

1 **WORKERS' COMPENSATION APPEALS BOARD**

2 **STATE OF CALIFORNIA**

3  
4 **ERIC PASQUOTTO,**

5 *Applicant,*

6 **vs.**

7 **HAYWARD LUMBER; CONNECTICUT**  
8 **INDEMNITY INSURANCE COMPANY; and**  
9 **ATHENS ADMINISTRATORS (Adjusting**  
10 **Agent),**

11 *Defendant(s).*

**Case Nos. GRO 0028123**  
**GRO 0028394**

**OPINION AND DECISION**  
**AFTER RECONSIDERATION**  
**(EN BANC)**

12 We granted reconsideration to further study the issue of apportionment under Labor Code  
13 sections 4663 and 4664,<sup>1</sup> as enacted by Senate Bill 899 (SB 899),<sup>2</sup> in situations where an  
14 employee suffers an industrial injury causing permanent disability and where there has been a  
15 prior industrial injury that was settled by an approved compromise and release agreement.  
16 Because of the important legal issues presented, and in order to secure uniformity of decision in  
17 the future, the Chairman of the Appeals Board, upon a majority vote of its members, assigned this  
18 case to the Appeals Board as a whole for an en banc decision. (Lab. Code, § 115.)<sup>3</sup>

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23 <sup>1</sup> Unless otherwise indicated, all further statutory references are to the Labor Code.

24 <sup>2</sup> Stats. 2004, ch. 34, §§ 34 & 35.

25 <sup>3</sup> The Appeals Board's en banc decisions are binding precedent on all Appeals Board panels and  
26 workers' compensation administrative law judges. (Cal. Code Regs., tit. 8, § 10341; *City of Long Beach v.*  
27 *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];  
see also Govt. Code, § 11425.60(b).)

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

- 2 (1) An order approving a compromise and release agreement, without  
3 more, is not a “prior award of permanent disability” within the  
4 meaning of section 4664(b);
- 5 (2) Where there is no “prior award of permanent disability” within the  
6 meaning of section 4664(b), the medical reports and other evidence  
7 relating to a prior industrial injury that was settled by a compromise  
8 and release still may be relevant in determining whether any of the  
9 permanent disability found after a subsequent industrial injury was  
10 caused by “other factors” under section 4663; and
- 11 (3) The concept of medical rehabilitation from a prior industrial disability  
12 remains viable under section 4663; however, even if an injured  
13 employee has medically rehabilitated from a prior industrial disability,  
14 this does not necessarily preclude a prior industrial injury from being  
15 an “other factor” causing the employee’s present disability.

16 **I. BACKGROUND**

17 This matter involves three industrial injuries sustained by Eric Pasquotto (applicant).<sup>4</sup>  
18 Applicant’s first injury was settled by an approved compromise and release. His two subsequent  
19 injuries – involving a different employer – are now pending before us, with the parties disputing  
20 the issue of apportionment.

21 **A. The First Injury**

22 On May 9, 1998, applicant sustained an industrial injury to his low back while employed as  
23 a carpet layer by Joseph Rodney Pospisil (Pospisil), who was insured by State Compensation  
24 Insurance Fund (SCIF). Applicant received initial treatment for this injury from various  
25 physicians. An MRI of June 8, 1998 reflected that he had a disc herniation at L5-S1, as well as a

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27 <sup>4</sup> There are references in the record to additional injuries, but no party has asserted they are relevant here.

1 disc protrusion at L4-5. In a July 1998 report, one physician suggested that applicant might  
2 benefit from an L5-S1 discectomy.

3 On July 27, 1998, applicant was admitted to the hospital with severe back pain. There, he  
4 was treated with pain medications and kept on bed rest. He was discharged on July 30, 1998.

5 On July 31, 1998 (the next day), he was again admitted to the hospital, this time with  
6 pulmonary emboli. He was treated with anti-coagulants and discharged on August 4, 1998.

7 On August 21, 1998, applicant started treatment for his back with Richard D. Kahmann,  
8 M.D., an orthopedic surgeon. In his initial report, Dr. Kahmann reviewed the June 1998 MRI  
9 scan, which he described as “suboptimal.” Nevertheless, based on the MRI scan, Dr. Kahmann  
10 diagnosed: moderate degenerative disc changes/disc desiccation at L4-5 and L5-S1; a moderate  
11 disc herniation at L5-S1, appearing to just touch the left S1 nerve root; a smaller herniation at L4-  
12 5; and a herniation at L3-4, which may contact the left L4 nerve root. Dr. Kahmann recommended  
13 a CT scan to better evaluate the disc protrusions at each level.

14 On October 21, 1998, applicant had a CT scan of the lumbar spine. It showed “[d]isc  
15 bulges at all scanned levels (L2-S1), most prominent at L3-4 on the left ... , but also prominent  
16 and calcified in the midline at L5-S1.” A lumbar myelogram performed the same day indicated  
17 “[d]isc bulges at L3-4, L4-5, and L5-S1.”

18 On October 29, 1998, applicant was seen by Randolph H. Noble, M.D., as an agreed  
19 medical evaluator (AME) in internal medicine. In a December 1, 1998 report, Dr. Noble opined  
20 that applicant’s earlier pulmonary emboli were industrial, due to his July 1998 immobilization in  
21 the hospital because of his back injury. Dr. Noble opined that applicant had no residual respiratory  
22 problems, but he should be restricted from any work that would immobilize his lower extremities,  
23 preventing movement for greater than four hours. He said there was no basis for apportionment of  
24 this disability.

25 On December 17, 1998, Dr. Kahmann performed a left lateral microdiscectomy at L3-4.

26 On May 10, 1999, Dr. Kahmann issued a report finding applicant to be permanent and  
27 stationary. He said that applicant had slight sacroiliac pain that increases to moderate with heavy

1 lifting and repetitive bending. He also said that applicant was precluded from heavy work and  
2 should not lift more than 30 pounds. He found no basis for apportionment.

3 On approximately June 14, 1999, applicant commenced vocational rehabilitation,  
4 apparently with the goal of becoming a truck driver.

