WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

JACK C. STRONG, ***Applicant,*** **vs.** **CITY & COUNTY OF SAN FRANCISCO, Permissibly Self-Insured,** ***Defendant(s).***	**Case No. SFO 0479038** **OPINION AND DECISION AFTER RECONSIDERATION (EN BANC)**

We granted reconsideration to further study the issue of apportionment under Labor Code section 4664,[1] as enacted by Senate Bill 899 (SB 899),[2] in situations where an employee suffers an industrial injury causing permanent disability to one region of the body, and where there has been a prior industrial injury resulting in an award of permanent disability involving and/or including different regions of the body. Because of the important legal issue presented, and in order to secure uniformity of decision in the future, the Chairman of the Appeals Board, upon a majority vote of its members, assigned this case to the Appeals Board as a whole for an en banc decision. (Lab. Code, §115.)[3]

Based on our review of the relevant statutes and case law, we hold:

(1) Where an employee suffers an industrial injury causing permanent disability to one region of the body, and where there is a prior award of

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[1] Unless otherwise indicated, all further statutory references are to the Labor Code.

[2] Stats. 2004, ch. 34, §35.

[3] The Appeals Board's en banc decisions are binding precedent on all Appeals Board panels and workers' compensation administrative law judges. (Cal. Code Regs., tit. 8, §10341; *City of Long Beach v. Workers' Comp. Appeals Bd. (Garcia)* (2005) 126 Cal.App.4th 298, 313, fn. 5 [70 Cal.Comp.Cases 109]; *Gee v. Workers' Comp. Appeals Bd.* (2002) 96 Cal.App.4th 1418, 1425, fn. 6 [67 Cal.Comp.Cases 236, 239, fn. 6]; see also Govt. Code, §11425.60(b).)

permanent disability involving and/or including any other region(s) of the body, section 4664 requires the apportionment of overlapping permanent disabilities;

(2) The defendant has the burden of proving the existence of any prior permanent disability award(s) involving and/or including any other region(s) of the body;

(3) When the defendant has established the existence of any prior permanent disability award(s) involving and/or including any other region(s) of the body, the permanent disability underlying any such award(s) is conclusively presumed to still exist, i.e., the applicant is not permitted to show medical rehabilitation from the disabling effects of the earlier industrial injury or injuries;

(4) When the defendant has established the existence of any prior permanent disability award(s) involving and/or including any other region(s) of the body, the percentage of permanent disability from the prior award(s) will be subtracted from the percentage of permanent disability for the body region of the most recent injury, unless the applicant *disproves* overlap, i.e., the applicant demonstrates that the prior permanent disability and the current permanent disability affect different abilities to compete and earn, either in whole or in part; and

(5) The issue of whether the prior permanent disability for a different region of the body overlaps the current disability is determined using substantially the same principles that were applied prior to the enactment of section 4664.

I. BACKGROUND

Jack C. Strong (applicant) sustained a series of industrial injuries while employed as a stationary engineer by the City and County of San Francisco (defendant). For each injury, Peter A.

von Rogov, M.D., treated him. Dr. von Rogov's reports were the only medical reports received in evidence in this matter.

Applicant initially sustained a November 27, 1995 injury to his left knee. On December 8, 1999, a stipulated award issued, which found that this left knee injury caused permanent disability of 34-½%. Based on the summary rating determination received in evidence at trial,[4] the 34-½% stipulated permanent disability finding was based on a 20% standard rating, in accordance with Dr. von Rogov's August 13, 1998 permanent and stationary report. That report found that applicant "has a disability corresponding to Category C of the Guidelines for Work Capacity," i.e., a preclusion from heavy lifting. The report also found that applicant had objective and subjective disability.

Applicant had another industrial injury on February 12, 1999, to his left shoulder, left knee, left ankle, and right wrist. A stipulated award issued on March 28, 2003, finding that this injury caused permanent disability of 42%. Based on the summary rating determination admitted in evidence at trial, this 42% rating was based on a limitation to light work, after apportionment to applicant's prior preclusion from heavy lifting. Both the light work limitation and the apportionment to the prior no heavy lifting restriction were consistent with the June 6, 2001, February 28, 2001, December 13, 2001, and May 9, 2002 reports of Dr. von Rogov.[5] Those reports also set forth various objective and subjective factors of disability, as well as some additional work restrictions.

The back injury in the case now before us occurred on May 8, 2002. In various reports issued after applicant became permanent and stationary (i.e., reports dated November 3, 2002, November 30, 2002, February 17, 2003, and January 26, 2004), Dr. von Rogov states that applicant's present *overall* disability is a limitation to semi-sedentary work and that the *increase* in

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[4] We note there was no objection to the admission of the summary rating determination. Moreover, as a general rule, there appears to be no reason why summary rating determinations should be deemed inadmissible.

[5] Although this last report issued on May 9, 2002, the day after the May 8, 2002 back injury at issue here, it was based on a March 18, 2002 examination.

disability from a limitation to light work is a result of the May 8, 2002 back injury.[6] Dr. von Rogov's reports also contain some partial descriptions of objective and subjective factors of disability for applicant's back.

On December 9, 2004, a trial occurred at which the various reports of Dr. von Rogov, the prior stipulated permanent disability awards, and the summary rating determinations discussed above were all admitted in evidence. The parties also stipulated that applicant's *overall* permanent disability is 70%, after adjustment for age and occupation. The parties raised the issue of the application of section 4664 and the issue of apportionment (overlap) for determination.

After receiving trial briefs from the parties, the WCJ issued rating instructions to the Disability Evaluation Unit (DEU), as follows:

> "Please consider whether there is overlap between the following disabilities:
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> "Applicant has an overall disability of 70% after adjustment of for age and occupation based on a limitation to semi-sedentary work because of a back injury of 5/08/02 and previous injuries to the left shoulder, left knee, left ankle and right wrist.
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> "Prior to the 5/08/02 injury, applicant was limited to light work for an injury to the left shoulder, left knee, left ankle and right wrist limiting the applicant to light work."

On March 29, 2005, a disability evaluation specialist (rater) of the DEU issued a 10% recommended permanent disability rating opining: (1) that applicant's pre-existing light work limitation rated 60%, after adjustment for his current occupation;[7] and (2) that applicant's May 8, 2002 caused 10% permanent disability, after apportionment (i.e., the stipulated 70% overall disability minus the 60% pre-existing disability).

