management or attributable to management including such things as done by one who has authority to review, criticize, demote or discipline an employee. Personnel actions may include transfers, demotions, layoffs, or performance evaluations and can include warnings, suspensions and termination."

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Good Faith Personnel Action

Other cases refine this line of thinking by finding that not every action by management will be considered a personnel action, and the determining factor is suggestion or threat of discipline. (*County of Butte v. WCAB(Purcell)*)

With this section of the Labor Code, it is not sufficient for the medical-legal evaluator to understand the section, they must also be able to communicate their opinions in a way that is useful to the to the parties.

- The hallmark case for this purpose is the case of *Rolda v. Pitney Bowes*, or the *Rolda* case.
- This case includes an *en banc* decision by the WCAB, wherein the commissioners concluded that a multilevel analysis was required when a psychiatric injury was alledged and the defense of a lawful, non-discriminatory good-faith personnel action had been raised.
- The case sets forth a four-step analysis to be undertaken by the medical-legal evaluator with reliance upon opinions of the Trier of Fact intermingled.

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Good Faith Personnel Action – The Rolda Analysis

The four steps of the *Rolda* analysis are as follows:

- 1. A determination must be made that actual events of employment are involved. *This is a factual/legal determination, not a medical one, and therefore is deferred to the Trier-of-fact.*
  - This determination, made by the Trier of Fact, occurs in all cases of psychiatric workplace injury. The psychiatric medical-legal evaluator will not be aware of the result of this determination; it should just be understood that the determination will be made.
- 2. There must be competent medical evidence establishing that the actual events of employment were the predominant cause (greater than 50%) of the injury to the psyche. *This is a medical determination and therefore should be determined by the psychiatric medical-legal evaluator and addressed in the analysis.*
  - This is the same determination as the psychiatric medical-legal evaluator must make when determining industrial causation and compensability in any case. The opinion expressed here should therefore be the same opinion as the evaluator has expressed for causation and compensability of the psychiatric injury as a whole.

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Good Faith Personnel Action – The Rolda Analysis

- 3. A further determination must be made establishing whether any of the actual employment events were personnel actions that were lawful, nondiscriminatory and in good faith. *This is a factual/legal determination, not a medical one, and therefore is deferred to the Trier-of-Fact.*
  - Much like in step #1, the psychiatric medical-legal evaluator will not be aware of the result of this determination; it should just be understood that the determination will be made. You should understand that the quality of the medical-legal reporting is crucial here and the history of the particular events must have adequate depth and breadth to allow the Trier of Fact to understand the events occurring in the workplace.
- 4. Finally, a determination must be made as to whether the lawful, nondiscriminatory, good faith personnel actions were a "substantial cause" (remember, this means 35 to 40%) of the psychiatric injury. *This again is a medical determination and therefore should be determined by the psychiatric medical-legal evaluator and addressed in the analysis.*

This determination should be approached by the psychiatric medical-legal evaluator as a bifurcation of the original causation opinion, separating out that portion of the total industrial causation that is deemed to be the result of actions and events of employment that the evaluator has determined to be personnel actions.

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What Constitutes "Actual Events of Employment"?

Particular to the psychiatric medical-legal evaluator's consideration of causation and compensability is the requirement in Labor Code §3208.3 (b)(1), that "actual events of employment" are a predominant or substantial cause of the injury.

In most cases, this concept of "actual events of employment" will become clear to the evaluator through the clinical interview.

- The experience of stress caused by constantly being pushed to meet tighter and tighter deadlines would be actual events of employment as the injured worker would be describing the actions of supervisors and management in creating and enforcing burdensome and/or unrealistic deadlines for work output.
- Or, the injured workers' description of developing depression from enduring unwanted attention and romantic pressure from a supervisor to the point that the work environment became unbearable would be actual events of employment because the supervisor's position of superiority over the employee which is integral to the claim of injury is defined by the company hierarchy.

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What Constitutes "Actual Events of Employment"?

The consideration of "actual events of employment" is also at issue where perceptions of events are inherent in the experience of the injury.

This issue is taken up in the important case of *Verga v. WCAB, United Airlines*, decided in 2008.

In this case, the Court of Appeals took up the question of whether the disdainful reactions of a supervisor and co-workers in response to an employee's mistreatment of them constituted "actual events of employment" for which the employee could then obtain workers' compensation benefits for the psychological stress she experienced because of these disdainful reactions to her own inappropriate conduct.

Ultimately, the Court of Appeals upheld the decision of the WCAB that the reactions of the supervisor and co-workers were not "actual events of employment".

Let's look at the facts of the case.

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"Actual Events of Employment" – The *Verga* Case

- Ms. Verga filed a claim of psychiatric injury alleging she suffered injury as a result of abusive behavior by her supervisor
- Ms. Verga believed that she was mistreated by her supervisor, including being delegated responsibilities without being given proper authority to allow success in the tasks
- As a result she believed that co-workers resisted her directives
- Ms. Verga requested that the supervisor hold a meeting with all staff to discuss their behavior toward her
- Ms. Verga expected that the supervisor would advise the staff of her authority and be harsh and direct with the staff
- Instead, during the meeting, staff members were allowed to criticize Ms. Verga and she was not allowed to respond until the end of the meeting, which lasted for several hours
- By the time she was given the opportunity to respond, Ms. Verga was so overwhelmed she was unable to respond
- Following the meeting, Ms. Verga began to experience frequent crying spells and difficulty sleeping
- She eventually reported her supervisor to his own boss, and she was then demoted
- She sought care and was soon thereafter taken off work and did not return to work for United Airlines

46

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"Actual Events of Employment" – The *Verga* Case

When the case was heard, particulars of Ms. Verga's behavior in the workplace were brought to light, including:

- Employees testified that during the meeting with Ms. Verga, their ideas were called "dumb" by Ms. Verga who was unwilling to listen to them
- One co-worker testified that it was he who should have a stress claim because of the treatment he endured from Ms. Verga; calling her controlling and aggressive and stating that she required that things be done her way and created tension in the office by having an "attitude" toward the staff
- Other accounts described her as very negative, rigid, stubborn, defensive, and abusive to the office staff
- Employment records revealed past problems getting along with coworkers dating to the very beginning of her employment more than 20-years prior
- Specific accounts regarding Ms. Verga's attitude on the job had been provided by numerous co-workers and supervisors making it less likely that she was targeted by the current supervisor and group of co-workers.

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"Actual Events of Employment" – The *Verga* Case

- The WCJ found that Ms. Verga's testimony about her psychiatric injury was not as credible as that of the coworkers and other employees of United Airlines.
- The Judge found her hard to get along with and it was this that caused the job to be difficult and stressful.
- The Judge concluded that Ms. Verga's false perceptions of the workplace did not constitute "actual events of employment".
- The Judge believed that Ms. Verga was not actually subjected to any harassment or persecution at all; rather she herself brought upon the behavior because she was "a difficult person to get along with", was impolite, unpleasant, and her co-workers "never knew when [she] might get upset."