5 On September 9, 1999, applicant executed a compromise and release agreement with SCIF,  
6 settling his May 9, 1998 injury “to his lumbar spine, low back, pulmonary system and all other  
7 medical conditions documented in the medical file.” The settlement was for \$35,000, less  
8 permanent disability advances. Applicant also executed an addendum, which paragraph 10 of the  
9 agreement “incorporated” into the settlement. Among other things, the addendum stated:

10 “The following are in issue and are settled as part of this  
11 Compromise and Release: Injury AOE/COE, parts of body injured,  
12 nature and extent of permanent disability, duration of temporary  
13 disability, need for further medical treatment, self-procured  
14 medical treatment, apportionment, penalties of all types,  
15 reimbursement of all types, sanctions, costs and mileage.”<sup>5</sup>

16 The addendum also provided that the settlement included “all ... disabilities as documented in the  
17 medical file,” all future medical treatment, and all accrued benefits. It further provided that  
18 applicant was settling “any potential compensation and/or medical benefits” that might arise out of  
19 an injury sustained in vocational rehabilitation, as well as any potential claims by his dependents  
20 for death benefits if his injury ever contributes to his death. Nowhere in the compromise and  
21 release or in the addendum was there any stipulation or representation by the parties as to the  
22 percentage of permanent disability – or the factors of disability – caused by the May 9, 1998  
23 injury.

24 In early October 1999, applicant completed vocational rehabilitation and received a  
25 commercial driver’s license. During the job search portion of his vocational plan, he applied for a  
26 truck driver job with Hayward Lumber, the employer for the current injuries.

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27 <sup>5</sup> Although the addendum indicated that “injury AOE/COE” was in issue, there was no *Thomas*  
finding request (see *Thomas v. Sports Chalet, Inc.* (1977) 42 Cal.Comp.Cases 625 (Appeals Board en  
banc)) and it appears that SCIF never disputed injury.

1 On October 7, 1999, SCIF signed the compromise and release agreement.

2 On October 15, 1999, a workers' compensation administrative law judge (WCJ) issued an  
3 order approving compromise and release (OACR). The OACR made a \$35,000 award to  
4 applicant – less permanent advances, attorney's fees, and a lien.

5 **B. The Current Injuries**

6 On October 8, 1999, applicant was seen by Steven Dosch, M.D., for a pre-employment  
7 physical examination for the truck driving job with Hayward Lumber. In an October 15, 1999  
8 report on that examination, Dr. Dosch related a history from applicant: that he had “low back  
9 surgery done in 1997;” that he had been released in 1998 “to do heavy work;” that “he has had no  
10 recent low back pain whatsoever;” and that “[h]e has been working out at the YMCA lifting  
11 weights five times a week with no pain or symptoms.” Dr. Dosch concluded that applicant was  
12 medically qualified to perform the job of truck driver “without restrictions.”

13 On or about October 19, 1999, applicant was hired as a driver by Hayward Lumber. There,  
14 he had to unload doors, windows, molding and specialty lumber by hand. At all times relevant  
15 here, Hayward Lumber was insured by Connecticut Indemnity Insurance Company.

16 In December 2001, applicant sustained an admitted industrial injury while delivering a  
17 prefabricated 10'x 4' “strong wall,” which was “very, very, very heavy.” He and a co-worker  
18 were carrying it, but the co-worker tripped and the strong wall fell onto applicant, causing a back  
19 injury.

20 On August 2, 2002, applicant sustained another admitted injury when, while he was  
21 bending to move some lumber, he reagravated his back.

22 Eventually, applicant saw Dr. Kahmann again. On July 10, 2003, Dr. Kahmann performed  
23 a left L5-S1 microdiscectomy.

24 Defendant had applicant evaluated by Daniel N. Ovadia, M.D., as its qualified medical  
25 evaluator (QME) in orthopedic surgery. In a September 15, 2003 report (i.e., about seven  
26 months before SB 899), Dr. Ovadia concluded that applicant was permanent and stationary, with

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3 intermittent slight lumbar spine pain and with a preclusion from heavy work. With respect to  
4 apportionment, Dr. Ovadia stated:

5            “[I]t is my feeling that there is a reasonable basis for  
6 apportionment given that Mr. Pasquotto has been diagnosed with  
7 an L5-S1 disc herniation following an injury that he sustained at  
8 Joe Pospisill [sic] in 1998. The Applicant also had disc herniation  
9 at L3-4 for which surgery was undertaken. Permanent work  
10 restrictions were imposed on the Applicant who received an award.  
11 Based on this information, I would apportionment fifty percent of  
12 Mr. Pasquotto’s lumbar spine residuals to factors predating his  
13 employment with Hayward Lumber and the specific injuries that  
14 he sustained in December of 2001 and August of 2002.  
15 Furthermore, I believe the combined effects of the Applicant’s  
16 previous injury in 1998 that resulted in disc herniations at L5-S1  
17 and at L3-4 (the latter requiring surgery) combined with the  
18 injuries at Hayward Lumber led to the need for Mr. Pasquotto’s  
19 recent lumbar spine surgery. As such, I believe Mr. Pasquotto  
20 would have had fifty percent of his current level of lumbar spine  
21 disability even in the absence of his employment at Hayward  
22 Lumber. The remaining fifty percent of lumbar spine disability is  
23 directly related to the Applicant’s employment and injuries at  
24 Hayward Lumber.”

25            On May 17, 2004 (i.e., about a month after SB 899), Dr. Kahmann examined applicant and  
26 issued a report. The report declared him to be permanent and stationary, with subjective disability  
27 of frequent slight low back pain increasing to moderate with heavy lifting and repetitive bending.  
28 Dr. Kahmann also stated that applicant was precluded from heavy work, that he has a 30-pound  
29 lifting limitation, and that he should avoid repetitive bending. Under the heading  
30 “Apportionment,” Dr. Kahmann said:

31            “Not indicated. He did have previous surgery at the L3-4 level,  
32 recovered from that surgery and was back to work full-time in a  
33 very heavy work capacity without symptoms. On a 1998 CT  
34 scan/myelogram, it was noted that he had a disc herniation on the  
35 left at L5-S1. This herniated disc was completely asymptomatic  
36 and did not become symptomatic until his present injury.  
37 Therefore, in my opinion this is a pre-existing asymptomatic

1 abnormality that did not cause any disability whatsoever until the  
2 industrial injury. Therefore, in my opinion, there are no grounds  
3 for apportionment to pre-existing industrial or non-industrial  
4 factors.”

5 On September 28, 2004, the matters proceeded to trial, with defendant having raised the  
6 issue of “apportionment.”

7 On October 6, 2004, the WCJ issued rating instructions for applicant’s December 2001 and  
8 August 2, 2002 back injuries with Hayward Lumber. The WCJ asked the disability evaluation  
9 specialist (rater) to consider that these two injuries resulted in a preclusion from heavy work, a  
10 thirty-pound lifting limitation, and a need to avoid repetitive bending. The WCJ further asked the  
11 rater to “consider apportionment where applicant had a prior low back disability [from the May 9,  
12 1998 injury] precluding heavy work (Category E); should not lift greater than thirty pounds.” The  
13 rater found that applicant’s December 2001 and August 2, 2002 injuries caused 0% (zero percent)  
14 permanent disability, after apportionment – i.e., the rater concluded that both applicant’s current  
15 back disability and his prior back disability rated 30% standard (and 36% after adjustment for age  
16 and occupation), resulting in a net 0% rating.

