WORKERS' COMPENSATION APPEALS BOARD
STATE OF CALIFORNIA

MATTHEW HUNT, *Applicant*

vs.

CALIFORNIA HIGHWAY PATROL, LEGALLY UNINSURED, administered by STATE COMPENSATION INSURANCE FUND, *Defendants*

Adjudication Number: ADJ13285870
Riverside District Office

OPINION AND ORDER DENYING PETITION FOR RECONSIDERATION

Applicant seeks reconsideration of the Findings and Award (F&A) issued on October 26, 2023, wherein the workers' compensation administrative law judge (WCJ) found that applicant, while employed as a Highway Patrol Officer from March 13, 1997, to May 13, 2020, sustained industrial injury to the low back, heart, hypertension, psyche, abdomen/groin (in the form of prostate cancer and urinary incontinence), hemorrhoids, hiatal hernia and GERD. The WCJ found that applicant sustained a prior industrial injury resulting in 66 percent permanent disability, and that the prior and current disabilities exceeded the 100 percent lifetime accumulative limit set forth in Labor Code[1] section 4664(c)(1)(G). The WCJ reduced applicant's current disability levels to comply with the lifetime limit for that body region, then combined the resulting disability with the disability arising out of other body regions described in section 4664(c)(1), resulting in a net award of 43 percent disability.

Applicant contends that section 4664(c) does not apply to presumptive injuries, and that applicant's prior industrial award is subsumed by the instant case because there is no legal apportionment, and because applicant's current and prior injuries overlap.

[1] All further references are to the Labor Code unless otherwise noted.

We have received an Answer from defendant. The WCJ prepared a Report and Recommendation on Petition for Reconsideration (Report), recommending that the Petition be denied.

We have considered the Petition for Reconsideration, the Answer, and the contents of the Report, and we have reviewed the record in this matter. For the reasons discussed below, we will deny reconsideration.

FACTS

Applicant sustained injury to the low back, heart, hypertension, psyche, abdomen/groin (in the form of prostate cancer and urinary incontinence), hemorrhoids, hiatal hernia and GERD, while employed as a Highway Patrol Officer by defendant California Highway Patrol from March 13, 1997, to May 13, 2020.

Applicant has previously sustained injury to the heart and hypertension while employed as an Officer for the California Highway Patrol from March 13, 1997, to January 20, 2012, resulting in a December 23, 2013 Award of 66 percent permanent disability. (Ex. C, Stipulations with Request for Award, December 23, 2013.)

The parties have selected Qualified Medical Evaluators (QMEs) Mark M. Davidson, M.D., in gastroenterology and internal medicine, and Susan Velasquez, Ph.D., in psychology. Applicant has also been evaluated by Keola Chun, M.D., in orthopedic medicine.

On September 6, 2023, the parties proceeded to trial, and stipulated to injury to the body parts of the low back, heart, hypertension, psyche, abdomen/groin (in the form of prostate cancer and urinary incontinence), hemorrhoids, hiatal hernia and GERD, and the need for future medical treatment. (Minutes of Hearing (Minutes), September 13, 2023, at p. 2:3.) The parties placed in issue permanent disability, apportionment, and attorney fees. The parties also placed in issue whether applicant qualified for various statutory presumptions applicable to specified safety officers, including sections 3213.2 (duty belt presumption), 3212.1 (cancer presumption), 3212.3 (heart presumption), and 3212 (hernia presumption). The parties also raised the issue of the applicability of the non-attribution mandate of section 4663(e), apportionment under section 4664(b), and the lifetime "cap" for permanent disability of section 4664(c)(1)(G). The parties submitted the matter for decision without testimony.

On October 26, 2023, the WCJ issued his decision, finding in relevant part that applicant qualified for all of the claimed statutory presumptions. (F&A, Finding of Fact No. 4.) Pursuant to the "non-attribution clause" of section 4663(e), the WCJ determined that the presumptively injured body parts were not subject to apportionment under section 4463. (F&A, Finding of Fact No. 6.)