48

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"Actual Events of Employment" – The *Verga* Case

In upholding the decision of the WCJ, the Court of Appeals cited the following key points:

- That Verga ***subjectively misperceived*** as harassment the disdainful reaction of her co-workers to Verga's mistreatment of them did not entitle her to workers' compensation benefits for psychiatric injury;
- In enacting Labor Code §3208.3 the legislature established a new and higher threshold of compensability for psychiatric injury that was meant to limit such claims for psychiatric injury due to their proliferation and potential for abuse;
- This change in the statutory scheme constituted an intent to require the claimant to establish objective evidence of harassment, persecution or other such basis for alleged psychiatric injury;
- Verga failed to do this, and rather ***the evidence established that Verga's hostile behavior towards her co-workers and the consequences thereof were the predominant cause of her own psychiatric injury***;
- Although the workers' compensation system generally provides benefits regardless of the fault of any party, there are limits when an employee intentionally causes their own injury.

49

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Causation Case Example 1 – Good Faith Personnel Action

- The applicant, Sally, is a single, 22-year-old woman claiming psychiatric injury due to alleged continuous harassment during her employment as a production worker.
- Sally began working for the Acme Company on October 1, 2013.
- About one-month into her employment, her supervisor Joel began paying a lot of attention toward her. Initially she was flattered and did not think too much of the attention.
- Then, at the company Thanksgiving lunch get-together on November 18, 2013, Joel told Sally that he liked her and wanted to be her boyfriend and even to marry her so she would not have to work. Sally began to feel uncomfortable with Joel because she had done nothing to reciprocate his attentions.
- Joel escalated his attentions and began to call Sally his wife in the workplace. Sally became very uncomfortable with the turn of events after the Thanksgiving lunch and the escalating of the unwanted attention from Joel.
- Sally began to alter her routines and avoid certain break areas at work for fear of seeing Joel.

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Causation Case Example 1
Good Faith Personnel Action (Continued)

- Sally did not report anything to management during this time for fear of losing her job.
- The unwanted attention continued and escalated. Joel became agitated when other men in the company spoke to Sally and he started to display anger toward her in these circumstances, giving her "dirty looks" and accusing her of flirting with other men.
- The harassment further escalated and by the spring of 2014, the supervisor started getting physically closer and closer to her, first touching her hand on several occasions and later placing his body against hers to whisper in her ear. At these times, he used physical force to keep Sally from pulling away.
- Sally stated that she continually told Joel to stop bothering her and to stop being so physically close to her.
- She became fearful of Joel, who began following her when she went shopping on her meal break. She recalled that this was in September of 2014.
- She felt growing stress in the workplace due to the harassment from the supervisor.

51

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Causation Case Example 1
Good Faith Personnel Action (Continued)

- After enduring escalating harassment and unwanted attention by the supervisor for a period of one year and balancing her fear of losing her job with her concern about the escalation in attention from the supervisor, she reported the activity to the human resources secretary. She recalled that this was just after her one-year anniversary with the company. She believed that having the one-year term of employment made her job more secure. However, nothing was done about the harassment. Approximately one month later she again reported Joel's behavior and formally requested to file a claim of injury. Instead of being offered assistance, she was told that she complained too much and would be fired if she continued to complain. The applicant was so afraid that she would lose her job that she stopped going to the human resources department for assistance. She became sad about her employment situation and began to feel that her situation was hopeless.
- In addition, during the time of her employment, she tried to find another job, but was unsuccessful in finding a job that paid as well as her job at Acme and this caused her to be more angry about her situation with her job. Further, she enjoyed every aspect of her job except the harassment from Joel, and this furthered her anger.

52

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Causation Case Example 1
Good Faith Personnel Action (Continued)

Over the next year of her employment:

- She felt sad and stopped socializing with her co-workers during breaks;
- She became more irritable at home;
- She felt more and more trapped by her situation;
- She started to have nightmares about the supervisor and his actions;
- Her work production and quality suffered. Shortly after going to the human resources department for assistance, she was given a verbal warning for not working fast enough in comparison to other, more experienced workers; however she believed that she had been reassigned to an unfamiliar machine in retaliation for rebuking Joel's advances and seeking assistance from management. She believed that she had not been given enough time to adjust to the new machine before receiving the verbal warning.

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Causation Case Example 1
Good Faith Personnel Action (Continued)

- Her concentration suffered. On her birthday, May 13, 2015, she was wearing earrings she received as a gift and she was given a formal verbal warning because she forgot to remove them when she began working. She felt she was being over-scrutinized for rebuking Joel's advances; particularly because other coworkers were merely reminded to remove their earrings in similar situations.
- She became forgetful. She was suspended for one week in early September 2015 when she took her time punch card home with her and forgot to bring it back. She recalled it was early September because coworkers were talking about their children being back in school. She was sent home to retrieve the card, but then was not allowed to return to work when she arrived back at the company with the punch card. She felt over-scrutinized again.

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Causation Case Example 1
Good Faith Personnel Action (Continued)

- Then, on a Friday afternoon, which she believes was about a month after her suspension, she returned to work after her lunch break and went to use the restroom, and while in the stall she discovered a phone in the box that held toilet seat covers. The phone's camera was aligned with a hole in the box. She became very frightened and took the phone and went back to work.
- Very soon after this, Joel came over and asked her for his phone, at which time she "snapped" and immediately left her work area and went to the human resources office. She reported that she believed Joel was filming the female employee's bathroom, and she tearfully demanded forms to file a claim of injury due to the stress caused by Joel. This time, she was provided the appropriate paperwork, which she completed.
- She went home and tried to forget about the events at work, believing that being allowed to report the injury would force Joel to stop harassing her, and she would be able to keep her job.
- On Monday, she presented to the workplace and was terminated from her job.
- The applicant retained legal counsel and was referred for care. She attended weekly therapy from January 2016 through August 2016, with benefit. She declined psychotropic medication. She was never released from care by her therapist, rather the insurance carrier denied further sessions and she was unable to pay for ongoing sessions.

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Causation Case Example 1
Good Faith Personnel Action (Continued)

Upon presentation to the Psychiatric Qualified Medical Evaluation in November 2016, she reported a variety of physical and emotional symptoms, including:

- Daily headaches lasting most of the day responsive to Tylenol;
- Stomach pain and nausea about once weekly when particularly distressed or when she had to leave the house;
- Sleep disturbance (delayed insomnia) waking up early in the morning;
- Nightmares about the supervisor and intense fear that he would come after her;
- Flashbacks and intrusive recollections regarding the bathroom incident with fear of using public restrooms and avoidance of going out because of this;
- Hypervigilance and intense reaction to anyone resembling the particular supervisor;
- Feeling depressed, sad and alone;
- Feeling anxious and nervous with worry about the future;
- Feeling angry, irritable and frustrated;
- Decreased sex drive when she remembers the incident, which causes fear that her boyfriend will leave her and she will be alone;
- Feeling guilty about the situation;
- Occasional passive suicidal ideations, without intent or plan.

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Causation Case Example 1
Good Faith Personnel Action (Continued)

The evaluator noted the following other, concurrent sources of stress in the applicant which factored into the consideration of causation:

- The applicant worried about financial hardship and being dependent on others, but the evaluator believed that this was caused by the loss of her job that appeared to be in retaliation for filing her claim of injury;
- In July 2016, the applicant's car was repossessed and therefore she had to rely on her friends and her boyfriend for many transportation needs, but again the evaluator believed that this was a consequence of the workplace injury;
- The applicant did not have legal status in the U.S. and this caused fear that she would not be able to find another job; again, the evaluator believed that this concurrent stressor was affected by the workplace injury because she would not be as worried about her legal residency status if she was currently working;
- She specifically denied bankruptcy, significant debt, family issues including estrangement or physical abuse, illness in herself or loved ones;
- She denied any past psychiatric history in herself or any family member.