17 On December 15, 2004, the WCJ issued a Joint Findings and Award. The WCJ determined  
18 that “[a]pplicant is not entitled to a permanent disability award” for his December 2001 and  
19 August 2, 2002 back injuries because “[t]here is a legal basis for apportionment under Labor Code  
20 § 4663 [sic].” In the accompanying Opinion on Decision, however, the WCJ stated that he “does  
21 not believe [section] 4663 is relevant.” The WCJ further said, “the crux of this case revolves  
22 around Labor Code § 4664 and more specifically subparagraph (b).” His Opinion then indicated,  
23 in essence, that he found a legal basis for apportionment because defendant had established the  
24 existence of a “prior award of permanent disability” within the meaning of section 4664(b) – i.e.,  
25 the OACR for the May 9, 1998 injury – and that, under section 4664(b), this “prior award is  
26 conclusively presumed to [still] exist.”

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4 Applicant then filed a timely petition for reconsideration. In substance, he contends:  
5 (1) that section 4664(b) cannot be applied because his injuries occurred prior to the effective date  
6 of SB 899;<sup>6</sup> (2) that he never received a “prior award of permanent disability,” within the meaning  
7 of section 4664(b), because the OACR for his May 9, 1998 back injury neither awarded permanent  
8 disability nor made any determination regarding the level of permanent disability; and (3) that  
9 section 4664(b) must be interpreted as merely creating a rebuttable presumption and, here, the  
10 evidence establishes that he had recovered from his May 9, 1998 injury and that he was  
11 performing his work without symptoms or limitations until his December 2001 and August 2, 2002  
12 injuries.

13 Defendant filed an answer, essentially asserting that the OACR for the May 9, 1998 injury  
14 was a “prior award of permanent disability” under section 4664(b) because it was based solely on  
15 the May 10, 1999 report of Dr. Kahmann precluding applicant from heavy work and from lifting  
16 more than 30 pounds – which were the same restrictions imposed by Dr. Kahmann in his May 17,  
17 2004 permanent and stationary report.

18 Because the parties on reconsideration had limited their briefing to the section 4664(b)  
19 apportionment issue, the Appeals Board gave the parties leave to file supplemental briefs on the  
20 issue of whether apportionment might be valid under section 4663, without regard to whether

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24 <sup>6</sup> We summarily reject applicant’s initial contention. It is now well established that the new  
25 apportionment provisions of SB 899 apply to all cases that were not final as of the time of its April 19, 2004  
26 enactment, regardless of the date of injury. (*E & J Gallo Winery v. Workers’ Comp. Appeals Bd. (Dykes)*  
27 (*2005*) 134 Cal.App.4th 1536, 1543 [70 Cal.Comp.Cases 1644]; *Rio Linda Union School Dist. v. Workers’*  
*Comp. Appeals Bd. (Scheftner)* (*2005*) 131 Cal.App.4th 517, 531 [70 Cal.Comp.Cases 999]; *Marsh v.*  
*Workers’ Comp. Appeals Bd.* (*2005*) 130 Cal.App.4th 906, 916 [70 Cal.Comp.Cases 787]; *Kleemann v.*  
*Workers’ Comp. Appeals Bd.* (*2005*) 127 Cal.App.4th 274, 285-289 [70 Cal.Comp.Cases 133].)



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5 apportionment might be valid under section 4664(b).<sup>7</sup> The supplemental briefing has been  
6 completed, and we now issue our Decision After Reconsideration.

7 **II. DISCUSSION**

8 **A. An Order Approving A Compromise And Release Agreement, Without More, Is Not A**  
9 **“Prior Award of Permanent Disability” Within The Meaning Of Section 4664(b).**

10 Section 4664(b) provides: “If the applicant has received a prior *award of permanent*  
11 *disability*, it shall be conclusively presumed that the prior permanent disability exists at the time of  
12 any subsequent industrial injury.” (Emphasis added.)

13 For the reasons that follow, we conclude that an approved compromise and release  
14 agreement, without more, does not constitute an “award of permanent disability” under section  
15 4664(b).

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17 <sup>7</sup> The Labor Code provides that “all judicial powers” and original jurisdiction in workers’  
18 compensation matters are vested with the Appeals Board itself. (Lab. Code, §§ 111(a), 5300, 5301.) The  
19 WCJs conduct trials and make initial determinations pursuant to a *delegation* by the Appeals Board. (Lab.  
Code, §§ 5309, 5310; Cal. Code Regs., tit. 8, § 10348.) A decision of a WCJ only becomes the decision of  
the Appeals Board if reconsideration is *not* granted. (Lab. Code, § 5900 *et seq.*; Cal. Code Regs., tit. 8, §  
10348.)

20 Moreover, section 5906 provides that “[u]pon the filing of a petition for reconsideration ... the  
21 appeals board may, with or without further proceedings and with or without notice affirm, rescind, alter, or  
22 amend the order, decision, or award made and filed by the appeals board or the workers’ compensation  
judge...” (Lab. Code, § 5906.) Similarly, section 5908 provides that “[a]fter ... a consideration of all the  
facts the appeals board may affirm, rescind, alter, or amend the original order, decision, or award.” (Lab.  
Code, § 5908.)

23 Based on these statutes, it is settled law that a grant of reconsideration has the effect of causing “the  
24 whole subject matter [to be] reopened for further consideration and determination” (*Great Western Power*  
*Co. v. Industrial Acc. Com. (Savercool)* (1923) 191 Cal. 724, 729 [10 I.A.C. 322]) and of “[throwing] the  
25 entire record open for review.” (*State Comp. Ins. Fund v. Industrial Acc. Com. (George)* (1954) 125  
26 Cal.App.2d 201, 203 [19 Cal.Comp.Cases 98].) Thus, once reconsideration has been granted, the Appeals  
27 Board has the full power to make new and different findings on issues presented for determination at the  
trial level, even with respect to issues not raised in the petition for reconsideration before it. (*Ibid.*; e.g.,  
also, *Tate v. Industrial Acc. Com.* (1953) 120 Cal.App.2d 657, 663 [18 Cal.Comp.Cases 246]; *Pacific*  
*Employers Ins. Co. v. Industrial Acc. Com. (Sowell)* (1943) 58 Cal.App.2d 262, 266-267 [8  
Cal.Comp.Cases 79].)