On May 31, 2005, the WCJ issued a Findings and Award determining that applicant's May

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[6] Dr. von Rogov's January 26, 2004 report states, "I do not believe that the results of the injury of May 8, 2002 should be subsumed by the light work disability." This, however, is a legal conclusion – not a medical conclusion.

[7] In apportioning applicant's prior light work limitation, the rater indicated that she did not adjust for age, stating: "unable to determine age."

8, 2002 back injury caused 10% permanent disability.

Thereafter, applicant filed a timely petition for reconsideration. In substance, the petition contends: (1) that, under section 4664(a), the employer is liable for the "percentage of permanent disability directly caused by the injury" and, here, applicant's May 8, 2002 back injury has directly caused permanent disability of 70%; (2) that, because the 70% permanent disability caused by the May 8, 2002 injury is all in the region of the back, then under section 4664(c)(1) there cannot be any apportionment to pre-existing disability in other regions of the body; and (3) that, if apportionment is to apply, it is limited to subtracting the monetary equivalent of the pre-existing disability from the monetary equivalent of the current overall disability.

Defendant filed an answer to the petition for reconsideration. In essence, defendant asserts: (1) that the repeal of former section 4750 did not eliminate the principle of overlapping disability; and (2) that, under *Nabors v. Piedmont Lumber and Mill Co.* (2005) 70 Cal.Comp.Cases 856 (Appeals Board en banc), the amount of indemnity due is calculated by subtracting the permanent disability caused by other factors from the overall percentage of permanent disability.

II. DISCUSSION

A. The Determination Of Overlapping Disabilities Prior To SB 899

In order to evaluate whether new section 4664, as enacted by SB 899, requires the apportionment of overlapping disability when an employee suffers an industrial injury causing permanent disability to one region of the body, but there has been a prior industrial injury resulting in an award of permanent disability involving and/or including different regions of the body, we will first trace some of the pre-SB 899 history of apportionment based on pre-existing permanent disability.

The apportionment of pre-existing permanent disability has been a fixture of California workers' compensation law since its inception. The original Workmen's Compensation, Insurance and Safety Act of 1917 (the 1917 Act) contained a provision stating: "The percentage of permanent disability caused by any injury shall be so computed as to cover the permanent disability caused by that particular injury without reference to any injury previously suffered or

any permanent disability caused thereby." (Stats. 1917, ch. 586, p. 839, §9; see also, Stats. 1919, ch. 471, p. 916, §4; Stats. 1925, ch. 354, p. 643, §1.) In 1929, the Legislature amended the 1917 Act to provide:

> "The fact an employee has suffered previous disability or received compensation therefor shall not preclude compensation for a later injury …; … provided, however, that an employee who is suffering physical impairment and shall sustain permanent injury thereafter shall not receive compensation for a later injury in excess of the compensation allowed for such injury when considered by itself and not in conjunction with or in relation to the previous disability or impairment. The employer shall not be liable for compensation to such employee for the combined disability but only for that portion due to the later injury as though no prior disability or impairment had existed." (Stats. 1929, ch. 222, p. 420, §1.)

In 1937, the 1917 Act and its amendments were codified in the Labor Code. At that time, the Legislature adopted former section 4750, whose language was substantially similar to the 1929 law, *supra*. For the next 67 years, the language of former section 4750 remained essentially unchanged, until its repeal on April 19, 2004 by SB 899. (Stats. 2004, ch. 34, §37.) At the time of its repeal, former section 4750 provided:

> "An employee who is suffering from a previous permanent disability or physical impairment and sustains permanent injury thereafter shall not receive from the employer compensation for the later injury in excess of the compensation allowed for such injury when considered by itself and not in conjunction with or in relation to the previous disability or impairment.
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> "The employer shall not be liable for compensation to such an employee for the combined disability, but only for that portion due to the later injury as though no prior disability or impairment had existed." (Stats. 1937, ch. 90, p. 285; amended by Stats. 1945, ch. 1161, p. 2209, §1.)[8]

One long-standing purpose of former section 4750 was to encourage employers to hire people with disabilities; the Legislature recognized that employers might refrain from hiring the

[8] The 1945 amendment merely added the phrase "from the employer" in the first sentence.

disabled if, upon a subsequent injury, the employer would become obligated to compensate the employee for the pre-existing disability. (*Mercier v. Workers' Comp. Appeals Bd*. (1976) 16 Cal.3d 711, 714 [41 Cal.Comp.Cases 205]; *Hegglin v. Workmen's Comp. Appeals Bd.* (1971) 4 Cal.3d 162, 173 [36 Cal.Comp.Cases 93]; *State Comp. Ins. Fund v. Industrial Acc. Com.* (*Hutchinson*) (1963) 59 Cal.2d 45, 49 [28 Cal.Comp.Cases 20].)[9] Thus, under former section 4750, when an employee who had pre-existing permanent disability sustained an industrial injury that also resulted in permanent disability, the employer or its insurer was not liable for the combined disability, but only for that portion attributable to the subsequent industrial injury, considered alone. (*E.g., State Comp. Ins. Fund v. Industrial Acc. Com.* (*Hutchinson*), *supra*, 59 Cal.2d at p. 48; *Smith v. Industrial Acc. Com*. (1955) 44 Cal.2d 364, 365 [20 Cal.Comp.Cases 82]; *Gardner v. Industrial Acc. Com.* (1938) 28 Cal.App.2d 682, 684 [3 Cal.Comp.Cases 143].)

In applying former section 4750, when the permanent disability resulting from a new injury included factors of disability that were the same as ones that already existed as the result of a prior injury or condition, the disabilities were said to "overlap." (*Mercier v. Workers' Comp. Appeals Bd.*, *supra*, 16 Cal.3d at p. 714; *State Comp. Ins. Fund v. Industrial Acc. Com.* (*Hutchinson*), *supra*, 59 Cal.2d at pp. 47, 49, 52, 53-54.) If all of the factors of permanent disability attributable to the subsequent industrial injury already existed as a result of the prior injury or condition, then there was "total" overlap, and the employee was not entitled to any additional permanent disability indemnity; if, however, the subsequent industrial injury caused some new factors of permanent disability that were not pre-existing, then there was "partial" overlap, and the employee was entitled to permanent disability indemnity to the extent the subsequent industrial injury further restricted his or her earning capacity or ability to compete. (*Mercier v. Workers' Comp. Appeals Bd*., *supra*, 16 Cal.3d 711 (employee had prior back disability precluding heavy lifting and repetitive bending, and then sustained a new industrial injury to his heart resulting in a limitation