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Causation Case Example 1
Good Faith Personnel Action (Continued)

In addition, the applicant reported that after her injuries and shortly after the termination of her employment, she suffered a personal loss in the death of her father in early December 2015. She described an acute period of grief and mourning in reaction to this loss and reported that she was still struggling with the loss at the time of the medical-legal evaluation, because she was very close with her father and relied on him for emotional and financial support.

Medical records were entirely consistent with the history reported by the applicant and the applicant was considered highly credible.

The psychiatric QME determined that actual events of employment were responsible for 95% of the psychiatric injury and found 5% non-industrial causation.

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Causation Case Example 1
Good Faith Personnel Action (Continued)

The evaluator stated that there was psychiatric injury both on the basis of the cumulative trauma and on the basis of specific traumatic events:

- The applicant appeared to develop psychiatric distress over time in response to continuous harassment and unwanted attention from her supervisor.
- The evaluator noted that the unwanted attention initially was experienced by Sally as mostly just flattering attention from a male coworker. Initially, Sally did not find the attention to be much of a concern.
- However, shortly after the Thanksgiving company lunch, the applicant started to dislike the attention from Joel, particularly as Joel's unwanted attention turned to verbal harassment. She started to feel apprehensive about going to work.
- The evaluator believed that this was the beginning of the period of continuous trauma psychiatric injury.
- The harassment escalated over the spring of 2014 when Joel began to exert some physical force over Sally, who began to feel hopeless in the situation and that she had no power to stop the behavior of Joel. She developed fear, depression, and anxiety in the workplace as a result of the cumulative trauma psychiatric injury.

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Causation Case Example 1
Good Faith Personnel Action (Continued)

- The applicant had three specific instances of acute psychiatric distress in response to the personnel actions of being written up for not working fast enough and for not removing her earrings and being suspended for one week for not having her time punch card after mistakenly taking it home with her. Each of these instances caused her to experience increased symptoms for a period of time, but she would then resign herself to her situation and believed that she could manage the depression and anxiety that she had from the workplace. Cumulatively, the personnel actions made her more fearful of Joel and more depressed about her lack of control of her work situation.
- The applicant then experienced an acute episode of psychiatric distress in reaction to what she perceived to be violation/assault in the bathroom in October 2015. The evaluator believed that this represented a distinct specific workplace psychiatric injury.
- The applicant's psychiatric distress worsened in response to being terminated after she filed her claim of injury.
- The evaluator believed that the company's terminating of Sally's employment instead of supporting her when she brought them evidence of Joel's inappropriate behavior was also a specific event of injury.

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Causation Case Example 1
Good Faith Personnel Action (Continued)

In considering causation, the evaluator took into account the concurrent stressors:

- Repossession of her car came after she was terminated and therefore was not a cause of her psychiatric injury;
- Financial stress came after her termination and therefore was not a cause of her psychiatric injury;
- Fear of being unable to get another job because she did not have legal status was considered by the evaluator to be present during the time of her employment and contributed to causation of the injury both on an industrial basis and on a non-industrial basis. The evaluator considered that this issue was intensified as a stressor because she began to fear for her job as a result of Joel's behaviors and therefore was part of the continuous trauma injury. It also intensified as a result of being terminated and was therefore a part of the causation related to her termination. The evaluator also considered that the issue of her immigration status was a stressor for her outside of the employment as well, based on the interview.
- The death of her father came after her termination and therefore was not a cause of her psychiatric injury.

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Causation Case Example 1
Good Faith Personnel Action (Continued)

Under the particular sections of the Labor Code, the evaluator also considered several personnel actions occurring during the course of her employment:

- Being given a verbal warning for not working fast enough in comparison to other, more experienced workers, despite her belief that she had been reassigned to an unfamiliar machine in retaliation for rebuking the advances of the supervisor.
- Being given a verbal warning for forgetting to remove her earrings, despite her belief that she was being over-scrutinized for rebuking the advances of the supervisor.
- Being suspended for one week when she took her time punch card home with her and forgot to bring it back, and was then not allowed to return to work when she arrived back at the company after going home to retrieve the punch card; despite her belief that she was again being over-scrutinized.
- She was terminated from her employment shortly after filing her claim of injury.

62

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Causation Case Example 1
Good Faith Personnel Action (Continued)

After this consideration, the evaluator found that:

- 65% of the total industrial causation of the injury was attributable to the specific event in the bathroom and sequelae including loss of her job;
- 15% of the total industrial causation was attributable to the personnel actions in the aggregate;
- 15% of the total industrial causation was attributable to continuous harassment by the supervisor during the applicant's period of employment.
- 5% of the total causation of the injury was of non-industrial cause, primarily centered around her apprehension about her immigration status. While this apprehension did factor into the severity of the industrial injury to a degree and that was accounted for in the percentages for the industrial portions of causation, the evaluator also considered that this stressor was present before the employment and would be present now absent any employment or injury. The evaluator noted the current sociopolitical environment with regard to illegal immigration and based on his interview, believed that the applicant would have psychiatric distress including fear, anxiety and some altered behavior from her lack of legal status, regardless of any industrial injury.

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Causation Case Example 1
Good Faith Personnel Action (Continued)

- In discussing the reasoning behind the percentages, the evaluator noted that while the harassment of the supervisor had been ongoing, it did not account for a significant percentage of the causation of the injury because before the specific event in the bathroom, the applicant found the attentions of her supervisor to be mostly a nuisance which made her somewhat angry and depressed that her workplace could not be a more happy place, as well as mildly anxious about what would happen if she lost her job; but overall she was capable of continuing her job duties with adaptive measures. Thus, the harassment was considered to account for the same percentage of overall industrial causation as the personnel actions; and these in the aggregate were about half as significant to the applicant as the event in the bathroom in terms of what caused her psychiatric injury.
- The evaluator noted that the event in the bathroom was viewed by the applicant as an assault and as such was significantly traumatic to her. This assault crushed the adaptive mechanisms she had built to deal with the daily harassment by Joel. And the assault is what ultimately what led to her termination, which she viewed as a betrayal and further assault by her employer. Further, the termination increased the industrial component of the distress caused by her lack of legal residency status.

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Causation Case Example 1
Good Faith Personnel Action (Continued)

The evaluator then moved on to consideration of the personnel actions:

- The applicant's injury was partially the result of personnel actions consisting of her suspension and write-ups;
- These personnel actions were ***not*** a substantial cause of the mental disorder and need for treatment, as they were less than 35% of the cause of her psychiatric injury.
- The *Rolda* analysis was incorporated into the discussion of causation, with the evaluator first citing their own opinion that actual events of employment were the predominant cause, in this case 95%, of the psychiatric injury as required of step two of the four-part analysis. Then, the evaluator reiterated their opinion that the personnel actions accounted for 15% of the cause of her psychiatric injury, and therefore did not meet the burden of substantial cause, or 35 to 40% cause, as is required of step four of the four-part analysis.
- Final determination of compensability of the injury was deferred to the Trier of Fact for determination of all matters of compensability including steps one and three of the four-part *Rolda* analysis.