The WCJ further found that applicant had sustained a prior injury for which he received an award of 66 percent for "heart and hypertension," and that the "lifetime cap" for the award of permanent disability of section 4664(c)(1)(G) applied. (F&A, Findings of Fact No. 5 and 7.) The WCJ awarded net permanent disability of 43 percent. In the accompanying Opinion on Decision, the WCJ explained that applicant's prior award of 66 percent fell within the body region described in section 4664(c)(1)(G), and that all of applicant's current permanent disability also fell within the same body region, save the lumbar spine and psychological disabilities. (Opinion on Decision, at p. 9.) Because applicant's current disability when combined with his prior award of 66 percent would exceed the 100 percent limit of section 4664(c), the permanent disability falling within the same body region of section 4664(c)(1)(G) was limited to an additional 34 percent. The WCJ combined the 34% available under section 4664(c)(1)(G) with the 13 percent permanent disability for the lumbar spine and zero percent for psychological injury, yielding a net permanent disability of 43 percent. (Opinion on Decision, at pp. 10-11.)

Applicant's Petition for Reconsideration (Petition) contends that section 4664(c) does not apply to presumptive injuries. Applicant cites to our decision in *Bates v. County of San Mateo* (March 13, 2019, ADJ7497019) [2019 Cal. Wrk. Comp. P.D. LEXIS 72] (*Bates*), where a panel of the Appeals Board applied the more specific and recent statutory provisions of section 4663(e) over the more general provisions of section 4664(a). Applicant avers that section 4663(e) "does not make Labor Code Section 4664 ineffectual, it simply does not allow apportionment for presumptive injuries." (Petition, at 5:9.) Similarly, in *California Highway Patrol v. Workers' Comp. Appeals Bd.* (*Santiago*) (2022) 87 Cal.Comp.Cases 1011 [2022 Cal. Wrk. Comp. LEXIS 51] (writ denied) (*Santiago*), a panel of the Appeals Board held that section 4663(e) precluded apportionment under section 4664(b). Applicant contends that 4663(e) precludes apportionment under section 4664(c) because of the overarching principle that "a safety officer should be compensated for the full effect of a presumptive injury or injuries." (Petition, at p. 7:20.) Applicant also asserts that "the court should follow the method applied in *Santiago* and give a monetary credit for monies paid [as against the prior award] as there is complete overlap without recovery

instead of sidestepping the anti-attribution clause of Labor Code §4663(e)." (Petition, at 8:20.) Applicant further contends that the WCJ's application of section 4664(c) is inequitable and contrary to legislative intent. (Petition, at 9:9.)

Defendant's Answer observes that in section 4664, subsections (a) and (b) are apportionment provisions, while subsection (c) is a lifetime cap based on body regions. (Answer, at 3:18.) Defendant also submits that the language of section 4664(c) is clear and unambiguous, obviating the need to resort to rules of statutory construction. (*Id.* at p. 7:9.) Defendant asserts:

> The mandate of 4664(c)(1) is clear: to ensure applicants do not receive lifetime awards to the same region or body part which results in permanent disability exceeding 100%. There is no case law that the anti-attribution clause changes the Legislature's intent to limit permanent disability to 100% for the same region of body nor is there case law finding "presumptive injuries" are an exception to §4664(c)(1). *Bates* and *Santiago* do not discuss §4663(e) in conjunction with §4664(c)(1) because as the WCJ found, a lifetime cap on permanent disability is an entirely different legal issue than apportionment.
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> (Answer, at p. 10:17.)

The WCJ's Answer similarly distinguishes the apportionment provisions found in section 4664 (a) and (b) from the lifetime accumulative maximum of 100 percent disability found in subsection (c).