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[9] See also, *Wolski v. Industrial Acc. Com*. (1945) 70 Cal.App.2d 427, 432 [10 Cal.Comp.Cases 181] (the purpose of section 4750 was "to remove any reasonable ground for an employer to refuse to hire one-armed, one-legged, or one-eyed men. In short, it [was] intended for the long-range benefit of handicapped workmen.")

between light work and semi-sedentary work and in a need to avoid strenuous activities and severe emotional stress; *held*, all factors of disability attributable to the back were included in or subsumed by the factors attributable to the heart injury, resulting in total overlap, and it was proper to deduct the rating for the back disability from the rating for the heart disability); *State Comp. Ins. Fund v. Industrial Acc. Com.* (*Hutchinson*), *supra*, 59 Cal.2d 45 (employee had prior neck disability consisting of constant slight pain, becoming slight with overhead work and climbing, and becoming moderate with lifting over 30 pounds, and then sustained a new injury to his low back resulting in disability consisting of minimal pain increasing to slight pain on heavy work; *held,* disability from neck injury was held to overlap the disability from back injury because the latter resulted in pain when performing certain work activities); *Edson v. Industrial Acc. Com*. (1928) 206 Cal. 134 [15 I.A.C. 193] (employee had previously lost 30/50ths of the sight of each eye, and then sustained new industrial injury resulting in an additional 17-½/50ths loss of the sight of his left eye; *held*, employee entitled to compensation only for the latter impairment); *Gardner v. Industrial Acc. Com.*, *supra*, 28 Cal.App.2d 582 (employee had prior left ankle disability resulting in partial stiffness of the ankle joint, and then sustained a new industrial injury resulting in amputation of left leg between knee and hip joint; *held*, rating for loss of leg properly reduced by rating for ankle).)[10]

As can be seen from these cases, it was not the part of the body involved in the subsequent industrial injury that was important; rather, it was the nature of the disability resulting from the new injury in relation to the pre-existing disability that was determinative. (*State Comp. Ins. Fund. v. Industrial Acc. Com*. (*Hutchinson*), *supra*, 59 Cal.2d at pp. 51-52.) Thus, the fact that the pre-existing disability and the new disability involved two different anatomical parts of the body, while relevant, did not in itself preclude apportionment using the rules of overlap. (*Mercier v.*

[10] See also, e.g. *Sidders v. Workers' Comp. Appeals Bd.* (1988) 205 Cal.App.3d 613 [53 Cal.Comp.Cases 445] (back and back); *Johns-Manville v. Workers' Comp. Appeals Bd.* (*Carey*) (1978) 87 Cal.App.3d 740 [43 Cal.Comp.Cases 1372] (back and pulmonary); *Bookout v. Workers' Comp. Appeals Bd.* (1976) 62 Cal.App.3d 214 [41 Cal.Comp.Cases 595] (back and heart); *Argonaut Ins. Co. v. Workmen's Comp. Appeals Bd.* (*Lopez*) (1971) 15 Cal.App.3d 436 [36 Cal.Comp.Cases 89] (back and back – total overlap); *Truck Ins. Exchange v. Industrial Acc. Com.* (*Tarantino*) (1965) 235 Cal.App.2d 207 [30 Cal.Comp.Cases 194] (neck/back/hand and heart).

Workers' Comp. Appeals Bd., *supra*, 16 Cal.3d at p. 716; *State Comp. Ins. Fund v. Workers' Comp. Appeals Bd.* (*Gaba*) (1977) 72 Cal.App.3d 13 [42 Cal.Comp.Cases 598]; *Bookout v. Workers' Comp. Appeals Bd.*, *supra*, 62 Cal.App.3d at p. 222.)[11]

The mechanics of rating overlap generally provided that each separate factor of permanent disability for both the new industrial injury and the pre-existing condition be set forth, so it could be determined what elements, if any, of one disability were included in the other. (*State Comp. Ins. Fund v. Workers' Comp. Appeals Bd.* (*Gaba*), *supra*, 72 Cal.App.3d 13 (rating instructions for subsequent industrial heart injury described employee's disability as "moderate" but omitted any heart-related work restrictions; WCAB's decision was annulled and the matter remanded to delineate work preclusions for heart and to determine extent, if any, to which employee's heart disability overlapped pre-existing back disability resulting in a limitation to light work).) The issue of apportionment would be resolved by determining the percentage of combined disability after the new injury, and then subtracting the percentage of disability due to the prior injury which overlapped – either partially or totally – the disability resulting from the new injury. (*Mercier v. Workers' Comp. Appeals Bd*., *supra*, 16 Cal.3d at p. 716; *Sidders v. Workers' Comp. Appeals Bd*., *supra*, 205 Cal.App.3d at p. 629; *Bookout v. Workers' Comp. Appeals Bd.*, *supra*, 62 Cal.App.3d at p. 223.)

If, however, successive injuries produced separate and independent disabilities – i.e., if the disabilities did not fully or partially overlap because they did not affect the *same* abilities to compete and earn – then each was rated separately. (*Mercier v. Workers' Comp. Appeals Bd*., *supra*, 16 Cal.3d at p. 714; *State Comp. Ins. Fund. v. Industrial Acc. Com*. (*Hutchinson*), *supra*, 59 Cal.2d at p. 53; *Fresno Unified School Dist. v. Workers' Compensation Appeals Bd*. (*Humphrey*) (2000) 84 Cal.App.4th 1295, 1310, fn. 3 [65 Cal.Comp.Cases 1232].) Thus, for example, where an employee, who had a childhood disease that resulted in the amputation of one leg above the knee,

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[11] See also, *Abril v. Workers' Comp. Appeals Bd*. (1976) 55 Cal.App.3d 480, 486 [40 Cal.Comp.Cases 804]: "[I]t is the nature of the disability and not the anatomical part of the body to which the injury was inflicted which must be considered in computing compensation." (quoting from *Luchini v. Workmen's Comp. Appeals Bd*. (1970) 7 Cal.App.3d 141, 144 [35 Cal.Comp.Cases 205].)

later sustained an industrially-related cerebral vascular accident that resulted in hearing loss, loss of the use of his left arm, decreased vision, loss of memory, and learning disabilities, the employee was entitled to the full rating for the industrial disabilities because they did not overlap the pre-existing loss of his leg. (*Newman v. Workers' Comp. Appeals Bd*. (1984) 152 Cal.App.3d 219, 223 [49 Cal.Comp.Cases 126].)