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Causation Case Example 2
Actual Versus Perceived Events of Employment

- In this case, we present Lucille, an applicant who is employed as a Registered Nurse for Horizons, a skilled nursing facility. Her job involves providing nursing services to the residents of the facility.
- From the outset of the employment, Lucille believed that she accepted a job that was beneath her level of training and experience, but she accepted the job anyway due to a recent divorce causing her a need for her to return to the workforce. She did emphasize her love of working with her patients.
- According to the applicant's history, Teresa, who was the Director of Nursing at Horizons, did not like her from the outset, but was "stuck with her" as she had been hired by the Horizons U.S.A., the corporation that owned this and other Horizons facilities.
- Lucille believed that Teresa was out to get her from the beginning of her employment.
- Further, she believed that the various CNA's and technicians working under her conspired to make her work look bad.

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Causation Case Example 2
Actual Versus Perceived Events of Employment (Continued)

Ultimately, she believed that she would be promoted to Director of Nursing soon after she was hired, due to the excellence of her education, training and experience.

However, the applicant instead filed numerous complaints with the corporate office citing what she believed were infractions of company policy and procedures by virtually all members of the staff from Teresa, the Director of Nursing, to various members of the kitchen staff. Her letters of complaint began within one month of her first day of work.

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Causation Case Example 2
Actual Versus Perceived Events of Employment (Continued)

The applicant reported to the psychiatric medical-legal evaluator that in her letters, she advised that staff:

- Were caught talking on their cell phones and participating in social media during work hours,
- Were caught talking behind her back in break areas,
- Were caught speaking ill of her to the residents causing strife in her relationship with the patients she served, and
- Were suspected of meeting outside of work to discuss ways of attacking her job performance.

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Causation Case Example 2
Actual Versus Perceived Events of Employment (Continued)

The applicant reported that she specifically heard one co-worker, Freddy, state that they needed to get rid of her because she was the problem, not their violations of company policy.

She further believed that two specific co-workers, Francis and Orlando, were sabotaging her work and that this was being done at the direction of Teresa, the facility's Director of Nursing.

In all, the applicant stated that she sent monthly letters to the corporate office, "to keep them appraised of the situation with their employees", as well as made "weekly reports to the Director of Nursing, apprising her of what was going on under her nose."

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Causation Case Example 2
Actual Versus Perceived Events of Employment (Continued)

Throughout the interview and the applicant's account of the injury, the psychiatric medical-legal evaluator noted:

- The absence of any taking of responsibility on the part of the applicant for any of the events occurring in the workplace.
- That the applicant had a prevailing belief that she was better than the people she worked with and that they should fall in line and listen to her under what the evaluator likened to her perception of her "absolute authority".
- That she was upset because despite her efforts to "educate her employer" about what was going on in their facility, no changes were made.

Ultimately, the applicant decided to file a claim for what she perceived as workplace harassment at the hands of her superior, the Director of Nursing, her co-workers, and even the HR staff at the corporate office.

She sought care using her private insurance and was taken off work and did not return to the workplace.

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Causation Case Example 2
Actual Versus Perceived Events of Employment (Continued)

In reviewing the provided medical records, the psychiatric medical-legal evaluator noted:

- Interviews with co-workers including Freddy, Francis and Orlando, and with Teresa, the Director of Nursing;
- All of the interviews contained the same message that from the outset, the applicant created a hostile work environment with her denigrating treatment of others and her unwillingness to train or assist employees seeking to perform their duties according to her standards.
- According to the interviews, the applicant was noted to be kind to the nursing home patients, with whom she sought to bond in an apparent revolt against the staff, all to the detriment of the workplace.

71

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Causation Case Example 2
Actual Versus Perceived Events of Employment (Continued)

Noted also in the interview and the medical records were concurrent stressors including:

- The recent divorce which initially caused her to be back in the workforce.
  - Her deposition indicated that the divorce was not amicable;
  - Prevalent was the applicant's belief that her husband was the entire cause of the problems in the marriage through adultery and distancing himself from her, ultimately causing the divorce.
- Longstanding estrangement from Elizabeth, her one daughter, who was noted to be a married, 32-year-old teacher living in a nearby city.

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Causation Case Example 2
Actual Versus Perceived Events of Employment (Continued)

In considering the past psychiatric history, the evaluator made note of:

- Prior diagnosis of depression in her early twenties when she was in nursing school;
- Prior diagnosis of depression during her divorce
  - Medical records were available from the therapist who treated her during her divorce, and this therapist noted that the applicant seemed incapable of accepting any blame for any circumstances leading up to the divorce;
  - The therapist noted rather prominently that the applicant had great anger because her husband "did not treat her with the respect due his wife".

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Causation Case Example 2
Actual Versus Perceived Events of Employment (Continued)

- In discussing causation, the psychiatric medical-legal evaluator reported that he believed that the applicant's perception of workplace events was causative of approximately 60% of her injury, whereby the divorce and estrangement from her daughter was responsible for 40% of the injury. In supporting his opinion, the evaluator cited the applicant's great hope that her return to the workplace would be met with accolade and she would be given the recognition she deserved, and it was this final failure that was the predominant causative factor.
- However, in discussing causation, the psychiatric medical-legal evaluator noted at the outset that the events described by the applicant did not represent actual events of employment in accordance with the *Verga* case and therefore 100% of the psychiatric injury was deemed non-industrial.

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Causation Case Example 2
Actual Versus Perceived Events of Employment (Continued)

The specific issue here is actual vs. perceived events:

- The 60% causation that the psychiatric medical-legal evaluator ascribed to the applicant's perception of a hostile work environment did not appear to be based on actual events of employment.
- Rather, Lucille perceived that she was being mistreated when in actuality there did not appear to be actual mistreatment.
- As Lucille's misperception of work events would not be an actual event of employment, this component of the causation of her psychiatric injury was correctly deemed non-industrial by the evaluator.

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Causation Case Example 2
Actual Versus Perceived Events of Employment (Continued)

- The evaluator noted heavy reliance on Lucille's own statements and accounts of the workplace events, and her steadfast belief that she had no role at all in the unpleasant events she believed she was exposed to. The evaluator noted that Lucille's accounts were similar to the same events as described by Teresa, Freddy, Francis and Orlando, as well as some other co-workers in their interviews and affidavits as contained in the medical records provided to him; however, there were starkly different explanations as to what brought about the incidents and events when considering Lucille's point of view versus the employees' points of view.

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Causation Case Example 2
Actual Versus Perceived Events of Employment (Continued)

In his discussion, the psychiatric medical-legal evaluator discussed these differing accounts of what caused many unpleasant workplace events, concluding that in the aggregate, the prevailing theme in the accounts on both sides, even Lucille's, was that the incidents and events were caused by the applicant's belief that she was not being respected, revered and even celebrated in the workplace.

- For the employees, this caused them to react defensively and with some disdain.
- For the applicant, this caused her to react with tantrums, hostility, and outright denial.

Thus, the evaluator concluded that what was claimed as the industrial injury was in reality Lucille's perception of the workplace events.

