

## WORKERS' COMPENSATION NEWSLETTER

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### THE TIMES THEY ARE A-CHANGIN': Rating Permanent Disabilities

By Charles Leath, LFLM Fresno

With increasing frequency at the WCAB, parties must answer the question "to add or not to add" in deciding to resolve permanent disability disputes. This has not been a prevalent issue in the past, but I am here to say "the times they are a-changin'".

Applicant attorneys have always advocated adding the various ratings provided by the medical legal evaluator to determine the final permanent disability rating for the injured worker as it results in a higher award. On the other hand, defendants have championed the Combined Values Chart (CVC) as the proper method and the norm for determining the final permanent disability when multiple disabilities exist. Recent case law requires us to reevaluate this position. This article will analyze the various holdings from recent decisions as well as the relevant language contained in the American Medical Association (AMA) Guides and try to distill the answer to the question of "to add or not to add."

Specifically this article will focus on three WCAB panel cases: *Taina v. County of Santa Clara Valley Medical Center* (2018) Cal.Wrk.Comp. P.D. LEXIS, *Herrera v. Maple Leaf Foods* (2018) Cal.Wrk.Comp. P.D. LEXIS, and *Foxworthy v. State of California Department of Parks and Recreation* (2016 Cal.Wrk.Comp. P.D. LEXIS 634).

#### Add If There is No Overlap

In the recent noteworthy panel decision, *Taina v. County of Santa Clara Valley Medical Center*, the WCAB affirmed the trial judge's decision holding that there was no error when the judge determined the level of permanent disability was properly calculated by adding the relevant ratings to find an 87% permanent disability rather than using the CVC.

In this case, the applicant suffered an orthopedic injury on October 4, 2011 to her neck and shoulders. She later developed psychiatric sequela as a compensable consequence. Agreed Medical Examiner, David Pang, MD, evaluated the orthopedic claims and provided the rating of 48%. Joshua Kirz, MD, evaluated the psychiatric claims and provided the rating of 39%. The trial court relied on the opinions of Dr. Kirz who stated in response to the question from applicant's counsel of whether the impairment ratings should be added together rather than combined. Dr. Kirz stated, "I do not perceive any overlap between the physical and psychiatric impairments in this case."

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## RATING PERMANENT DISABILITIES

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The defendant contended that the WCJ erred by not using the CVC. The CVC is based on the American Medical Association's Guides to the Evaluation of Permanent Impairment, Fifth Edition (AMA Guides) formula of  $A+B(1-A)=$ , which is used to assure that the combining of multiple whole person impairments does not exceed 100%. The WCAB upheld the trial judge's decision and stated, "disability values of multiple impairments may be added instead of combined using the CVC if that provides an accurate rating, particularly when there is no overlap, and when the **synergistic effect** of the multiple disabilities support that method of combination."

The sole disagreement between the parties at the time of trial was the overall level of permanent disability and whether this was to be represented by combining the two values using the CVC resulting in 68% permanent disability or if the two ratings should be added resulting in 87% permanent disability as referenced by Dr. Kirz. When the trial judge opted for 87% permanent disability rating, defendant filed a Petition for Reconsideration which was denied by the WCAB.

The take away from this case when deciding to add or to combine hinges on the concept of overlapping body parts, or symptoms **and the synergistic effect** of the multiple disabilities. It is important to question a medical provider closely in a case with both orthopedic and psychological claims on how orthopedic pain may cause psychological symptoms. If a practitioner can affirm the existence of overlap, then the risk of an "added" permanent disability award should be minimized.

To espouse that opinion further, the WCAB noted that the WCJ's decision was supported by the AMA Guides, citing Chapter 1.4 and 1.5 on pages 9 and 10, which states in relevant part:

A scientific formula has been established to indicate the best way to combine multiple impairments. Given the diversity of impairments and great variability herein in combining multiple impairments, it is difficult to establish a formula that accounts for all situations. A combination of some

impairments could decrease overall functioning more than suggested by just adding the impairment ratings for separate impairments (i.e. blindness and inability to use both hands). When other multiple impairments are combined, a less than additive approach may be more appropriate...