DISCUSSION

Section 4663(a) provides that "[a]pportionment of permanent disability shall be based on causation." (Lab. Code, § 4663(a).) Subsections (b) and (c) generally require that evaluating physicians address apportionment and describe the minimum requirements for the physician's apportionment analysis. (Lab. Code, §§ 4663(b)-(c).) However, subsection (e) provides that, "[s]ubdivisions (a), (b), and (c) do not apply to injuries or illnesses covered under Sections 3212, 3212.1, 3212.2, 3212.3, 3212.4, 3212.5, 3212.6, 3212.7, 3212.8, 3212.85, 3212.9, 3212.10, 3212.11, 3212.12, 3213, and 3213.2." (Lab. Code, § 4663(e).)

Here, there is no dispute that applicant is entitled to multiple presumptions found in section 3212 et seq., including the "duty belt presumption" of section 3213.2, the cancer presumption of section 3212.1, the heart trouble presumption of section 3212.3, and the hernia presumption found in section 3212. Pursuant to section 4663(e), each of these presumptive injuries or illnesses precludes the apportionment otherwise mandated under 4663 subsections (a), (b), and (c). (Lab.

Code, § 4663(e).) Accordingly, the WCJ's Findings of Fact provide that "[d]ue to the 'non-attribution clause' in Labor Code 4663(e), apportionment to 'other causes' under Labor Code 4663 does not apply to the injuries/disability that falls under the following presumptions Labor Codes." (F&A, Finding of Fact No. 6.)

However, and notwithstanding inapplicability of apportionment under section 4663(e), the WCJ also determined that the lifetime accumulative limits of section 4664(c) would limit the award of permanent disability.

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.
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> (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.
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> (c)
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> (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.
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> (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.

(Lab. Code, § 4664.)

The WCJ's Opinion on Decision explains that applicant's industrial injuries in the present matter resulted in 13 percent lumbar spine disability. Applicant's injuries also resulted in permanent disability of 55 percent for heart disease, 69 percent for hypertension, 2 percent for the lower gastrointestinal tract, 3 percent for the upper gastrointestinal tract, 11 percent for the bladder, 54 percent for sequelae of prostate cancer, and 0 percent for psychiatric injury.

Turning to the body regions described in section 4664(c), the WCJ determined that applicant's low back disability of 13 percent would fall under section 4664(c)(1)(D), while applicant's psychiatric disability of zero percent was not relevant to the analysis. The WCJ determined that every other body part and corresponding percentage of disability would fall under the "catch-all" provisions of section 4664(c)(1)(G), which applies to "[t]he head, face, cardiovascular system, respiratory system, and all other systems or regions of the body not listed in subparagraphs (A) to (F), inclusive." (Lab. Code, § 4664(c)(1)(G).) The WCJ determined that applicant's prior award of 66 percent disability arising out injury to the "heart and hypertension" fell within the same body region described under subsection section 4664(c)(1)(G). Thus, the maximum percentage of allowable disability under the lifetime accumulative limit for injuries falling within the catch-all provision of section 4664(c)(1)(G) was 100 percent, less the prior award of 64 percent, or 34 percent. Because the permanent disability attributable to applicant's injuries that also fell within the body regions described under section 4664(c)(1)(G) would far exceed 34 percent permanent disability, the WCJ awarded the maximum allowable percent of 34 percent for the body regions described in section 4664(c)(1)(G), which was then combined with applicant's low back disability of 13 percent to yield final disability of 43 percent. (F&A, Finding of Fact No. 8.)

Applicant contends that section 4663(e) obviates all apportionment under 4664 generally, and the lifetime accumulative maximums set forth in 4664(c) specifically. Applicant cites to our panel decision in *Bates* and *Santiago* for the proposition that the anti-attribution features of section 4663(e) preclude apportionment under 4664 subsections (a) and (b), respectively. Applicant contends that section 4463(e) would similarly preclude the application of the lifetime accumulative limit of 100 percent found in section 4664(c).