Her perception of harassment and mistreatment by her employer and co-workers, rather than any actual mistreatment by these people, is what caused her injury and therefore did not constitute any actual events of employment consistent with the decision in the *Verga* case.

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Take-Away Points on Causation

- There is a significant difference in the discussion of causation of the injury (Causation), and discussion of causation of any permanent disability (Apportionment). Remember, causation of the injury deals with whether the particular injury being evaluated arose out of employment and occurred in the course of employment. (AOE/COE).
- For psychiatric injuries, the causation determination alone does not unlock benefits; the evaluator must also discuss compensability of the injury, which is governed by Labor Code § 3208.3, which was designed by the legislature to set a "higher threshold of compensability" for psychiatric injuries in the workers' compensation arena.
- The employment does not need to be the sole cause of a psychiatric injury, but it must be the predominant cause (greater than 50%) except for violent injuries. For violent injuries, a substantial cause (35-40%) threshold must be industrial in order for the injury to be compensable.

78

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Take-Away Points on Causation (Continued)

- Support your conclusions and provide your reasoning. "The chief value of an expert's testimony….rests upon the material from which his opinion is fashioned and the reasoning by which he progresses from his material to his conclusion; it does not lie in his mere expression of conclusion;….the opinion of an expert is no better than the reasons upon which it is based."
- Exceptions to compensability exist for employment of less than 6 months, filing of claims after termination or notice of termination, injury based on acts deemed to be lawful, good-faith personnel actions, and for injury based on misperceptions of the events of employment.

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Apportionment

The Division of Workers' Compensation (DWC) defines apportionment very simply, as:

> "A way of figuring out how much of your permanent disability is due to your work injury and how much is due to other disabilities."

In their report, "Understanding the Effect of SB899 on the Law of Apportionment", prepared for the California Commission on Health, Safety and Workers' Compensation, C. L. Swezey, Esquire and the Honorable D. Lachlan Taylor, WCJ, defined apportionment as; "The process in which an overall permanent disability that was caused at least in part by an industrial injury is separated into the components that are and are not compensable results of that injury."

The statutory basis for the medical-legal evaluator's discussion of apportionment is found in Labor Code §§4663 and 4664.

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Apportionment

Labor Code §4663, in its various subsections states, in pertinent part:

- (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) In order for a physician's report to be considered complete on the issue of permanent disability, the report must include an apportionment determination;
- (d) An employee who claims an industrial injury shall, upon request, disclose all previous permanent disabilities or physical impairments.

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Labor Code §4663

It is subsection (c) that provides the specifics for the medical-legal evaluator's discussion of apportionment. Therefore, let's break it down:

- 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;
- *The actual term "direct result" should be used in the evaluator's discussion of apportionment in the medical-legal report.*

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Labor Code §4663 (continued)

- The physician will also find what approximate percentage of the permanent disability was caused by other factors both before and subsequent to the industrial injury, including prior industrial injuries.
  - *Generally, if the evaluator finds that a certain percentage of the disability is caused by "other factors" (factors not causally related to the subject injury being evaluated), and there are multiple other factors, the evaluator is not required to determine an approximate percentage for each of the other factors; it is sufficient to give a total percentage for all other factors in the aggregate.*
  - *However, in the case of prior or subsequent psychiatric injuries, when the evaluator is able to make a medically reasonable conclusion based on adequate history and available medical records, the evaluator may determine percentages for apportionment to defined prior and subsequent industrial injuries as well as non-industrial injuries or Axis II diagnoses.*

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Labor Code §4663 (continued)

- If the physician is unable to include an apportionment determination in his or her report, the physician shall state the specific reasons why they 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.
  - *The physician may also request additional information such as medical records of a past injury or illness, or from the patient's private medical provider(s), to assist them in formulating a medically reasonable opinion on apportionment.*

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Labor Code §4664

- Labor Code §4664, in pertinent part, states:
  - 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;
  - 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.
  - The accumulation of all permanent disability awards issued with respect to any one region of the body in favor of one individual employee shall not exceed 100 percent over the employee's lifetime unless the employee's injury or illness is conclusively presumed to be total in character pursuant to Section 4662.

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Labor Code §4664

The regions of the body are the following:

(A) Hearing.
(B) Vision.
(C) Mental and behavioral disorders.
(D) The spine.
(E) The upper extremities, including the shoulders.
(F) The lower extremities, including the hip joints.
(G) The head, face, cardiovascular system, respiratory system, and all other systems or regions of the body not listed.

Nothing in this section shall be construed to permit the permanent disability rating for each individual injury sustained by an employee arising from the same industrial accident, when added together, from exceeding 100 percent.

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- In practice, the medical-legal evaluator must look to the patient's history, the medical records, and their clinical and objective findings to support their opinions on apportionment. For instance, when encountering a patient with a stressful job who faces harassment and pressure from their supervisor and a diagnosed industrial psychiatric injury, consider such factors as outside stressors, Axis II diagnoses or traits, as well as any history of psychiatric care or treatment predating the employment; and the contribution of these factors on the severity of the permanent disability from the diagnosed psychiatric condition present at the time of maximal medical improvement.
- In comparison to the statutes governing many sections of the medical-legal report, the Labor Code sections governing apportionment are relatively brief. However, there has been much development of how apportionment is applied in workers' compensation through case law. Therefore, while succinct, don't think that these sections in any way suggest that the discussion of apportionment by the medical-legal evaluator is simple, insignificant, or something to be taken lightly. A poor job by the physician can significantly change the settlement landscape for the applicant.

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Apportionment Case Law

- The earliest cases, *Escobedo v. Marshalls* (2005) and *E.L. Yeager Construction v. WCAB (Gatten)* (2006), deal with the Labor Code §4663 requirement that a physician addressing the issue of permanent disability also address the issue of causation of the permanent disability. These cases deal very well with the quality of the medical reporting and clearly set forth the requirements for an apportionment discussion that meets the burden of substantial medical evidence.
- The *Benson* case, *Benson v. Workers' Comp. Appeals Board* (2009), discusses how the medical-legal evaluator must treat apportionment in situations where they are determining permanent disability, and therefore apportionment, with more than one injury to the same body part or body system.

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Apportionment Case Law

- Both the *Escobedo* case and the *Yeager* case set forth the following:
  - The apportionment opinion shall not be speculative but rather it will set forth the evaluator's reasoning behind the conclusions based on an adequate medical history, examination, and facts;
  - The apportionment opinion is to be stated in terms of reasonable medical probability;
  - The evaluator will assess the relative percentages of industrial and nonindustrial causation based on the time of their evaluation of applicant;
  - The apportionment determination will be made by finding the approximate percentage of permanent disability caused by "other factors";
  - And, the evaluator must demonstrate knowledge of the principles of apportionment based on causation of the ***permanent disability*** as opposed to causation of the ***injury.***
- The *Yeager* case is important because it came soon after the *Escobedo* case, and affirmed the findings of the *Escobedo* case.

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Escobedo v. Marshalls (2005)

- The *Escobedo* case is such an important case that you should read the entire case. It can be found on the DWC website. The case is so useful because there is an abundance of very clear language by the WCAB that directs physicians in what needs to be included in an apportionment discussion to meet the burden of substantial medical evidence. The *Escobedo* case has become the flagship case on how to correctly apply Labor Code §§ 4663 and 4664.
- Therefore, let's look at the *Escobedo* case in more detail.