1 A compromise and release agreement approved by the WCAB generally constitutes an  
2 “award.” The Labor Code permits the parties to a workers’ compensation case to reach a  
3 compromise regarding the amount of compensation payable to the injured employee and to release  
4 the defendant(s) from further potential liability for compensation. (Lab. Code, § 5000 et seq.)  
5 Such a compromise and release agreement, once approved by the WCAB (Lab. Code, § 5001), is  
6 an “award” that has the same force and effect as any other workers’ compensation award. (Lab.  
7 Code, § 5002; *Smith v. Workers’ Comp. Appeals Bd.* (1985) 168 Cal.App.3d 1160, 1169-1170 [50  
8 Cal.Comp.Cases 311]; *City of Anaheim v. Workers’ Comp. Appeals Bd. (Davis)* (1982) 128  
9 Cal.App.3d 200, 206 [47 Cal.Comp.Cases 52]; *Raischell & Cottrell, Inc. v. Workmen’s Comp.  
10 Appeals Bd. (Adamson)* (1967) 249 Cal.App.2d 991, 997 [32 Cal.Comp.Cases 135]; *Jones v.  
11 Fremont Ins. Co.* (1986) 14 Cal. Workers’ Comp. Rptr. 79 (Appeals Board panel); see also *Kaiser  
12 Foundation Hospitals v. Workmen’s Comp. Appeals Bd. (Keifer)* (1974) 13 Cal.3d 20, 25 [39  
13 Cal.Comp.Cases 857]; *Ogdon v. Workmen’s Comp. Appeals Bd.* (1974) 11 Cal.3d 192, 196 [39  
14 Cal.Comp.Cases 297]; *Johnson v. Workmen’s Comp. Appeals Bd.* (1970) 2 Cal.3d 964, 973 [35  
15 Cal.Comp.Cases 362].)

16 Nevertheless, the fact that an approved compromise and release agreement generally  
17 constitutes an “award” does not mean that it is an “award of permanent disability” under section  
18 4664(b), even if the compromise and release agreement resolved the issue of permanent disability.

19 This is illustrated by the facts of the case before us. The 1999 compromise and release  
20 agreement did not stipulate to or otherwise specify the percentage of permanent disability – or the  
21 factors of disability – attributable to applicant’s May 9, 1998 back injury. In paragraph 6 of the  
22 agreement, in which “[t]he parties represent that the following facts are true,” there is no  
23 representation regarding the percentage or factors of permanent disability. There also are no such  
24 representations in paragraph 10 of the agreement, which contained “additional information”  
25 regarding the compromise and release. To the contrary, paragraph 10 incorporated an addendum,  
26 which expressly stated that “the nature and extent of permanent disability” was “in issue.”  
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1 We are cognizant of defendant's assertion that the 1999 compromise and release  
2 necessarily contemplated that applicant's May 9, 1998 back injury had resulted in a preclusion  
3 from heavy work and in a preclusion from lifting more than 30 pounds, as found by Dr.  
4 Kahmann's May 10, 1999 report – which was the only permanent and stationary report in evidence  
5 as to the back.

6 However, such a conclusion would be entirely speculative. The compromise and release  
7 agreement contained neither any stipulation regarding applicant's percentage of permanent  
8 disability nor any language specifying the nature of his back disability. Moreover, while it might  
9 be fair to assume that some of the \$35,000 in settlement money was for applicant's back, there is  
10 no way to determine – at least on this record – how much of this consideration was for his back  
11 *permanent disability* – particularly given: (1) the compromise and release specified there was an  
12 “issue” regarding the “nature and extent of permanent disability,” which implies there was a  
13 dispute regarding applicant's back permanent disability; (2) we do not know whether, absent the  
14 settlement, either party would have obtained supplemental medical reports on the issue of  
15 applicant's back permanent disability; and (3) we cannot determine how much of the settlement  
16 money was in consideration for releasing issues other than applicant's back permanent disability.  
17 This last point is of no small significance, given that applicant had a post-surgical back; yet, he  
18 settled his right to any further medical treatment. Moreover, in addition to applicant's back, there  
19 apparently also were issues regarding pulmonary disability and/or treatment.

20 Further, in this case – and in other cases – there is no reliable way to determine how much  
21 of the settlement monies paid under an approved compromise and release agreement represent  
22 compensation for permanent disability, at least where the compromise and release agreement does  
23 not contain any specific stipulation or representation regarding the applicant's percentage of or  
24 factors of permanent disability. There are many factors that may motivate parties to settle by way  
25 of a compromise and release agreement, some of which might not be disclosed in the compromise  
26 and release agreement and might have no relation to the percentage of or the nature of the  
27 applicant's permanent disability. These factors can include, but certainly are not limited to:

1 undisclosed issues regarding injury, employment, the statute of limitations, insurance coverage, or  
2 fraud; an applicant's desire to extricate him or herself from the workers' compensation system; an  
3 applicant's wish to avoid the delays inherent in obtaining a decision or the risks inherent in  
4 litigation; an applicant's non-industrial health factors; an applicant's immediate financial needs or  
5 desire for a lump sum; an undisclosed agreement that the applicant will resign his or her  
6 employment in conjunction with the compromise and release; a defendant's wish to avoid the risks  
7 and costs of litigation; a defendant's desire to close its file – thereby eliminating its need to  
8 maintain reserves for possible future benefits (if the case were to be reopened), eliminating its  
9 costs of maintaining the file for the lifetime of the employee (in the event of an award of further  
10 medical treatment), and reducing its risks of penalties; a defendant's desire to keep its costs down  
11 in multiple party cases or cases likely to entail multiple or extended proceedings; a defendant's  
12 desire to settle around liens; and third-party recovery issues.

13 We are aware that, in any given case, evidence outside the four corners of an approved  
14 compromise and release agreement conceivably might be presented in an attempt to show that  
15 some discrete portion of the settlement was for permanent disability. We conclude that such  
16 extrinsic evidence should not be allowed.

17 In this regard, an analogous situation was presented in *Claxton v. Waters* (2004) 34 Cal.4th  
18 367.

19 In *Claxton*, an employee had sued her employer and other defendants for civil damages,  
20 alleging workplace sexual harassment. Previously, however, the employee had filed workers'  
21 compensation claims, including one for injury to the "psyche due to sexual harassment." The  
22 employee then settled her workers' compensation claims through a standard pre-printed  
23 compromise and release agreement, approved by the WCAB, which made no reference to the  
24 pending civil lawsuit. Thereafter, the civil defendants moved for summary judgment on the  
25 ground that the compromise and release agreement had settled the employee's civil sexual  
26 harassment claim. In opposition, the employee filed a declaration stating her belief that the  
27 compromise and release agreement "did not include" her civil damages claim and stating she had

1 not authorized her workers' compensation attorney to settle her civil action. Her workers'  
2 compensation attorney filed a similar declaration.

