

THE WETC PSYCHOLOGY NEWSLETTER

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Apportioning Psychiatric Disability in Workers' Compensation and Assessing Aggravation in Personal Injury Litigation

Whether it is in the area of workers' compensation or personal injury, the courts have recognized that defendants are only responsible for disability or damages produced by their actions. In psychology and psychiatry this typically involves considering the person's pre-injury psychological status and concurrent stressors in order to draw conclusions about the effect of the injury. Unfortunately, the process of arriving at these estimates has often been very subjective although there is an alternative method available.

Starting with workers' compensation, as specified in California's Labor Code Section 4663, whenever a physician writes a report addressing the issue of permanent disability they must also address the issue of apportionment. Focusing on the simplest case for heuristic purposes, a case where there has been a specific injury, apportionment is the doctor's estimate of what percentage of the individual's permanent disability was caused by the direct result of the industrial injury and what percentage of the permanent disability was caused by non-industrial factors that may have occurred before or after the industrial injury, but were non-industrial in nature.

In the case of a psychiatric injury, the process of drawing conclusions about what permanent disability benefits the applicant receives is based on the doctor's conclusions about the Global Assessment of Functioning (GAF) score. Starting with the applicant's Current GAF score, that score is converted into a Whole Person Impairment (WPI) score that is then used to calculate an estimate of the applicant's loss of future earnings.

One approach to apportionment that has been widely used by many psychologists and psychiatrists is the "guestimation" approach. Essentially, the doctor first arrives at a Current GAF score that reflects their opinion regarding the amount of disability the patient has at the time of the doctor's examination. Once having done so, the doctor considers the patient's life history prior to and subsequent to the industrial injury and "guestimates" the percentage of disability that is attributable to the patient's industrial injury.

Using this methodology it is not unusual to find a physician apportioning the applicant's psychiatric disability to such events as a patient's bad experiences in marriage; their use of alcohol or

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other psychoactive substances; counseling for a variety of conditions that may or may not be disorders; a pre-existing psychological disorder such as a Personality Disorder, a Bipolar Disorder or Schizophrenia; problems with the law; a non-industrial physical illness; or the death of one or more loved ones. On many occasions the doctor summarily states that apportionment is "reasonable" to make given the patient's experiences, without any evidence that the events in question produced any pre-existing or concurrent disability. On these occasions, they seem to simply pick a percentage, state that the percentage selected is their professional opinion, and go no further.

Fortunately, there is a more scientific and arguably objective manner of apportioning disability. This method is based on the GAF score, the existing legally sanctioned method for assessing permanent psychiatric disability. In this regard, since the GAF is the accepted method for assessing permanent psychiatric disability it should also be used to determine apportionment.

In using the GAF score for determining apportionment, the first step is for the doctor to draw a conclusion about the patient's Current GAF score using the criteria outlined in the DSM-IV-TR. Next, using their comprehensive history of the patient, the doctor draws a conclusion about what the patient's GAF score was on the day before the injury. Since the GAF score is based on the patient's signs and symptoms or complaints and/or any impairments they may have had in social, occupational or school functioning, the doctor should have no difficulty drawing a conclusion about the patient's GAF score on the day before the industrial injury. The only complication in this procedure is that the doctor will not usually have any Mental Status Examination data or psychological testing data from before the injury. However, this can be at least partially offset by access to the patient's personnel records, which often contain performance evaluations, and information about salary changes, promotions and demotions, among other data, which clearly establish the patient's disability status at work prior to the injury. For example, let's assume that a reading of Ms. Smith's personnel file reveals that she was doing just fine at work, her supervisors were happy with

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her performance, there were commendations in her file and over the years she received steady wage or salary increases with no evidence of any pre-injury psychiatric disability. Let's also assume that Ms. Smith provided the doctor with no history of any mental health problems in the form of symptoms or treatment prior to her date of injury and that her medical records were consistent with that history. Under these circumstances it is very reasonable to conclude that Ms. Smith had a GAF score of at least 71 just prior to her industrial injury. This is equivalent to a WPI score of 0. In fact, according to the DSM-IV-TR if she had a GAF score as low as 70, she could have some "mild symptoms" or "some difficulty" in social, occupational or school functioning and still have no psychiatric disability because a GAF of 70 is equal to a WPI score of 0.