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Escobedo v. Marshalls (2005)

- In the *Escobedo* case, the patient injured her left knee when she fell while working as a sales associate at Marshalls. Soon after, she developed right knee complaints as well. She denied any prior knee problems or limitations, and she stated that she had never consulted a doctor about her knees; however, the records showed that her private physician diagnosed arthritis about ten years earlier. No work restrictions were ever imposed on the basis of the arthritis.
- After failed conservative treatment and left knee surgery, the patient was deemed permanent and stationary by the primary treating physician with bilateral knee permanent disability and no apportionment to anything other than the industrial injury.
- The patient was then seen by a Qualified Medical Evaluator who noted that a pre-surgical MRI of patient's left knee revealed degenerative changes and that post-surgical x-rays showed osteoarthritis in both knees. The QME noted the specific injury to the left knee and the development of right knee problems as a derivative of the left knee rather than as a result of any subsequent cumulative trauma.

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Escobedo v. Marshalls (2005)

The QME believed that there was a medically reasonable basis for apportionment given the "trivial nature of the original injury" and the almost immediate onset of right knee symptoms that occurred shortly after the left knee injury, and the obvious, significant degenerative arthritis in both knees.

- Here, note how the medical-legal evaluator is comparing the particular mechanism of injury as being causative of her ultimate disability, to the pre-existing significant degenerative arthritis of the knees as being at least partially causative of her ultimate disability.
- While this case hinges on the comparison of the "trivial nature" of the causative injury to the final level of permanent disability, we know that workplace psychiatric injuries deemed "trivial" will not rise to the level of predominant cause and will not be considered compensable injuries. However, it is still instructive to understand the process by which the Qualified Medical Evaluator goes from the factors of the injury to the factors of the permanent disability when supporting his opinion on apportionment.

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Escobedo v. Marshalls (2005)

Further, in his discussion, the Qualified Medical Evaluator pointed out that the primary treating physician did not discuss the degenerative arthritis in his apportionment discussion.

- This makes the Qualified Medical Evaluator's opinion de facto more well-reasoned than the opinion of the primary treating physician, as it considered factors that were not considered by the primary treating physician. This is where is it critical to obtain a thorough history from the applicant and be familiar with the information contained in the medical records so that discrepancies can be addressed with the applicant during the evaluation and then addressed in the final opinions and conclusions.

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Escobedo v. Marshalls (2005)

The patient was then re-evaluated by the primary treating physician, who responded to the Qualified Medical Evaluator's conclusions by stating that prior to the industrial injury, the patient was not suffering from any disability relative to her knees, was able to walk in an unlimited fashion, and had been able to work. The primary treating physician noted that she presently had disability which, in the absence of previously documented disability, he attributed to her industrial injury.

- This is the "but-for" rationale ("But for" the injury, the patient would not have any disability), that was rendered invalid by SB 899. It is not sufficient to support an apportionment opinion by merely stating that the injured worker had no effects of pre-existing conditions prior to the claimed injury.

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Escobedo v. Marshalls (2005)

The workers' compensation administrative law judge (WCJ) found apportionment in line with the Qualified Medical Evaluator, which was appealed to the WCAB. In an en banc decision, the decision of the original WCJ was upheld, with the WCAB deciding that the opinion of the Qualified Medical Evaluator constituted substantial medical evidence because the doctor opined that there was a "medically reasonable" basis for apportionment based on several factors that he discussed in detail and assigned specific percentages thereto.

In the discussion of the case and decision, important are the following opinions of the WCAB:

- "The issue of the causation of permanent disability, for purposes of apportionment, is distinct from the issue of the causation of an injury." The analyses of these issues are different and the medical evidence for any percentage conclusions might be different.

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Escobedo v. Marshalls (2005)

- In cases with more than one reporting physician and disagreement regarding the overall level of permanent disability and/or the approximate percentages of industrially and non-industrially caused permanent disability, the WCJ (or the Appeals Board) must weigh the evidence appropriately and determine these issues **based on the most persuasive substantial medical evidence.**
- A medical opinion is not substantial evidence if it is based on facts no longer germane, on inadequate medical histories or examinations, on incorrect legal theories, or on surmise, speculation, conjecture, or guess. Further, and this has been emphasized before, a medical report is not substantial evidence unless it sets forth the reasoning behind the physician's opinion, not merely his or her conclusions.

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Escobedo v. Marshalls (2005)

And, it should be remembered that the language in 4663(c) stating that apportionment may be based on "other factors both before and subsequent to the industrial injury" does not limit what nonindustrial factors may be considered as a cause of permanent disability for purposes of apportionment. Because of this, the **"other factors" may now include asymptomatic prior conditions and Axis II disorders or traits that were not productive of disability prior to the claimed injury,** provided there is substantial medical evidence establishing that these other factors have now caused permanent disability.

- This is the crux of the Escobedo case – the quality of the opinion of the Qualified Medical Evaluator in assigning permanent disability to the asymptomatic pre-existing arthritis and the demonstrated understanding by that evaluator that post-SB 899, allowed his apportionment determination.

Consider that as a medical-legal evaluator, you alone have knowledge of the opinions and conclusions that preceded yours, including flawed opinions and conclusions, inconsistencies and omissions. Use the information provided to you to guide your interview and craft final opinions and conclusions that correct prior flaws and demonstrate knowledge of the current regulatory environment.

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Benson v. Workers' Comp. Appeals Board (2009)

- The *Benson* case is important because it effectively overturned the Wilkinson rule, which was an opinion by the California Supreme Court that had governed settlement of cases of multiple injuries to the same body part or body system for more than thirty years. In *Wilkinson v. WCAB* (1977), it was decided that an injured worker who sustained multiple injuries to the same body part or body system was entitled to a combined award of permanent disability when the injuries became permanent and stationary at same time.
- In overturning this longstanding rule, the decision in the *Benson* case stated that apportionment post-SB 899 was to be based on causation, and therefore separate injuries must be considered for their particular causative factors of disability independently.
- Let's look at the *Benson* case in more detail.

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Benson v. Workers' Comp. Appeals Board (2009)

- The applicant had a long history working as a file clerk for The Permanente Medical Group;
- Her job required her to stand much of the day as well as perform repetitive neck and upper extremity motion;
- The applicant suffered a specific injury to her neck as a result of reaching over her head and pulling out a plastic bin to file a chart;
- She was initially diagnosed to have a neck strain; however, her condition deteriorated, and she ultimately underwent a three-level fusion of the cervical spine;
- The parties enlisted an Agreed Medical Evaluator, who concluded that the applicant actually sustained two separate injuries to her neck;
- The AME opined that the applicant suffered the claimed specific injury, as well as a cumulative trauma injury through the date of the specific injury.
- The applicant then filed a claim for the cumulative trauma injury, as found by the Agreed Medical Evaluator.

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Benson v. Workers' Comp. Appeals Board (2009)

- At trial, defendant contended that the apportionment provisions in SB 899 mandated that applicant receive two separate awards of 31% permanent disability, but the WCJ disagreed and found that the Wilkinson rule was still viable and separate awards of permanent disability were not required.
- The decision was appealed to the full Workers' Compensation Appeals Board, leading to an en banc decision reversing the finding of the WCJ and finding that the patient was entitled to two separate awards of permanent disability rather than one combined award.
- In their decision, the WCAB stated, in pertinent part:
- The application of Wilkinson, and the concomitant merging of separate injuries into a single award of disability, is contrary to the reforms set in place by SB 899, which mandate that an employer cannot be held liable for any disability other than that directly caused by the industrial injury.