3 The Supreme Court concluded that, to show that the standard pre-printed workers'  
4 compensation compromise and release agreement released the employee's civil claims, the civil  
5 defendants would have to produce a separate agreement expressly so stating. That is, the civil  
6 defendants cannot rely on extrinsic evidence to show that the compromise and release intended to  
7 settle claims outside the workers' compensation scheme. Among other things, the Court said:

8 "We are ... convinced that extrinsic evidence should not be  
9 admissible to show that the standard preprinted workers'  
10 compensation release form also applies to claims *outside* the  
11 workers' compensation system. To allow such evidence would  
12 unduly burden our courts. Illustrative of this point are [various]  
13 Court of Appeal decisions [citations omitted]. In those cases, as  
14 here, the employer relied on standard language in the preprinted  
15 workers' compensation release form as an affirmative defense in the  
16 worker's civil lawsuit and later as the basis for a motion for  
17 summary judgment in that action. In each case, the appellate court  
18 determined that there were triable issues of fact as to whether the  
19 parties intended the workers' compensation settlement to also apply  
20 to claims outside the workers' compensation system, thus requiring  
21 further proceedings. This necessitated the presentation of evidence  
22 on that issue, and ultimately required resolution of disputed issues of  
23 fact as to what occurred in negotiations at the workers'  
24 compensation proceedings. Thus, allowing such extrinsic evidence  
25 would require our trial courts, which currently are under severe  
26 budgetary restraints, to expend their already scarce resources to  
27 divine and reconcile the parties' intentions in signing a standard  
preprinted workers' compensation release form. And parties too  
would have to spend time and money in presenting this evidence."  
(*Claxton v. Waters*, *supra*, 34 Cal.4th at p. 377.)

22 The same or similar problems would occur if extrinsic evidence were allowed to establish  
23 what permanent disability, if any, was "awarded" under an approved compromise and release. As  
24 discussed above, the reasons are many and varied why parties agree to settle a workers'  
25 compensation claim by compromise and release, and the amount of the settlement may have no  
26 clear relation to the nature and extent of the employee's permanent disability. To permit extrinsic  
27 evidence to be developed through discovery and then introduced at trial – so that the WCAB could

1 attempt to “divine and reconcile” the parties’ intention on the issue of permanent disability, if they  
2 had a common intention or, indeed, any intention at all – would result in delays and expenses that  
3 would be inconsistent with the constitutional mandate that the California workers’ compensation  
4 system “shall accomplish substantial justice in all cases expeditiously, inexpensively, and without  
5 incumbrance [sic] of any character.” (Cal. Const., art. XIV, § 4.) Moreover, if a party to a  
6 subsequent case attempted to develop and present evidence from outside the four corners of an  
7 earlier compromise and release, regarding what was discussed or agreed to during settlement  
8 negotiations leading to that compromise and release, there could be significant potential legal  
9 problems. For example, attorney-client privilege issues could arise, even with respect to  
10 information that counsel for one party to the compromise and release disclosed to counsel for the  
11 other party – at least if those disclosures were reasonably necessary to further the interests of both  
12 parties in finalizing negotiations. (*Oxy Resources Calif. LLC v. Superior Court* (2004) 115  
13 Cal.App.4th 874, 898; *STI Outdoor LLC v. Superior Court* (2001) 91 Cal.App.4th 334, 339-341.)

14 Accordingly, for all of the reasons above, an approved compromise and release agreement,  
15 without more, does not constitute “an award of permanent disability,” within the meaning of  
16 section 4664(b).<sup>8</sup>

17 **B. Where There Is No “Prior Award Of Permanent Disability” Within The Meaning Of**  
18 **Section 4664(b), The Medical Reports And Other Evidence Relating To A Prior Industrial**  
19 **Injury Settled By A Compromise And Release May Be Relevant In Determining Whether**  
20 **Any Of The Permanent Disability Found After A Subsequent Industrial Injury Was Caused**  
**By “Other Factors” Under Section 4663.**

21 At trial, defendant raised the issue of “apportionment.” Under SB 899, there are two  
22 statutory avenues for apportionment: section 4663 and section 4664. Thus, although we have  
23 concluded there is no basis for apportionment under section 4664(b) because the October 15, 1999  
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26 <sup>8</sup> At this time, we need not and will not address the universe of circumstances, if any, under which an  
27 OACR might constitute a “prior award of permanent disability” under section 4664(b).

1 OACR was not a “prior award of permanent disability,” there may still be a basis for  
2 apportionment under section 4663.<sup>9</sup>

3 Under section 4663, apportionment is based on the causation of the permanent disability  
4 and the WCAB must determine what approximate percentage of the permanent disability was  
5 caused by the direct result of the injury and what approximate percentage of the permanent  
6 disability was caused by “other factors ... , including prior industrial injuries.” (Lab. Code,  
7 § 4663(a), (b), & (c); *Escobedo v. Marshalls* (2005) 70 Cal.Comp.Cases 604 [2005 Cal. Wrk.  
8 Comp. LEXIS 71, 2005 WL 910490] (Appeals Board en banc), writ den. sub nom. *Escobedo v.*  
9 *Workers’ Comp. Appeals Bd.* (2005) 70 Cal.Comp.Cases 1506 [2005 Cal. Wrk. Comp. LEXIS  
10 272], review den. 2005 Cal. LEXIS 13096 [Nov. 16, 2005, S137275].) Accordingly, if a prior  
11 injury was settled by an approved compromise and release agreement, then the medical reports and  
12 other evidence relating to that prior injury may be relevant in determining whether any of the  
13 current overall permanent disability was caused by “other factors” under section 4663.

14 In this case, however, the WCJ has not yet addressed the issue of apportionment under  
15 section 4663. Moreover, Dr. Ovadia’s report issued on September 15, 2003 – before the  
16 enactment of SB 899 – and Dr. Kahmann’s May 17, 2004 report do not discuss apportionment  
17 under section 4663 in accordance with the standards set out in *Escobedo*. Therefore, we will  
18 remand the matter to the WCJ to address section 4663 apportionment in the first instance. On  
19 remand, the WCJ shall redetermine the issues of permanent disability and apportionment under  
20 section 4663, without applying section 4664(b).