B. The Determination Of Overlapping Disabilities After SB 899

1. Where An Employee Suffers An Industrial Injury Causing Permanent Disability To One Region Of The Body, And Where There Is A Prior Award Of Permanent Disability Involving And/Or Including Any Other Region(s) Of The Body, Section 4664 Requires The Apportionment Of Overlapping Permanent Disabilities

SB 899 repealed former section 4750 (Stats. 2004, ch. 34, §37) and, as relevant here, added current section 4664. (Stats. 2004, ch. 34, §35.) New section 4664 provides:

> "(a) The employer shall only be liable for the percentage of permanent disability directly caused by the injury arising out of and occurring in the course of employment.
>
> "(b) If the applicant has received a prior award of permanent disability, it shall be conclusively presumed that the prior permanent disability exists at the time of any subsequent industrial injury. This presumption is a presumption affecting the burden of proof.
>
> "(c)(1) 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. As used in this section, the regions of the body are the following:
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> (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 in subparagraphs (A) to (F), inclusive.

> "(2) 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."

For the reasons that follow, we hold that new section 4664 still requires the apportionment of overlapping permanent disabilities where an employee suffers an industrial injury causing permanent disability to one region of the body, and where there is a prior award of permanent disability involving and/or including other regions of the body.

There is no doubt that, in repealing former section 4750 and in enacting new section 4664, the Legislature intended to change the law relating to apportionment of permanent disability. (See *People v. Mendoza* (2000) 23 Cal.4th 896, 916 (presumption that the Legislature intends to change the meaning of a law when it alters the statutory language, as for example when it deletes express provisions of the prior version); *In re Lance W*. (1985) 37 Cal.3d 873, 887 (general rule is that a new enactment reflects a legislative purpose to change existing law); *Mosk v. Superior Court* (1979) 25 Cal.3d 474, 493 (a substantial change in the language of a statute by an amendment indicates an intention to change its meaning).)

Nevertheless, when the Legislature enacts a statute, it is presumed the Legislature has in mind existing laws and judicial decisions. (*Viking Pools, Inc. v. Maloney* (1989) 48 Cal.3d 602, 609; *Bailey v. Superior Court* (1977) 19 Cal.3d 970, 977, fn. 10; *Estate of McDill* (1975) 14 Cal.3d 831, 837, 839.) It also is presumed the Legislature did not intend to overthrow long-established principles of law unless such an intention is clearly expressed or necessarily implied. (*People v. Superior Court* (*Zamudio*) (2000) 23 Cal.4th 183, 199; *Torres v. Automobile Club of So. Cal.* (1997) 15 Cal.4th 771, 779; *Fuentes v. Workers' Comp. Appeals Bd.* (1976) 16 Cal.3d 1, 7 [41 Cal.Comp.Cases 42]; *Theodor v. Superior Court* (1972) 8 Cal.3d 77, 92.)

Here, there is nothing in new section 4664 that evinces a clear expression of legislative intent to abandon the longstanding policy of encouraging employers to hire workers with disabilities by assuring that such employers are not made liable for pre-existing disabilities if those workers subsequently sustain an industrial injury. To the contrary, the express language of new

section 4664 suggests the Legislature intended this policy to have continuing force and effect. Specifically, section 4664(a) states, "[t]he 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." (Emphasis added; see, also, Lab. Code, §4663 (the employer is liable only for "the permanent disability … caused by the direct result of [the] injury" and it is not liable for "the permanent disability … caused by other factors both before and subsequent to the industrial injury, including prior industrial injuries").)

Thus, we conclude that, as was true before the repeal of former section 4750 and continuing with the enactment of new section 4664, an employee is not entitled to be compensated for permanent disability resulting from a new industrial injury to the extent that this permanent disability is overlapped by prior permanent disability, even where the prior permanent disability involves and/or includes different regions of the body. (See *Mercier v. Workers' Comp. Appeals Bd*., *supra*, 16 Cal.3d 711 (prior back disability overlapping subsequent heart disability); *Johns-Manville v. Workers' Comp. Appeals Bd.* (*Carey*), *supra*, 87 Cal.App.3d 740 (prior back disability overlapping subsequent pulmonary disability); *Bookout v. Workers' Comp. Appeals Bd*., *supra*, 62 Cal.App.3d 214 (prior back disability overlapping subsequent heart disability); *Truck Ins. Exchange v. Industrial Acc. Com.* (*Tarantino*), *supra*, 235 Cal.App.2d 207 (prior neck/back/hand disability overlapping subsequent heart disability).) In this way, the employer in a subsequent injury case is held liable only for the permanent disability directly caused by that injury. On the other hand, the employee is entitled to be compensated for any *new* permanent disability directly caused by the new industrial injury.

We further note that section 4664(b) states only that any prior permanent disability shall be conclusively presumed to "exist[]" at the time of the subsequent injury. It does not require that the prior permanent disability be subtracted, but also it does not preclude subtraction. Thus, the language of section 4664(b) also supports our conclusion that a determination must be made regarding the *consequences* of the previously "exist[ing]" permanent disability – i.e., if the

pre-existing permanent disability and the current permanent disability overlap, there will be subtraction to the extent of that overlap, but, otherwise, there will be no subtraction.

Having concluded that the principles of overlap remain alive under new section 4664, we now address how these overlap principles are to be applied to apportionment determinations under new section 4664 in situations where an employee suffers an industrial injury causing permanent disability relating to one region of the body, but where there has been a prior industrial injury resulting in an award of permanent disability involving and/or including a different region of the body.

2. The Defendant Has The Burden Of Proving The Existence Of Any Prior Permanent Disability Award(s) Involving And/Or Including Any Other Region(s) Of The Body

Section 4664(b) applies only "[i]f the applicant has received a prior award of permanent disability." Thus, the provisions of section 4664(b) are not triggered unless a prior award of permanent disability exists.