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Benson v. Workers' Comp. Appeals Board (2009)

- Section 4663 requires that for every claim of permanent disability, a reporting physician must make an apportionment determination on "the issue of causation of the permanent disability." The medical evidence must sort out the causes of the permanent disability, and apportion to the current industrial injury, a prior or subsequent industrial injury, or a prior or subsequent non-industrial injury or condition.
- The WCAB cited the *Escobedo* case, stating that a medical report that failed to offer an opinion on apportionment of each separate injury could not be considered substantial medical evidence to justify an award of permanent disability.

101

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Benson v. Workers' Comp. Appeals Board (2009)

- The WCAB also noted that, "we anticipate that in many, if not most instances, physicians will arrive at some apportionment determination in successive injury cases."
- For example, a physician evaluating a case involving successive industrial injuries might determine that all of the resulting permanent disability is solely attributable to one of the successive injuries, resulting in a single (non-combined) award for all of the permanent disability;
- Alternatively, a physician may determine that it is medically reasonable to separately assign a percentage cause of the overall disability to each injury (e.g., 50/50, 75/25, 90/10), thereby resulting in multiple (non-combined) awards for each injury's portion of the permanent disability."

102

102

Benson and Inextricably Intertwined

- Also noteworthy in the *Benson* case is the WCAB's consideration of the situation where the evaluator would not be able to medically parcel out the degree to which each injury is causally contributing to the employee's overall permanent disability.
- In such an instance, the WCAB stated that the physician's apportionment "determination," within the meaning of section 4663, could properly be that the approximate percentages of disability caused by each of the successive injuries could not reasonably be determined and as a result, the employee would be entitled to an undivided award for the combined permanent disability, because the respective defendants would have failed in their burdens of proof on the issue of apportionment.
  - This has become known as permanent disability that is "inextricably intertwined", despite the fact that neither the WCAB's decision nor the District Court of Appeals' decision, which adopted the language of the WCAB en banc decision, contain the term.

103

103

Benson and Inextricably Intertwined

- This facet of the *Benson* case will likely come into play in many psychiatric claims being evaluated by the psychiatric medical-legal evaluator. This is because, as stated in the very opening of this presentation, many claims of psychiatric injury are denied and as a result, the injured worker may never receive treatment prior to the Qualified Medical Evaluation.
- One of the most useful tools in considering apportionment between separate dates of injury is the medical records because these allow the evaluator a look into the past that is not speculative or based on assumption.
- The evaluator might, through review of the medical records, see the development of additional symptoms after a second injury; or see the institution of more aggressive treatment measures.
- In the absence of records detailing the time course of psychiatric injuries, the psychiatric medical-legal evaluator is left without a very substantive tool in considering apportionment between separate claims of psychiatric injury.

104

104

Percentages in Causation vs. Percentages in Apportionment

- As instructed in this presentation, the psychiatric medical-legal evaluator is singular in the medical-legal arena in their obligation to provide percentages of causation for diagnosed psychiatric injuries. These percentages reflect industrial causation versus non-industrial causation, as well as causation from specific causes within the scope of industrial causation, such as personnel actions or effect of a termination.
- When defining particular factors as being causative of the injury as a whole, the evaluator should then carry those same factors over into the discussion of apportionment. Consider that if a factor is significant enough to be attributed some percentage of causation of the injury, the evaluator should also discuss that factor in the context of causing some percentage of the permanent disability that exists at maximal medical improvement.

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Percentages in Causation vs. Percentages in Apportionment

- Certainly the ascribed percentages can be different, because what originally causes an injury will not necessarily be the same as what maintains the final level of permanent disability. Consideration should be given to the effect(s) of intervening factors such as:
  - Time;
  - Distance from the original causative events;
  - Beneficial effects of treatment;
  - Beneficial effects of interval positive life events such as getting a new job.
  - Subsequent stressors such as death of a loved one.
- Finally, understand that a factor that causes an injury may no longer be in effect at the time of maximal medical improvement, and causation of permanent disability attributed to such a factor may in fact be 0%. There is nothing that precludes this finding; again, as with all discussions in medical-legal evaluations, the quality of the opinion is the key.

106

106

Percentages in Causation vs. Percentages in Apportionment

- For example, consider the case of John, a forklift operator who suffers harassment by his foreman and develops depression on the basis of work-related continuous trauma.
- He continues to work and feels the onset of back pain because he is working harder and faster to keep the foreman from harassing him.
- One morning he slips while getting onto the forklift and suffers a specific orthopedic injury to his low back and left knee.
- He files a claim for both specific orthopedic injury as well as continuous trauma orthopedic and psychiatric injury and is taken off work by his treating orthopedist.
- Causation of the psychiatric injury is the harassment by the foreman.

107

107

Percentages in Causation vs. Percentages in Apportionment

- But consider what happens if John seeks treatment for his orthopedic injuries, undergoes surgery to his low back which fails, and he is left years later with chronic pain and significant physical limitations.
- When considering apportionment, or what is causing the permanent disability, it is important to understand that the harassing environment that originally caused psychiatric injury is no longer present and will therefore play a much smaller role in the causation of the permanent disability, if any at all;
- Whereas the chronic pain and physical limitations which are now the main source of John's psychiatric distress are in actuality causing most if not all of the permanent disability, even though these factors did not cause any of the psychiatric injury.

108

108

Percentages in Causation vs. Percentages in Apportionment

Overall, when discussing apportionment of psychiatric permanent disability in medical-legal evaluations, keep in mind:

- Percentages of apportionment do not need to be the same as percentages of causation (what causes injury versus what maintains the condition and therefore causes the permanent disability);
- There is no "threshold" that any particular factor causative of permanent disability must meet in order for the applicant to obtain permanent disability benefits;
- Consider and factor in the effects of industrial and non-industrial events subsequent to the industrial injury;

109

109

Percentages in Causation vs. Percentages in Apportionment

- If you are not sure whether a medical factor that is contributing to the psychiatric permanent disability is industrial or not, (e.g. applicant's psychiatric disability is due in part to claimed industrial diarrhea or industrially aggravated diabetes), you can apportion to that factor and defer a determination of whether that factor, and therefore that portion of the permanent disability, is compensable to the appropriate medical specialist.
- If you are not sure whether a non-medical factor is industrial or not (e.g. personnel actions as to whether they are lawful, good faith and non-discriminatory; an allegedly hostile work environment; financial difficulties related to the injury and its sequelae; litigation anxiety) you can defer a determination of the compensability of that factor to the Trier-of-Fact

110

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Apportionment Case Example

- To illustrate apportionment, let's go back to Case #1 presented at the end of the Causation section, the case of Sally, the 22-year-old woman claiming psychiatric injury due to continuous harassment during her employment as a production worker, and carry that case through to apportionment.
- Recall that Sally had a history of harassment and unwanted attention from her supervisor Joel over a two-year period with the subject employer. One-year into her employment, she reported the harassment to her employer but was not offered any assistance. One year later, she suffered a specific incident which was acutely traumatic, and she demanded assistance from her employer, at which time a report was filed. She was terminated several days later.
- Upon presentation to the Psychiatric Qualified Medical Evaluation, she reported a variety of ongoing physical and emotional symptoms. She also had several concurrent stressors, including financial and personal matters

111

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Apportionment Case Example

- When discussing causation, the psychiatric QME determined that actual events of employment were responsible for 95% of the psychiatric injury and stated that there was psychiatric injury both on the basis of the cumulative trauma and on the basis of the specific date of injury.
- Because of this opinion that there were two injuries with this employer, the psychiatric medical-legal evaluator must apportion between the two injuries to be in compliance with the *Benson* decision.
- In considering causation of the injury, the evaluator took into account the concurrent stressors but not the death of her father, because this event occurred after her termination and therefore after the end of the period of work-related continuous trauma. Now, in considering apportionment, all must be taken into account.