21 **C. The Concept Of Medical Rehabilitation From A Prior Industrial Disability Remains**  
22 **Viable Under Section 4663; However, Even If An Injured Employee Has Medically**  
23 **Rehabilitated From A Prior Industrial Disability, This Does Not Necessarily Preclude A**  
24 **Prior Industrial Injury From Being An “Other Factor” Causing The Employee’s Present**  
25 **Disability.**

26 \_\_\_\_\_  
27 <sup>9</sup> We do not mean to imply an opinion that sections 4663 and 4664 are mutually exclusive. In some cases, it may be that both sections 4663 and 4664 will apply.

1           The facts of this matter may raise questions of whether applicant had medically  
2 rehabilitated from the effects of his May 9, 1998 injury before he sustained his December 2001  
3 and August 2, 2002 injuries and, if so, whether any such medical rehabilitation would affect the  
4 determination of apportionment under section 4663 in this case.

5           In our en banc decisions in *Sanchez v. County of Los Angeles* (2005) 70 Cal.Comp.Cases  
6 1440 and *Strong v. City and County of San Francisco* (2005) 70 Cal.Comp.Cases 1460, we  
7 construed the language of section 4664(b), which states, in relevant part: “If the applicant has  
8 received a prior award of permanent disability, it shall be conclusively presumed that the prior  
9 permanent disability exists at the time of any subsequent industrial injury.” We held that if there  
10 has been a “prior award of permanent disability” within the meaning of section 4664(b), then the  
11 permanent disability underlying that award is “conclusively presumed” to still exist; therefore, the  
12 applicant is not permitted to show medical rehabilitation from the disabling effects of the earlier  
13 industrial injury or injuries. (*Sanchez v. County of Los Angeles, supra*, 70 Cal.Comp.Cases at p.  
14 1452; *Strong v. City and County of San Francisco, supra*, 70 Cal.Comp.Cases at p. 1472.) Thus,  
15 we concluded that where there has been a prior permanent disability award, section 4664(b)  
16 abrogates the line of cases that had allowed an injured employee to show he or she had medically  
17 rehabilitated from the effects of an earlier injury at the time of a subsequent injury. (See *Mercier v.*  
18 *Workers’ Comp. Appeals Bd.* (1976) 16 Cal.3d 711, 716, fn. 2 [41 Cal.Comp.Cases 205]; *State*  
19 *Comp. Ins. Fund v. Industrial Acc. Com. (Hutchinson)* (1963) 59 Cal.2d 45, 56 [28  
20 Cal.Comp.Cases 20]; *Robinson v. Workers’ Comp. Appeals Bd.* (1981) 114 Cal.App.3d 593, 602-  
21 603 [46 Cal.Comp.Cases 78]; *Bookout v. Workers’ Comp. Appeals Bd.* (1976) 62 Cal.App.3d 214,  
22 223-224 [41 Cal.Comp.Cases 595]; *Amico v. Workmen’s Comp. Appeals Bd.* (1974) 43 Cal.App.3d  
23 592, 607-608 [39 Cal.Comp.Cases 845].)

24           Nevertheless, in both *Sanchez* and *Strong*, we expressly did not address the issue of  
25 whether an injured employee may still show medical rehabilitation from a prior industrial or  
26 non-industrial condition to avoid apportionment *under section 4663*. (*Sanchez v. County of Los*  
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1 *Angeles, supra*, 70 Cal.Comp.Cases at p. 1452, fn. 14; *Strong v. City and County of San Francisco,*  
2 *supra*, 70 Cal.Comp.Cases at p. 1472, fn. 15.)

3 We now conclude that section 4663 does *not* preclude a showing that, prior to the injury or  
4 injuries for which the employee is now claiming permanent disability, he or she had medically  
5 rehabilitated from the disabling effects of an earlier industrial or non-industrial condition.

6 When construing a statute, the Appeals Board's fundamental purpose is to determine and  
7 effectuate the Legislature's intent. (*DuBois v. Workers' Comp. Appeals Bd.* (1993) 5 Cal.4th 382,  
8 387 [58 Cal.Comp.Cases 286, 289]; *Nickelsberg v. Workers' Comp. Appeals Bd.* (1991) 54 Cal.3d  
9 288, 294 [56 Cal.Comp.Cases 476, 480]; *Moyer v. Workmen's Comp. Appeals Bd.* (1973) 10  
10 Cal.3d 222, 230 [38 Cal.Comp.Cases 652, 657].) Because the statutory language generally  
11 provides the most reliable indicator of that intent, the Appeals Board's first task is to look to at the  
12 language of the statute itself. (*Ibid.*; e.g., also, *People v. Smith* (2004) 32 Cal.4th 792, 797.)

13 If the statutory language is clear and unambiguous, the Appeals Board must enforce the  
14 statute according to its plain terms. (*DuBois v. Workers' Comp. Appeals Bd., supra*, 5 Cal.4th at  
15 pp. 387-388 [58 Cal.Comp.Cases at p. 289]; *Atlantic Richfield Co. v. Workers' Comp. Appeals Bd.*  
16 (*Arvizu*) (1982) 31 Cal.3d 715, 726 [47 Cal.Comp.Cases 500, 508].)

17 If, however, the statutory language is ambiguous and susceptible of more than one  
18 reasonable interpretation, then the Appeals Board may look beyond the statutory language to other  
19 evidence of the Legislature's intent. (*In re Reeves* (2005) 35 Cal.4th 765, 771; *Estate of Griswold*  
20 (2001) 25 Cal.4th 904, 911.) For example, where a statute relating to a particular subject contains  
21 a critical word or phrase, then the omission of that word or phrase from another statute on the same  
22 subject generally shows a different legislative intent. (*People v. Valentine* (1946) 28 Cal.2d 121,  
23 142; *Reeves v. Workers' Comp. Appeals Bd.* (2000) 80 Cal.App.4th 22, 28 [65 Cal.Comp.Cases  
24 359]; see also *Ferguson v. Workers' Comp. Appeals Bd.* (1995) 33 Cal.App.4th 1613, 1621 [60  
25 Cal.Comp.Cases 275]; *Clark v. Workers' Comp. Appeals Bd.* (1991) 230 Cal.App.3d 684, 696 [56  
26 Cal.Comp.Cases 331].) This principle applies with particular force when the two statutes relating  
27 to the same subject matter were enacted by the same bill and chaptered at the same time. (See

1 *International Business Machines v. State Bd. of Equalization* (1980) 26 Cal.3d 923, 932; *Krumme*  
2 *v. Mercury Ins. Co.* (2004) 123 Cal.App.4th 924, 943, fn. 6; *People v. Hitchings* (1997) 59  
3 Cal.App.4th 915, 922; *Conservatorship of Bryant* (1996) 45 Cal.App.4th 117, 122.)