The CVC is included in the 2005 Permanent Disability Rating Schedule (PDRS) as a tool for the parties in a WCAB action to add impairments. The formula or "math" that is used is not traditional and has been characterized by some as simply "odd." The drafters of the 2005 PDRS felt that the reduction formula used is the most accurate means to rate an injured worker's impairment when there is "overlap" among injuries to multiple body parts arising from a single industrial injury.

In following the logic utilized in the *Alamaraz/Guzman* cases, if the PDRS is rebuttable and the CVC is considered part of it, then the CVC must be rebuttable as well.

### Do Not Add If There is Overlap

*Foxworthy v. State of California, Department of Parks & Recs* (2016 Cal. Wrk. Comp. P.D. LEXIS 634) is a Board Panel Decision that supports the use of the CVC when determining a final disability rat-

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ing. In this case, the applicant, while employed as a State Park Ranger on June 11, 2010, sustained an admitted injury to her low back, psych, hypertension and sexual dysfunction.

The injury occurred while applicant and three fire-fighters were involved in the attempted rescue of a visitor to a park. The visitor had to be extracted, and carried over 3 miles by the rescuers. Over the next few days the applicant experienced increased pain in her low back and legs. The parties agreed to use three AMEs in the fields of orthopedics, psychiatry and internal medicine. Each AME evaluated the applicant, wrote medical legal reports, and provided whole person impairment and apportionment. With this information, the parties could not agree to the applicant's level of permanent disability and apportionment.

The matter went forward to trial and the judge instructed the DEU to rate the reports using the following three methods:

1. Combine the permanent disability by use of the CVC as set forth in the 2005 Permanent Disability Rating Schedule (PDRS)

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Laughlin, Falbo, Levy & Moresi LLP conducts educational classes and seminars for clients and professional organizations. Moreover, we would be pleased to address your company with regard to recent legislative changes and their application to claims handling or on any subject in the workers' compensation field which may be of interest to you or about which you believe your staff should be better informed. In addition, we would be happy to address your company on recent appellate court decisions in the workers' compensation field, the American with Disabilities Act, or on the topic of workers' compensation subrogation.

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2. Add the Permanent Disability ratings
3. Combine the disability ratings by using the Multiple Disabilities Table for the 1997 PDRS.

The WCJ accepted the third method, and in response, two Petitions for Reconsideration were filed.

A Board panel found that the applicant's permanent disability was a result of her injury, and therefore, should be calculated by use of the CVC as the body parts overlapped. The panel reasoned that there was an overlap between the applicant's orthopedic restrictions regarding her ability to lift and carry and her psychiatric impairment in interacting and communicating. These restrictions affected the applicant's ability to perform her usual job duties. Therefore, as the body parts overlapped, the panel concluded the use of the CVC was proper.

### Add If the Injuries Cannot be Parceled Out

In *Enrique Herrera v. Maple Leaf Foods* (2018 Cal. Wrk. Comp. P.D. LEXIS), the trial judge found that the applicant suffered injury to his back, gastrointestinal system, psyche, bilateral shoulders, left index finger, lumbar spine and neck with associated headaches which collectively adjusted to 68% permanent disability. The parties stipulated to a specific injury date of October 15, 2002. The WCJ subsequently found that rather than a specific injury, the applicant suffered cumulative trauma to his right index finger, right shoulder, lumbar spine, cervical spine, psyche and gastrointestinal system with associated headaches from October 15, 2002, through January 2, 2003, which collectively adjusted to 39% permanent disability. Both defendants and the applicant filed for Reconsideration regarding the level of permanent disability and the extent it should be apportioned between the specific injury and cumulative trauma.

The Board panel ultimately concluded that the applicant's total combined permanent disability from both cases adjusted to 83% based on the "cannot

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parcel out” exception from *Benson v. Workers’ Comp. Appeals Bd.* In other words, the panel found that since the psychiatric and gastrointestinal disability could not be parceled out among the two separate dates of injury, then all industrially-caused disability must be rated together. The panel explained that if an applicant has two injuries with overlapping body parts, and if the medical evidence establishes that one of the injuries can be “parceled out” between the two injuries but the other injury/injuries cannot, the applicant is entitled to a single un-apportioned award of permanent disability.