We conclude it is defendant's burden to prove that applicant had a prior permanent disability award relating to a different region of the body. Placing this burden on defendant is consistent with the statutory provisions that the party holding the affirmative of an issue has the burden of proof by a preponderance of the evidence. (Lab. Code, §§3202.5, 5705.) Placing this burden on defendant is also consistent with the longstanding principle that, because it is the defendant that benefits from a finding of apportionment, it bears the burden of demonstrating that apportionment is appropriate. (*Pullman Kellogg v. Workers' Comp. Appeals Bd*. (*Normand*) (1980) 26 Cal.3d 450, 456 [45 Cal.Comp.Cases 170]; e.g., also, *Fresno Unified School Dist. v. Workers' Comp. Appeals Bd*. (*Humphrey*) (2000) 84 Cal.App.4th 1295, 1304 [65 Cal.Comp.Cases 1232]; *Ashley v. Workers' Comp. Appeals Bd*. (1995) 37 Cal.App.4th 320, 326 [60 Cal.Comp.Cases 683]; *Calhoun v. Workers' Comp. Appeals Bd*. (1981) 127 Cal.App.3d 1, 8 [46 Cal.Comp.Cases 1333].) *Robinson v. Workers' Comp. Appeals Bd*. (1981) 114 Cal.App.3d 593, 603 [46 Cal.Comp.Cases

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78].)[12] Under section 4664, it is still the defendant that benefits from a finding of apportionment. Although – as discussed below – section 4664 has effected some shift in the parties' respective burdens on apportionment in the context of a prior permanent disability award, we discern no legislative intent to completely overthrow this long-established principle. (See *People v. Superior Court* (*Zamudio*), *supra*, 23 Cal.4th at p. 199; *Torres v. Automobile Club of So. Cal.*, *supra*, 15 Cal.4th at p. 779; *Fuentes v. Workers' Comp. Appeals Bd.*, *supra*, 16 Cal.3d at p. 7 [41 Cal.Comp.Cases 42]; *Theodor v. Superior Court*, *supra*, 8 Cal.3d at p. 92.) Thus, it is defendant's burden to show that applicant *had* a prior permanent disability award, rather than applicant's burden to show he or she did *not* have one.

The preferred procedure for establishing the existence of a prior permanent disability award is for the defendant to offer in evidence a copy of the award, or to request that the WCAB take judicial notice of a prior award. If, for some reason, a copy of the prior permanent disability award cannot be produced,[13] then the existence of any prior permanent disability award may be shown by secondary evidence – *if the secondary evidence is sufficiently reliable and sufficiently establishes the substance of the lost or destroyed award*. (See Evid. Code, §1521; *Dart Industries, Inc. v. Commercial Union Ins. Co*. (2002) 28 Cal.4th 1059; *Prato-Morrison v. Doe* (2002) 103 Cal.App.4th 222.)[14] This opinion does not address what type(s) of secondary evidence might be

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[12] The "presumption affecting the burden of proof" language of 4664(b) has nothing to do with triggering defendant's burden to prove the existence of a prior permanent disability award, because: (1) the "presumption affecting the burden of proof" language relates back to the conclusive presumption; yet, the conclusive presumption is not even triggered until the existence of a prior permanent disability award has been established (i.e., "[*i*]*f* the applicant has received a prior award of permanent disability, it shall be conclusively presumed … "); and (2) a presumption affecting the burden of proof requires the party against whom the presumption operates to establish the non-existence of the presumed fact and, in the context of section 4664(b), it would make little sense to require a defendant to *disprove* the existence of a prior permanent disability award.

[13] For example, the WCAB's record of the permanent disability award may be destroyed (Cal. Code Regs., tit. 8, §§10755, 10758), and no other copy of it can be located.

[14] We do not mean to suggest that all of the Evidence Code provisions regarding secondary evidence are applicable in workers' compensation proceedings, because the WCAB is not bound by the Evidence Code in this context. (Lab. Code, §§5708, 5709.) Nevertheless, the Evidence Code provisions do provide some guidance with respect to secondary evidence issues.

used to establish the existence of a prior permanent disability award, but we will observe that the WCAB may draw reasonable inferences from any secondary evidence presented, if it is sufficiently reliable. (See *Leonard Van Stelle, Inc. v. Industrial Acc. Com*. (*Hartman*) (1963) 59 Cal.2d 836, 839 [28 Cal.Comp.Cases 140]; *Phoenix Indemnity Co. v. Industrial Acc. Com*. (*Hamilton*) (1948) 31 Cal.2d 856, 859 [13 Cal.Comp.Cases 118]; *Coborn v. Industrial Acc. Com*. (1948) 31 Cal.2d 713, 717 [13 Cal.Comp.Cases 89]; *Cal. Shipbuilding Corp. v. Industrial Acc. Com*. (*Baker*) (1946) 27 Cal.2d 536, 541-542 [11 Cal.Comp.Cases 14].)

3. When The Defendant Has Established The Existence Of Any Prior Permanent Disability Award(s) Involving And/Or Including Any Other Region(s) Of The Body, The Permanent Disability Underlying Any Such Award(s) Is Conclusively Presumed To Still Exist, i.e., The Applicant Is Not Permitted To Show Medical Rehabilitation From The Disabling Effects Of The Earlier Industrial Injury Or Injuries

Once a defendant establishes the existence of a prior award of permanent disability relating to a different region of the body, section 4664(b) provides, "it shall be conclusively presumed that the prior permanent disability exists at the time of any subsequent industrial injury."

Because section 4664(b) mandates "it shall be *conclusively* presumed that the prior permanent disability exists" (emphasis added), we conclude that, in the context of apportionment under section 4664(b), the Legislature intended to abrogate the line of cases that had allowed an injured employee to show he or she had medically rehabilitated from the effects of an earlier injury at the time of a subsequent injury. (See *Mercier v. Workers' Comp. Appeals Bd*., *supra*, 16 Cal.3d at p. 716, fn. 2; *Robinson v. Workers' Comp. Appeals Bd.* (1981), *supra*, 114 Cal.App.3d 593, at pp. 602-603 [46 Cal.Comp.Cases 78]; *Bookout v. Workmen's Comp. Appeals Bd.*, *supra*, 62 Cal.App.3d at pp. 223-224; *Amico v. Workmen's Comp. Appeals Bd.* (1974) 43 Cal.App.3d 592, 607-608 [39 Cal.Comp.Cases 845].)[15] Accordingly, an applicant cannot offer any medical or

[15] At this time, we need not and will not address the issue of whether an injured employee may still show that he or she has medically rehabilitated from a prior industrial or non-industrial condition to avoid apportionment under new section 4663.

testimonial evidence to contradict the conclusively presumed "prior permanent disability," i.e., he or she cannot attempt to demonstrate medical rehabilitation.[16]

4. When The Defendant Has Established The Existence Of Any Prior Permanent Disability Award(s) Involving And/Or Including Any Other Region(s) Of The Body, The Percentage Of Permanent Disability From The Prior Award(s) Will Be Subtracted From The Percentage Of Permanent Disability For The Body Region Of The Most Recent Injury, Unless The Applicant *Disproves* Overlap, i.e., The Applicant Demonstrates That The Prior Permanent Disability And The Current Permanent Disability Affect Different Abilities To Compete And Earn, Either In Whole Or In Part

Section 4664(b) provides, in relevant part:

> "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."