4 Sections 4663 and 4664 are both apportionment statutes that were enacted and chaptered at  
5 the same time. (Stats. 2004, ch. 34, §§ 34 & 35.) Section 4664(b) specifically states that, in “prior  
6 award” situations, “it shall be *conclusively presumed* that the prior permanent disability exists at  
7 the time of any subsequent industrial injury.” (Emphasis added.) Section 4663, however, contains  
8 no such language – notwithstanding the fact that it also applies in cases of “prior industrial  
9 injuries.” (Lab. Code, § 4663(c).) Because the Legislature omitted the conclusive presumption  
10 terminology from a concurrently adopted statute concerning the same subject, we conclude the  
11 Legislature did *not* intend, under section 4663, to bar an applicant from demonstrating that he or  
12 she had medically rehabilitated from the disabling effects of earlier industrial injuries.  
13 Accordingly, the line of medical rehabilitation cases – referred to above – remain valid, to that  
14 extent.<sup>10</sup>

15 Nevertheless, section 4663 ultimately is concerned with the *causation* of permanent  
16 disability. (Lab. Code, § 4663(a), (b), & (c); *Escobedo v. Marshalls, supra*, 70 Cal.Comp.Cases at  
17 p. 611.) The WCAB must determine what percentage of the permanent disability was directly  
18 *caused* by the industrial injury and what percentage was *caused* by other factors, including prior  
19 industrial injuries. (Lab. Code, § 4663(c); *Escobedo v. Marshalls, supra*, 70 Cal.Comp.Cases at  
20 pp. 607, 611-612.)

21 Even if an injured employee establishes medical rehabilitation from his or her prior  
22 industrial injury, this does not necessarily mean that the prior industrial injury cannot be an “other  
23 factor” that is “causing” some of the employee’s present disability under section 4663. This,  
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25 <sup>10</sup> This is true even though former section 4750, upon which the medical rehabilitation cases were  
26 predicated, was repealed by SB 899. (Stats. 2004, ch. 34, § 37). Like former section 4750, which addressed  
27 cases involving pre-existing disability, current section 4663 also addresses cases where “disability was  
caused by other factors ... before ... the industrial injury, including prior industrial injuries.” (Lab. Code, §  
4663(c).)

1 however, is an issue of proof requiring substantial medical evidence. (*Escobedo v. Marshalls*,  
2 *supra*, 70 Cal.Comp.Cases 604.)

3 Here, as discussed above (see Section II-B, *supra*), neither Dr. Ovadia’s September 15,  
4 2003 report nor Dr. Kahmann’s May 17, 2004 report discuss apportionment under section 4663 –  
5 including any potential medical rehabilitation issue – in accordance with the principles set out in  
6 *Escobedo*. Moreover, the WCJ has had the opportunity to observe the demeanor of applicant and  
7 to weigh his statements in connection with his manner on the stand. (*Garza v. Workmen’s Comp.*  
8 *Appeals Bd.* (1970) 3 Cal.3d 312, 318-319 [35 Cal.Comp.Cases 500]; see also, *Gay v. Workers’*  
9 *Comp. Appeals Bd.* (1979) 96 Cal.App.3d 555, 564-565 [44 Cal.Comp.Cases 817].) Therefore, in  
10 addition to remanding the general issue of section 4663 apportionment to the WCJ to address (see  
11 Section II-B, above), we will also remand this matter to the WCJ so that he may determine, in the  
12 first instance, whether applicant’s claims of medical rehabilitation from his May 9, 1998 injury are  
13 credible and, even if so, whether his May 9, 1998 injury nevertheless may be an “other factor” that  
14 is “causing” his current disability pursuant to section 4663.

15 For the foregoing reasons,

16 **IT IS ORDERED**, as the Decision After Reconsideration of the Appeals Board (En Banc),  
17 that the Joint Findings and Award issued by the workers’ compensation administrative law judge  
18 on December 15, 2005, be, and it is hereby, **RESCINDED** and that the matter is **RETURNED** to

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11 the workers' compensation administrative law judge for further proceedings and decision,  
12 consistent with this opinion.

13 **WORKERS' COMPENSATION APPEALS BOARD (EN BANC)**

14  
15 /s/ Joseph M. Miller  
**JOSEPH M. MILLER, Chairman**

16  
17 /s/ Merle C. Rabine  
**MERLE C. RABINE, Commissioner**

18  
19 /s/ William K. O'Brien  
**WILLIAM K. O'BRIEN, Commissioner**

20  
21 /s/ James C. Cuneo  
**JAMES C. CUNEO, Commissioner**

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23 /s/ Janice J. Murray  
**JANICE J. MURRAY, Commissioner**

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25 /s/ Ronnie G. Caplane  
**RONNIE G. CAPLANE, Commissioner**

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***I CONCUR IN THE RESULT  
(See attached Concurring Opinion)***

***/s/ Frank M. Brass  
FRANK M. BRASS, Commissioner***

***DATED AND FILED AT SAN FRANCISCO, CALIFORNIA***

***2/27/06***

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

***NPS/ams***

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**CONCURRING OPINION OF  
COMMISSIONER BRASS**

I concur with the majority’s conclusion that the WCJ improperly utilized Labor Code section 4664(b) to find a legal basis for apportionment in this matter. However, I do not join in the majority’s opinion because I would *not* defer deciding the question of whether, under some circumstances, an order approving a compromise and release agreement (OACR) might be “a prior award of permanent disability” within the meaning of section 4664(b). In my view, an OACR *never* can be “a prior award of permanent disability,” even if an approved compromise and release agreement contains a stipulation regarding the injured worker’s percentage of permanent disability and/or contains language specifying the nature and extent of the disability.

The law favors the settlement of controversies, including disputed workers’ compensation claims. (*Boehm & Associates v. Workers’ Comp. Appeals Bd. (Brower)* (2003) 108 Cal.App.4th 137, 149 [68 Cal.Comp.Cases 548]; *Permanente Medical Group v. Workers’ Comp. Appeals Bd. (Williams)* (1977) 73 Cal.App.3d 135, 139 [42 Cal.Comp.Cases 745].) The workers’ compensation system could not function without the settlement of cases by compromise and release agreements (C&Rs). According to recent Biennial Reports of the Department of Industrial Relations, there have been approximately 200,000 new workers’ compensation claims filed annually for the past ten years.<sup>1</sup> Well over half of these claims are settled by C&R.<sup>2</sup> These statistics make it clear that it would be impossible for the WCAB to try every case.