For example, if an applicant alleges two dates of injury, with one case involving a back injury with a psych claim, and the other injury claim alleges injury to the applicant’s hand and psych, if the psych claim cannot be “parceled out”, then there may be a single award for all claims.

The implications of this holding are significant. If an applicant can allege two dates of injury with overlapping body parts that are difficult to “parcel out” such as psych, the final permanent disability will increase exponentially.

The *Herrera* decision provides applicant attorneys a road map for the use of Benson in an effort to defeat apportionment where there is more than one injury with overlapping body parts. This case has cleared the way for the increase in life pension cases as well

as the ability for injured workers to achieve the rather difficult task of reaching 100% permanent disability. It is the key language of “cannot parcel out” that allows the multiple body parts and injuries in *Herrera* to be rated together without apportionment resulting in a final award of 83%.

### Conclusion

Distilling the three holdings down to a single rule that any practitioner in the field of workers’ compensation law can utilize in handling the day-to-day requirements of a claim can be difficult. In looking ahead to the future of claims it appears that the rule should be that if there are no overlapping body parts, or if there is a single injury that cannot be parceled out between two injuries, then it is well within the jurisdiction of the WCJ to use the adding method. If however, there is overlap, and the overlap can be parceled out, the CVC is the proper means of determining permanent disability. In order to support adding over using the CVC, the medical-legal evaluators must draw the necessary distinctions in the facts to show the lack of overlap or the inability to parcel out the injuries. Just saying it isn’t enough. In fact, defendants are advised to analyze whether the medical opinion advocating adding impairments is actually supported by the medical evidence. When found lacking, the adding method should be discarded and the CVC used instead. ♫

### Kids' Chance of California (KCOCA) *Educating Children of Injured Workers*

KCOCA is a non-profit organization dedicated to providing need-based scholarships to the children of fatally or seriously injured workers in California. Now in its fifth year since inception, KCOCA has raised more than \$480,000 and provided 19 students with scholarships for college and technical school.

The organization maintains exhibit booths and speaking opportunities at the various industry conferences throughout California such as CWC, PARMA, DWC Los Angeles and Oakland, as well as CSIA. If you are attending any of these conferences, swing by the KCOCA booth and say hello! Pick up some information on how you can get involved in improving the lives of the children of injured workers. Make a donation, refer a scholarship or volunteer your time.

Visit [kidschanceca.org](http://kidschanceca.org) or call (415) 561-6275.

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## UPCOMING CONFERENCES

### **2019 PARMA Conference**

Public Agency Risk Management Association

**February 10 - February 13, 2019**

Disneyland Hotel - Anaheim, California

**Marc Leibowitz** (LFLM San Diego) & **Jesus Mendoza** (LFLM San Francisco) will be presenting at this conference.

*Come by to see LFLM at Booth #232 or the LFLM Sponsored Cyber PARMA*

### **2019 DWC Educational Conference**

Division of Workers' Compensation

**Los Angeles: February 11 - February 12**

**Oakland: February 29 - March 1**

### **2019 Coalition of Workers' Compensation**

**July 17 - July 19, 2019**

Disney's Grand Californian Hotel & Spa - Anaheim, California

## DIVERSITY

The LFLM Diversity Committee, **Carroll Wheatley** (San Bernardino), **Nat Cordellos** (San Francisco), **Omar Behnawa** (San Diego) and **Erin Walker** (Oakland), is initiating another year of the LFLM Diversity Book Scholarships for law schools around the state. Last Fall, LFLM was proud to sponsor the Santa Clara School of Law Diversity Gala benefitting the Thurgood Marshall Civil Rights Scholarship Fund as well as sponsoring the Lambda Fall Spectacular benefitting the Jeffrey Poile LGBTQ Memorial Scholarship at University of the Pacific McGeorge School of Law.

We encourage LFLM attorneys and clients to contact the LFLM Diversity Committee regarding events-of-interest in 2019 with respect to diversity & inclusion efforts within the legal profession to expand our efforts!