The WCJ's Report acknowledges that "the court did not apply apportionment under Labor Code 4663, 4664(a) nor 4664(b)." (Report, at p. 3.) However, the Report also observes that the

salient question is "whether Labor Code 4664(c)(1) should be interpreted as another apportionment statute analogous to Labor Code 4664(a) or 4664(b)." (*Ibid.*)

The Report answers this question in the negative, finding that subsection (c) is not an apportionment statute, and that the subsection is not subject to the anti-attribution features of section 4663(e):

> It is the court's position that based on the plain interpretation of the language of Labor Code 4664(c)(1) it is not apportionment. In its' Opinion on Decision the court noted that it agreed with rationale noted in the prior panel decision *McGowan v. City of L.A*, which stated:
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> > "In her Report the WCJ describes her application of section 4664(c)(1) as a form of "apportionment." However, the application of that provision does not involve apportionment, which looks at the injured worker's current permanent disability in order to "parcel out its causative sources-nonindustrial, prior industrial, current industrial- and decide the amount directly caused by the current industrial source." (*Brodie v. Workers' Comp. Appeals Bd.* (2007) 40 Cal.4th 1313, 1328 [57 Cal. Rptr. 3d 644, 156 P.3d 1100, 72 Cal.Comp.Cases 565] (Brodie); cf. *Benson v. Workers' Comp. Appeals Bd.* (2009) 170 Cal.App.4th 1535 [89 Cal. Rptr. 3d 166, 74 Cal.Comp.Cases 113]; *Acme Steel v. Workers' Comp. Appeals Bd.* (*Borman*) (2013) 218 Cal.App.4th 1137 [160 Cal. Rptr. 3d 712, 78 Cal.Comp.Cases 751].) Instead, section 4664(c)(1) imposes a Legislatively created 100% lifetime cap on the total amount of permanent disability that a worker may accumulate and be awarded for each "region of the body" defined in that statute." *McGowan v. City of L.A.*, 2015 Cal. Wrk. Comp. P.D. LEXIS 24, *7-8 (Cal. Workers' Comp. App. Bd. January 7, 2015)
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> Petitioner acknowledges the holdings in the panel decision of *McGowan v. City of L.A* (*supra*), which applied Labor Code 4664(c)(1) to a presumptive injury, but contends that the decision "precedes both Bates and Santiago and as such did not consider the rationale..." in those cases. The court disagrees with the contention that the holding in *McGowan*, and the court's current opinion, are in conflict with the rationale in *Bates* and *Santiago*. *Bates* and *Santiago* extend the provisions of 4663(e) to the apportionment provisions under Labor Code 4664, however if the application of Labor Code 4664(c)(1) is not apportionment there is no conflict between the rationale in those decisions and that in McGowan nor the current Opinion on Decision.
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> Furthermore, contained within the language of Labor Code 4664(c)(1) the legislature has already identified the exceptions to the cap on the accumulation of awards exceeding 100% for a specific region of the body. That exception is

> limited to cases where "the employee's injury or illness is conclusively presumed to be total in character pursuant to Section 4662." There is no exception identified for the statutorily presumptive injuries for safety officers, statutes which existed at the time that Labor Code 4664(c)(1) was written and enacted. It is a long standing cannon of statutory construction that the express mention of one thing excludes all others, so the exception to Labor Code 4664(c)(1) for conclusively presumed total disability injuries pursuant to Section 4662 should be interpreted as the only situation in which the lifetime cap is inapplicable.
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> (Petition, at pp. 3-4.)