Thus, section 4664(b)'s first sentence creates a "conclusive" presumption that the prior permanent disability exists at the time of any subsequent industrial injury. The second sentence, however, states that this "conclusive" presumption is a "presumption affecting the burden of proof" – which is a rebuttable presumption. Hence, an inherent tension in section 4664(b) exists.

The Evidence Code establishes that there are only two types of presumptions: conclusive presumptions and rebuttable presumptions. (Evid. Code, §601 ("A presumption is either conclusive or rebuttable").)

The Evidence Code also establishes that a presumption affecting the burden of proof is a rebuttable presumption. (Evid. Code, §601 ("Every rebuttable presumption is either (a) a presumption affecting the burden of producing evidence or (b) a presumption affecting the burden of proof.").)

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[16] This conclusion is also consistent with Section 49 of SB 899, which states: "This act is an urgency statute necessary for the immediate preservation of the public peace, health, or safety within the meaning of Article IV of the Constitution and shall go into immediate effect. The facts constituting the necessity are: In order to provide relief to the state from the effects of the current workers' compensation crisis at the earliest possible time, it is necessary for this act to take effect immediately."

Where the law establishes a conclusive presumption, no evidence can be offered to dispute it. (*People v. McCall* (2004) 32 Cal.4th 175, 185 ("conclusive presumptions … are irrebuttable by definition"); 1 Witkin, Cal. Evidence (4th ed. 2000) Burden of Proof and Presumptions, §160, p. 301 ("a conclusive or indisputable presumption is entirely different from the ordinary rebuttable presumption: It need not have a logical basis, and no evidence may be received to contradict it."); 2 Jefferson, Cal. Evidence Benchbook (Cont. Ed. Bar, 3d ed. 2004) Presumptions, §46.6, p. 1055 ("A 'conclusive presumption' requires the trier of fact to find the existence of the presumed fact from the existence of the basic fact. An adverse party is not permitted to introduce evidence to contradict or rebut the existence of the presumed fact.").) Indeed, conclusive presumptions are not truly rules of evidence, but are substantive rules of law, which exist to further particular public policies and purposes. (*Estate of Cornelious* (1984) 35 Cal.3d 461, 464-465; *Kusior v. Silver* (1960) 54 Cal.2d 603, 619; *Federal Deposit Ins. Corp. v. Superior Court* (1997) 54 Cal.App.4th 337, 346.)

A presumption affecting the burden of proof is a rebuttable presumption. (Evid. Code, §601.) By law, "[t]he effect of a presumption affecting the burden of proof is to impose upon the party against whom it operates the burden of proof as to the nonexistence of the presumed fact." (Evid. Code, §606.) Like a conclusive presumption, a presumption affecting the burden of proof "implement[s] some public policy other than to facilitate the determination of the particular action in which the presumption is applied." (Evid. Code, §605; e.g., also, *City of Long Beach v. Workers' Comp. Appeals Bd*. (*Garcia*) (2005) 126 Cal. App. 4th 298, 314 [70 Cal.Comp.Cases 109]; *Gee v. Workers' Comp. Appeals Bd*. (2002) 96 Cal.App.4th 1418, 1425-1426 [67 Cal.Comp.Cases 236]; *Reeves v. Workers' Comp. Appeals Bd.* (2000) 80 Cal.App.4th 22, 30 [65 Cal.Comp.Cases 359]; *State Comp. Ins. Fund v. Workers' Comp. Appeals Bd*. (*Welcher*) (1995) 37 Cal.App.4th 675, 682-683 [60 Cal.Comp.Cases 717].) But, of course, a presumption affecting the burden of proof is rebuttable. (Evid. Code, §§601, 606.) The party against whom the presumption applies must produce evidence to *disprove* the presumed fact. (See *City of Long Beach v. Workers' Comp. Appeals Bd*. (*Garcia*), *supra*, 126 Cal. App. 4th at p. 314; *Gee v. Workers' Comp. Appeals*

Bd., *supra*, 96 Cal.App.4th at pp.1425-1426; *Reeves v. Workers' Comp. Appeals Bd.*, *supra*, 80 Cal.App.4th at p. 30.)

Of course, it is a basic principle of construction that meaning must be given to every word or phrase of a statute, if possible, so as not to cause any word or phrase to be mere surplusage. (*Hassan v. Mercy American River Hosp*. (2003) 31 Cal.4th 709, 716; *Moyer v. Workmen's Comp. Appeals Bd*. (1973) 10 Cal.3d 222, 230 [38 Cal.Comp.Cases 652]; *Dept. of Corrections v. Workers' Comp. Appeals Bd*. (*Stentz*) (2003) 109 Cal.App.4th 1720, 1725-1726 [68 Cal.Comp.Cases 853]; *McGee Street Productions v. Workers' Comp. Appeals Bd*. (*Peterson*) (2003) 108 Cal.App.4th 717, 723 [68 Cal.Comp.Cases 708].) Moreover, statutory phrases are not to be read in isolation; rather, they must be harmonized, both internally and with the entire statutory scheme of which they are a part, to the extent possible. (*State Farm Mut. Auto. Ins. Co. v. Garamendi* (2004) 32 Cal.4th 1029, 1043; *Chevron U.S.A., Inc. v. Workers' Comp. Appeals Bd*. (*Steele*) (1999) 19 Cal.4th 1182, 1194 [64 Cal.Comp.Cases 1]; *DuBois v. Workers' Comp. Appeals Bd*. (1993) 5 Cal.4th 382, 388 [58 Cal.Comp.Cases 286]; *Moyer v. Workmen's Comp. Appeals Bd*. (1973) 10 Cal.3d 222, 23-231 [38 Cal.Comp.Cases 652].) Therefore, it is our duty to harmonize both the first and second sentences of section 4664(b), if possible, so as to give effect to them both and so as *not* to render either sentence meaningless.