Now let's assume that there is substantial evidence indicating that Ms. Smith's Current GAF is 60. Let's also assume that Ms. Smith had a GAF of at least 70 on the day before the injury. If we can assume we can use the basic operations of arithmetic to deal with these scores, then a decrease in the GAF score from say 70 to 60 is a 14% drop in her GAF score ($10/70 = .14$). However, there would be no basis for apportionment to non-industrial factors since a GAF score of 70 carries with it a WPI score of 0, which is simply another way of saying that Ms. Smith had no psychiatric disability on the day before the injury.

This method also can be used if Ms. Smith had some permanent psychiatric disability on the day before her industrial injury. For example, let's assume that there are data in the doctor's history indicating that on the day before the injury Ms. Smith had a GAF score of 60. Let's also assume that on the day the doctor conducted his evaluation that her GAF score was 50. If we apply the rules of arithmetic to these scores we have a relatively simple method that provides a reasonably objective basis for calculating the amount of apportionment that is devoid of any "guestimation."

Specifically, first we calculate Ms. Smith's current disability status by finding the difference between a GAF of no disability (70) and the GAF on the date of the doctor's examination ($70-50 = 20$). Then we calculate Ms. Smith's disability status prior to the injury by finding the difference between a GAF of no disability (70) and the GAF on the day before the injury (60), which works out to 10 ($70-60 = 10$). Accordingly, she is now 20 GAF units below no disability and she was 10 GAF units below "no disability" on the day before the injury. This represents a 50% increase in disability ($10/20=.50$), or alternately 50% of the disability is apportionable to the industrial injury.

Expressed in arithmetic terms:

$$\frac{(70 - \text{Current GAF}) - (70 - \text{Pre-Injury GAF})}{70 - \text{Current GAF}} = \frac{20 - 10}{20} = 50\%$$

Of course, this assumes that apportionment is based on the GAF score. A similar set of calculations can be made if it is decided that apportionment should be made on the WPI scores. Thus, if Ms. Smith had a WPI score of 30 (GAF=50) at the time of the doctor's examination and a WPI score of 15 (GAF=60) on the day before the injury, 15/30 or 50% of her current disability is due to the industrial injury. Note that given the lack of a perfect correlation between the GAF and WPI scales, which may be due to rounding errors in the construction of the WPI scale, the two different methods may give slightly different apportionment percentages.

$$\frac{(\text{Current WPI}) - (\text{Pre-Injury WPI})}{\text{Current WPI}} = \frac{30 - 15}{30} = 50\%$$

A similar process can be used to calculate apportionment for concurrent or subsequent factors of disability. However, unfortunately, there is no objective basis for separating the amount of permanent disability due to a concurrent factor from the disability due to the industrial injury other than the doctor's experience with similar cases and their knowledge of the patient and their opinion about the likely reaction to the concurrent aversive events. On those occasions the doctors will earn the big bucks for spelling out in detail the reasons for arriving at their opinions without taking refuge to the old standbys such as "in my professional opinion" or "it is reasonable to conclude." Nevertheless, when there are no such concurrent issues, which is most frequently the case, the "guestimation" can be kept to a minimum. Of course, if the doctor finds there are no sources of concurrent disability, an applicant who had a pre-existing GAF of at least 70 would require no apportionment since their pre-existing WPI was 0.

Essentially, this method of apportionment is substantially better than one in which the doctor subjectively provides a percentage "guestimate" since it is based on the legally sanctioned GAF/WPI scores and all the doctor needs to do is to use their history of the patient to come up with a second GAF score and do some simple arithmetic.

Finally, it should be noted that although personal injury litigation does not use the formal concept of apportionment, that area uses the notion of aggravation. Accordingly, if the plaintiff has had some pre-existing psychological signs, symptoms, disorders, disabilities and/or problems that have been aggravated by say an automobile accident, a slip-and-fall or a possibly defective product, it is possible to use the workers' compensation GAF method described above. This will allow the court to consider how to adjust the damages the plaintiff is entitled to based upon their prior emotional condition, which was worsened by the defendant's actions.