112

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Apportionment Case Example

- With regard to causation, the medical-legal evaluator noted that there was 5% non-industrial causation of the psychiatric injury. Of the 95% of the psychiatric injury that had industrial causation; 65% of this was attributable to the specific event in the bathroom and sequelae including loss of her job; 15% of this was attributable to the personnel actions; and 15% of this was attributable to continuous harassment by the supervisor during the applicant's period of employment.
- In considering apportionment, the evaluator went back to these percentages as a starting point.

113

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Apportionment Case Example

- For the specific event in the bathroom, the evaluator believed that the applicant was no longer as gripped by fear as she was at the time of that injury, with benefit achieved through the treatment she had received. She had come to accept that she was a victim of a predator and held no personal responsibility for this man's actions. She did remain with anger that her employer betrayed her and terminated her employment after this event, which continued to make her feel somewhat victimized; also considered was the effect of her termination on her fear of finding another job due to her illegal status. All things considered, the evaluator did not believe that the specific injury carried as much weight in the cause of the permanent disability the applicant had at MMI as it had with regard to causation of the injury. The evaluator believed that this specific event was causative of 30% of the ongoing permanent disability in Sally.

114

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Apportionment Case Example

- For the personnel actions, the evaluator noted that the applicant remained steadfast in her belief that these actions were both unfair and motivated by revenge on the part of the supervisor who harassed her and should not have been upheld by her employer. The evaluator believed that these events held at least as much weight in the causation of her permanent disability as they did for causation of the injury, and the personnel actions were causative of 15% of the ongoing permanent disability in Sally.
- For the ongoing harassment from the supervisor, the evaluator noted that the applicant was more distraught about this than she had been in the past. She had processed the event in the bathroom to a degree but believed that she may have allowed her circumstance to escalate to that point because she did not adequately address the initial harassment. She felt guilty for this and had ruminations about the ongoing harassment and how she could have been more effective in bringing it to an end. The evaluator believed that the continued effects of the harassment accounted for 25% of the ongoing permanent disability in Sally.

115

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Apportionment Case Example

- The evaluator went on to note that part of this rumination involved Sally missing her father, and being very afraid because she did not have a current legal status in the U.S. She believed she would have been more powerful in demanding assistance from her employer if she had legal status in the U.S. Further, the evaluator noted that Sally relied heavily on her father for emotional support during the time of the harassment. She felt betrayed by life because her father had been taken from her and she still needed his support. The evaluator believed that this was probably the most likely reason for the applicant's current belief that the ongoing harassment was more of an issue than the event in the bathroom, while the actual medical records supported that during the course of treatment, she felt the opposite. During that time, she felt that she handled the harassment well, but the bathroom incident was significantly traumatic. After thorough consideration, the evaluator believed that these non-industrial factors accounted for 30% of the ongoing permanent disability in Sally.

116

116

Apportionment Case Example

- The evaluator also considered financial strain, but discounted this as a source of ongoing distress, as she had received a small inheritance from her father and currently felt financially secure.
- Based upon the consideration of the applicant's history, clinical presentation, and review of the medical records, the psychiatric medical-legal evaluator apportioned 70% of the permanent psychiatric disability to industrial causes, and 30% to non-industrial causes, primarily the death of her father and her illegal status.
- For the 70% of industrial causation, the evaluator believed that causation of the permanent disability was to be split between the specific incident in the bathroom and the cumulative trauma of the harassment from her supervisor.

117

117

Apportionment Case Example

- With regard to *Benson* apportionment, the industrial portion of the psychiatric disability was caused by both a specific injury and a continuous trauma injury. The evaluator believed that 30% of the total industrially caused permanent psychiatric disability was the result of the specific injury in the bathroom, and 40% was the result of continuous trauma both with regard to personnel actions and harassment; making up the 70% of industrially caused permanent psychiatric disability. The ultimate determination of whether the portion of the permanent disability caused by the personnel actions would be considered industrial or non-industrial was deferred to the Trier-of-Fact. If the personnel actions were considered to be lawfully administered good faith personnel actions, then the portion of industrially caused permanent psychiatric disability related to industrial causes overall would drop to 55%; with the same 30% being considered the result of the specific injury and 25% being the result of the continuous trauma injury from harassment by Joel.

118

118

Apportionment Case Example

- This case example demonstrates how the psychiatric medical-legal evaluator emphasized that with time and the beneficial effect of treatment, the factors serving to maintain the psychiatric condition and produce the permanent disability at maximal medical improvement were different than the factors that originally caused the psychiatric injury. Specific reasoning was given and appropriate percentages applied.

119

119

Take-Away Points on Apportionment

- Medical-legal evaluators must demonstrate knowledge of the principles of apportionment based on causation of the disability as opposed to causation of the injury.
- Any physician who prepares a report addressing the issue of permanent disability due to a claimed industrial injury shall also address the causation of that permanent disability.
- Apportionment of permanent disability shall be based on causation of that disability. A physician shall find what approximate percentage of the permanent disability was caused by the direct result of injury arising AOE/COE, and what approximate percentage of the permanent disability was caused by other factors both before and subsequent to the industrial injury, including the presence of the diagnosed condition prior to the industrial injury or aggravation.
- For the psychiatric medical-legal evaluator, the percentages of industrial causation assigned to various factors do not need to correlate with the percentages of apportionment assigned to those same factors. What causes an injury may not be the same as what causes or maintains a disability from that injury.
- 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 and scope of employment.

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Take-Away Points on Apportionment

- The *Escobedo* case is the flagship case on how to correctly apply Labor Code §§ 4663 and 4664. The pertinent points of the case are:
  - The apportionment opinion shall not be speculative;
  - The apportionment opinion is to be stated in terms of reasonable medical probability;
  - The evaluator will assess the relative percentages of industrial and nonindustrial causation based on the time of their evaluation of applicant.
- The *Benson* case guides the medical-legal evaluator in discussing apportionment when there are two or more injuries to the same body part or body system. It states:
  - Apportionment post-SB 899 is to be based on causation, and therefore separate injuries must be considered for their particular causative factors of disability independently;
  - In a situation where the evaluator is unable to parcel out the degree to which each injury is causally contributing to the patient's overall permanent disability with any reasonable medical probability, the patient may receive an undivided award for the combined permanent disability.

121

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Thank You

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122