In light of these principles, we conclude that, once a defendant has established the existence of a prior award of permanent disability relating to a different region of the body, then the percentage of permanent disability found under the prior award will be subtracted from the current overall percentage of disability, *unless* the applicant *disproves* overlap by establishing that the prior permanent disability does not overlap the current permanent disability, either in whole or in part.

This interpretation of section 4664(b) harmonizes its first sentence, which provides that "it shall be conclusively presumed that the prior permanent disability exists at the time of any subsequent industrial injury," with its second sentence, which provides that "[t]his presumption is a presumption affecting the burden of proof." That is, consistent with the first sentence, the prior

permanent disability still will be conclusively presumed to "exist," and the applicant cannot show that he or she has medically rehabilitated from it. Nevertheless, consistent with the second sentence, the applicant will have the opportunity to disprove or negate apportionment, in whole or in part, by showing that his or her most recent injury caused some *new* permanent disability that did *not* previously "exist," i.e., that the new injury has produced separate and independent permanent disability that does not overlap the pre-existing permanent disability because the new disability affects *different* abilities to compete and earn. If, however, the applicant fails to disprove overlap, then the applicant cannot avoid the application of the conclusive presumption that the prior permanent disability still "exists" and, therefore, the prior percentage permanent disability rating will be deducted from the current overall percentage permanent disability rating, even where the disabilities are in different regions as described in section 4664(c).

Further, the phrase "prior permanent disability" in section 4664(b) does *not* mean the *factors of disability* upon which the prior permanent disability award was based.[17] To so interpret section 4664(b) would mean that, before the conclusive presumption could attach, the defendant would have both the burden of proving the existence of a prior permanent disability award *and* the burden of proving the nature of the permanent disability upon which that award was based. As noted earlier, the trigger for the conclusive presumption is the existence of a prior award of permanent disability, not the factors of permanent disability underline such an award.

Additionally, if a defendant were required to establish the prior factors of permanent disability as well as the existence of the prior permanent disability award, this effectively would cause the *second* sentence of section 4664(b) to be read out of the statute, in violation of the principles of construction discussed above. Once more, the second sentence of section 4664(b)

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[17] See *Hegglin v. Workmen's Comp. Appeals Bd*., *supra*, 4 Cal.3d at pp. 171, 174 ("The individual physical and mental abnormalities resulting from [the] injury are referred to as 'factors' of permanent disability" and it is "[*t*]*he individual factors taken together* [*that*] *constitute the entire permanent disability*;" i.e., the employee's prior "*permanent disability is a composite of all the factors of disability arising from* [*that injury*]." (emphasis added); *Franklin v. Workers' Comp. Appeals Bd*. (1978) 79 Cal.App.3d 224, 248 [43 Cal.Comp.Cases 310] ("All the factors of disability … must be determined in order to ascertain the entire permanent disability"); 1 Cal. Workers' Compensation Practice (Cont. Ed. Bar, 4th ed. (June 2005 update)), Permanent Disability, §5.40, p. 326 [and, generally, §§5.41-5.45, pp. 326-331].

provides, in essence, that the conclusive presumption that the prior permanent disability exists "is a presumption affecting the burden of proof." As discussed above, a "presumption affecting the burden of proof" requires the party *against* whom the presumption operates to establish the *nonexistence* of the presumed fact. (Evid. Code, §606.) Reading the first and second sentences of section 4664(b) together, as we must, the conclusive presumption of the existence of prior permanent disability in the first sentence of section 4664(b) operates *in favor* of defendant. Therefore, any interpretation of the second sentence must require applicant to *disprove* something, while at the same time not nullifying whatever has been conclusively established.

Both of these aspects of section 4664(b) are fulfilled by requiring the applicant to *disprove* the existence of overlap by establishing the nature of the permanent disability upon which the prior permanent disability award was based, rather than by requiring the defendant to *prove* the existence of overlap by establishing the nature of that permanent disability. This is because, once the character of the permanent disability underlying the prior permanent disability award is established, the determination of apportionment is essentially a mechanical process – not a burden of proof issue – i.e., as will be discussed below, it is determined using substantially the same overlap principles that have been historically applied in the cases discussed in Section II-A, above. Thus, if a defendant had to prove not only the existence of a prior permanent disability award, but also the character of the permanent disability upon which the prior award was predicated, there would be nothing left for the applicant to *disprove*, in contravention to the second sentence of section 4664(b).

Moreover, as discussed above, a conclusive presumption is a substantive rule of law adopted to further some particular public policy or purpose. (*Estate of Cornelious*, *supra*, 35 Cal.3d at p. 464; *Kusior v. Silver*, *supra*, 54 Cal.2d at p. 619; *Federal Deposit Ins. Corp. v. Superior Court*, *supra*, 54 Cal.App.4th at p. 346.) Similarly, a presumption affecting the burden of proof is intended to "implement some public policy other than to facilitate the determination of the particular action in which the presumption is applied." (Evid. Code, §605.) It appears that the public policies behind the twofold conclusive and rebuttable presumptions of section 4664(b) are

that apportionment of pre-existing disability will occur (i.e., the pre-existing disability will be deducted), unless some showing is made (other than medical rehabilitation) why apportionment should not occur. To interpret section 4664(b) to mean that, once a prior permanent disability award has been established, the prior permanent disability percentage will be deducted *unless* applicant shows that the present and pre-existing disabilities do *not* overlap, in whole or in part, is consistent with these policies.

We will not now address what documentary evidence and/or testimony might suffice to establish the nature of the prior permanent disability; however, we reiterate that the WCAB will have the power to draw reasonable inferences from the record before it. (*Leonard Van Stelle, Inc. v. Industrial Acc. Com*. (*Hartman*), *supra*, 59 Cal.2d at p. 839; *Phoenix Indemnity Co. v. Industrial Acc. Com*. (*Hamilton*), *supra*, 31 Cal.2d at p. 859; *Coborn v. Industrial Acc. Com*., *supra*, 31 Cal.2d at p. 717; *Cal. Shipbuilding Corp. v. Industrial Acc. Com*. (*Baker*), *supra*, 27 Cal.2d at pp. 541-542.)[18] Of course, if an applicant introduces evidence to show that his or her present and pre-existing disabilities do *not* overlap, the defendant is entitled to introduce rebuttal evidence to show why overlap should be found.