We agree with the WCJ's analysis. Our jurisprudence with respect to the anti-attribution requirements of section 4663(e) has not limited the application of section 4664(c) because section 4664(c) governs the lifetime accumulation of permanent disability rather than issues of causal attribution. (See *Russell v. County of Los Angeles* (June 9, 2021, ADJ12319674) [2021 Cal. Wrk. Comp. P.D. LEXIS 152] (writ den.) [section 3212.1 presumption does not preclude application of prior award of 34 percent against lifetime regional maximum under section 4664(c)(1)(G)]; *Ross v. California Highway Patrol* (2020) 86 Cal.Comp.Cases 99) [2020 Cal. Wrk. Comp. P.D. LEXIS 331] [section 3212.5 heart presumption does not preclude application of prior awards totaling 59 percent against lifetime regional maximum under section 4664(c)(1)(G)]; *Varga v. City of Los Angeles* (July 10, 2019, ADJ11278324) [2019 Cal. Wrk. Comp. P.D. LEXIS 253] [section 3212.1 cancer presumption does not obviate the application of 4664(c) in principle, but lifetime cap not applied due to failure of quantum of proof]; *McGowan v. City of Los Angeles* (January 7, 2015, ADJ7912683) [2015 Cal. Wrk. Comp. P.D. LEXIS 24] [section 3212.1 presumption does not preclude application of prior awards totaling 87 percent against lifetime regional maximum under section 4664(c)(1)(G)].)

The WCJ's determination finds further support in the well-established rule of statutory construction that where exceptions to a general rule are specified by statute, other exceptions are not to be implied or presumed in the absence of a clear legislative intent to the contrary. (*People v. Guillen* (2013) 212 Cal.App.4th 992 [51 Cal.Rptr.3d 514]; *People v. Palacios* (2007) 41 Cal.4th 720, 732 [62 Cal.Rptr.3d 145]; *Collins v. Superior Court* (2001) 89 Cal.App.4th 1244 [66 Cal.Comp.Cases 706].) Here, the legislature has provided that the lifetime accumulation of permanent disability in specified body regions may not exceed 100 percent. (Lab. Code, § 4664(c)(1).) The legislature has further specified that the lifetime limits are inapplicable only in

cases of conclusive disability under section 4662(a).[2] Accordingly, the legislature has specified that the sole exception to section 4664(c)(1) rests in those conditions defined under section 4662(a), and additional exceptions are not to be implied or presumed absent clear evidence of legislative intent. (See also *California Teachers Assn v. Governing Bd. of Rialto Unified School Dist.* (1997) 14 Cal.4th 627, 633 [59 Cal.Rptr.2d 671] ["[t]his court has no power to rewrite the statute so as to make it conform to a presumed intention which is not expressed"].)

In summary, we concur with the WCJ's conclusion that section 4664(c) is appropriately distinguished from the apportionment requirements of 4664 subsections (a) and (b), in that subsection (c) does not concern causal attribution. Rather, subsection (c) is a lifetime accumulative limit to permanent disability arising out of injuries to statutorily defined body regions. We therefore conclude that although applicant is entitled to the presumptions of sections 3212, 3212.1, 3212.3, and 3213.2, section 4663(e) does not preclude the application of the lifetime accumulative limit of section 4664(c). Here, the WCJ properly applied the lifetime limits specified by the legislature to applicant's past and current disabilities under section 4664(c)(1)(G), and then appropriately combined those disabilities with applicant's disabilities arising under other body regions described in section 4664(c)(1). We will affirm the WCJ's F&A, accordingly.

[2] Labor Code section 4662 specifies that certain permanent disabilities shall be "conclusively presumed to be total character," including the loss of both eyes or the sight thereof; the loss of both hands or the use thereof; an injury resulting in a practically total paralysis; or an injury to the brain resulting in permanent mental incapacity.

For the foregoing reasons,

IT IS ORDERED that the Petition for Reconsideration is **DENIED**.

WORKERS' COMPENSATION APPEALS BOARD

/s/ JOSEPH V. CAPURRO, COMMISSIONER

I CONCUR,

/s/ ANNE SCHMITZ, DEPUTY COMMISSIONER

/s/ CRAIG SNELLINGS, COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

January 19, 2024

SERVICE MADE ON THE ABOVE DATE ON THE PERSONS LISTED BELOW AT THEIR ADDRESSES SHOWN ON THE CURRENT OFFICIAL ADDRESS RECORD.

MATTHEW HUNT
O'MARA & HAMPTON
STATE COMPENSATION INSURANCE FUND

SAR/abs

I certify that I affixed the official seal of the Workers' Compensation Appeals Board to this original decision on this date. *abs*