5. Under Section 4664, The Issue Of Whether The Prior Permanent Disability For A Different Region Of The Body Overlaps The Current Disability Is Determined Using Substantially The Same Principles That Were Applied Prior To The Enactment Of SB 899

If the defendant meets its burden of proving the existence of a prior permanent disability award relating to a different region of the body, and if the applicant meets his or her burden of establishing the character of the permanent disability that was the basis of the prior award (from which he or she cannot assert medical rehabilitation), then apportionment shall be determined substantially in accordance with the same overlap principles that were historically applied in cases decided before the enactment of SB 899. (See Section II-A, *supra*.)

We state that apportionment shall be determined "substantially" in accordance with historical overlap principles because we recognize that, in future cases, the differences between

[18] We recognize that, often, the applicant may satisfy this burden by establishing the *factors of disability* underlying the prior permanent disability award. Nevertheless, future cases may illustrate how overlap may be negated even without the specific factors of disability being shown.

how permanent disability is determined under the April 1997 Schedule for Rating Permanent Disabilities and how it is determined under the January 2005 Schedule for Rating Permanent Disabilities may present novel overlap questions. None of these questions are presented here, however, and we will not speculate on them.

C. Application Of These Principles To The Present Case

The WCJ correctly determined that applicant's May 8, 2002 back injury caused 10% permanent disability, after apportionment.

At trial, the parties stipulated that applicant's *overall* permanent disability is 70%, after adjustment for age and occupation. The parties then placed the questions of the application of section 4664 and of apportionment (overlap) in issue.

To claim apportionment under section 4664(b), defendant had the burden of proving the existence of any prior permanent disability award(s) including or involving different regions of the body. Defendant satisfied this burden by offering in evidence: (1) a December 8, 1999 stipulated award finding that applicant's November 27, 1995 left knee injury caused 34-½% permanent disability; and (2) a March 28, 2003 stipulated award finding that applicant's February 12, 1999 left shoulder, left knee, left ankle, and right wrist injury caused 42% permanent disability.

Under section 4664(b), applicant was not entitled to assert that he had medically rehabilitated from the permanent disability caused by his two prior injuries. However, he was entitled to disprove apportionment by demonstrating that his conclusively existing permanent disability, upon which the December 8, 1999 and March 28, 2003 awards were based, does not overlap the permanent disability caused by his May 8, 2002 back injury, either in whole or in part.

On this record, applicant succeeded in disproving total overlap, i.e., he established there is only partial overlap between his current disability and the disability upon which his prior permanent disability awards were based.

The evidence establishes: (1) that the stipulated 34-½% permanent disability rating for applicant's November 27, 1995 left knee injury was based on a preclusion from heavy lifting, in accordance with Dr. von Rogov's August 13, 1998 report; and (2) that that the stipulated 42%

permanent disability rating for applicant's February 12, 1999 left shoulder, left knee, left ankle, and right wrist injury was based on a limitation to light work, after apportionment to applicant's prior preclusion from heavy lifting, in accordance with Dr. von Rogov's June 6, 2001, February 28, 2001, December 13, 2001, and May 9, 2002 reports. Accordingly, applicant had pre-existing overall disability consisting of a limitation to light work, from which he cannot assert medical rehabilitation.

The evidence also establishes that the parties' stipulation that applicant's *overall* disability following his May 8, 2002 back injury is 70%, after adjustment for age and occupation, is based on an *overall* a limitation to semi-sedentary work, in accordance with Dr. von Rogov's November 3, 2002, November 30, 2002, February 17, 2003, and January 26, 2004 reports.

Finally, these four reports of Dr. von Rogov state that the *increase* in disability from a limitation to light work to a limitation to semi-sedentary work is a result of applicant's May 8, 2002 back injury.

The pre-existing light work limitation only partially overlaps the current semi-sedentary work limitation. (See April 1997 Schedule for Rating Permanent Disabilities, at pp. 2-14 – 2-15 & fn. 3.) Therefore, applicant is entitled to be compensated for the difference. This is what the WCJ did. Specifically, he found that applicant's May 8, 2002 back injury caused 10% permanent disability, after apportionment. He arrived at this 10% rating by deducting the pre-existing 60% disability (which was based on applicant's pre-existing light work limitation, as adjusted by the DEU for applicant's current age)[19] from the stipulated 70% overall disability (which was based on applicant's current overall limitation to semi-sedentary work, as adjusted for his current age and occupation).

Accordingly, the WCJ followed the correct procedure. On this record, with the evidentiary basis for the prior permanent disability awards having been established, it would not have been

[19] No issue has been raised by either party with respect to the DEU's adjustment of the pre-existing light work limitation to 60%. Our opinion, therefore, does not address whether this adjustment was or was not legally correct.

appropriate for the WCJ to utilize a methodology of simply adding the percentages of permanent disability from the prior awards and then subtracting that total from the current overall percentage of permanent disability.[20]

As a final point, we must briefly address applicant's contention that, if apportionment is to apply, it is limited to subtracting the monetary equivalent of the pre-existing disability from the monetary equivalent of the current overall disability. This issue has already been resolved adversely to applicant by our en banc decision in *Nabors v. Piedmont Lumber and Mill Co.* (2005) 70 Cal.Comp.Cases 856 (Appeals Board en banc). We will not re-visit *Nabors* here.

Accordingly, we affirm the WCJ's May 31, 2005 decision finding that applicant's May 8, 2002 back injury caused 10% permanent disability, after apportionment.

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[20] Had there been a *single* prior industrial injury and award or multiple prior injuries and awards with multiple body parts involved, the methodology for determining the prior percentage of permanent disability and the resulting current overall permanent disability *might* have been different. However, those situations are not presented here, so we need not and will not address those potential issues.

For the foregoing reasons,

IT IS ORDERED, as the Decision After Reconsideration of the Board (En Banc), that the Findings and Award issued by the workers' compensation administrative law judge on May 31, 2005, be, and it is hereby, **AFFIRMED** [21]

WORKERS' COMPENSATION APPEALS BOARD (EN BANC)

/s/
JOSEPH M. MILLER, Chairman

/s/
MERLE C. RABINE, Commissioner

/s/
WILLIAM K. O'BRIEN, Commissioner

/s/
JAMES C. CUNEO, Commissioner

/s/
FRANK M. BRASS, Commissioner

/s/
RONNIE G. CAPLANE, Commissioner

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

October 26, 2005

SERVICE BY MAIL ON SAID DATE TO ALL PARTIES AS SHOWN ON THE OFFICIAL ADDRESS RECORD, EXCEPT LIEN CLAIMANTS

NPS/tab

[21] Commissioner Janice J. Murray is on leave and did not participate in this decision.