Not only is the WCAB unable to try every case, but the parties cannot always agree to resolve every case through a stipulated findings and award (see Lab. Code, § 5702)<sup>3</sup> – even if industrial injury is undisputed. There may be numerous obstacles to resolving permanent disability by stipulation, including but not limited to: a disparity of evidence regarding the nature

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<sup>1</sup> See, e.g., [http://www.dir.ca.gov/OD\\_pub/DIR\\_BR2001.pdf](http://www.dir.ca.gov/OD_pub/DIR_BR2001.pdf)

<sup>2</sup> <http://www.dir.ca.gov/dwc/98Charts.pdf>

<sup>3</sup> See also, e.g., Cal. Code Regs., tit. 8, §§ 10353(a), 10346(b), 10400, 10496, 10578, 10875, 10878, 10882, 10165.5.

1 and extent of the employee’s disability; disputes as to how to rate the permanent disability  
2 described in one or more medical reports; questions regarding the legal substantiality of the  
3 existing medical evidence; or questions about how much – if any – of the employee’s permanent  
4 disability is related to his or her industrial injury.<sup>4</sup> Accordingly, because of these and other  
5 reasons, and because of the practical reality that the WCAB cannot try every case, the parties  
6 often agree to settle by compromise and release.

7 As the majority’s opinion recognizes, there are a great many reasons why parties agree to  
8 settle by C&R. Consequently, the amount of a settlement may bear little or no relation to the  
9 actual nature and extent of the employee’s permanent disability. This is true even if the parties  
10 make some sort of representation – or set forth a “stipulation” – regarding permanent disability in  
11 the body of the C&R. Such representations or stipulations are not extraordinary. However, when  
12 the parties’ settlements *do* include a representation or stipulation regarding permanent disability, it  
13 is often *not* because they have had a true meeting of the minds as to the nature and extent of  
14 permanent disability. Instead, such representations or stipulations are commonly put into a  
15 settlement simply to persuade the WCJ that the settlement is “adequate.”<sup>5</sup> Indeed, history and  
16 experience demonstrate that some WCJs will not approve a C&R without such a representation or  
17 “stipulation.” Moreover, such representations or stipulations may be included in a compromise  
18 and release in order to address issues relating to: (1) set-offs against the employee’s social security

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24 <sup>4</sup> This latter point is especially true in cases where industrial injury to one or more body parts was  
25 disputed and the parties requested and received a “*Thomas*” finding. (See *Thomas v. Sports Chalet, Inc.*  
(1977) 42 Cal.Comp.Cases 625 (Appeals Board en banc); former Lab. Code, § 4646.)

26 <sup>5</sup> A compromise and release agreement is not valid unless it is approved by the WCAB. (Lab. Code,  
27 § 5001.) Moreover, a compromise and release agreement will not be approved unless the WCAB has  
determined that the settlement is in the best interest of the parties (Cal. Code Regs., tit. 8, § 10870) and that  
it is adequate. (Cal. Code Regs., tit. 8, § 10882.)

1 disability indemnity (SSDI)<sup>6</sup> or (2) the Medicare secondary payer provisions.<sup>7</sup>

2 Beyond the fact that a “stipulation” or other representation regarding permanent disability  
3 in a compromise and release may simply be creative draftsmanship, an OACR is not “an award of  
4 permanent disability” as that phrase is commonly understood in the workers’ compensation  
5 community. In our community, the general understanding is that an “award of permanent  
6 disability” is received by the injured worker following either the filing of a “Stipulations with  
7 Request for Award” that resolves permanent disability or the issuance of a “Findings and Award”  
8 after a trial on the disputed issue of permanent disability. When parties enter into a compromise  
9 and release agreement, their goal is to close the case and move on – unlike a stipulated or an  
10 adjudicated award of permanent disability, when the relationship between the parties generally  
11 continues (e.g., there are permanent disability indemnity payments that continue for months, years,  
12 or even the injured worker’s lifetime; or there are cases when the injured worker petitions to  
13 reopen permanent disability within five years of the date of injury).

14 In the case of most compromise and release agreements, the parties have absolutely no  
15 notion that they might be making a disposition regarding the nature or percentage of permanent  
16 disability *for future cases*. This is particularly true with respect to C&Rs (as here) that were  
17 executed before SB 899. It also may be true with respect to C&Rs that were executed after SB  
18 899. Moreover, it probably is true – at least for the injured employee – with respect to post-SB  
19 899 C&Rs when the employee is not represented by counsel. To analogize to the Supreme Court’s  
20 opinion in *Sumner*, in such situations, “the compromise and release [is] entered into by the  
21 employee without benefit of independent counsel, on the basis of advice by a representative of his  
22 employer, and as a result of discussions in which the impact of the settlement upon [permanent  
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24 <sup>6</sup> See 42 U.S.C. § 424a; 20 C.F.R. § 404.408(d) & (g). See, also, *Bubnis v. Apfel* (2nd Cir. 1998) 150  
25 F.3d 177, 182; *Sanfilippo v. Barnhart* (3d Cir. 2003) 325 F.3d 391, 395; *Wilson v. Apfel* (D.Va. 2000) 81  
F.Supp.2d 649, 653-654.

26 <sup>7</sup> See 42 U.S.C. § 1395y(b)(2)(A)(ii); 42 C.F.R. §§ 411.24(b), (e), & (g), 411.26(a), 411.37; see,  
27 generally, *In re RJF Int’l Corp.* (D.R.I. 2004) 332 F.Supp.2d 458, 465; *Frazer v. Transcon. Ins. Co.* (D.  
Ala. 2004) 374 F.Supp.2d 1067, 1071.



1 disability] was not mentioned.” (See *Sumner v. Workers’ Comp. Appeals Bd.* (1983) 33 Cal.3d  
2 965, 972 [48 Cal.Comp.Cases 369].)

3 As a practical matter, if the parties wish to truly stipulate to a level of permanent disability,  
4 there is a mechanism by which they can easily do that: the *stipulated* Findings and Award.<sup>8</sup> When  
5 the parties submit a “Stipulations with Request for Award” to the WCJ for approval, the four  
6 corners of the document clearly explain what they are doing with respect to permanent disability.  
7 Because there is a specific stipulation regarding permanent disability, it is clear that the parties  
8 actually focused on the issue and came to a meeting of the minds on it, i.e., the stipulation is not  
9 merely a piece of ingenious fiction. (See *County of Sacramento v. Workers’ Comp. Appeals Bd.*  
10 (*Weatherall*) (2000) 77 Cal.App.4th 1114 [65 Cal.Comp.Cases 1] (a stipulation is an agreement,  
11 entered into to obviate the need for proof, from which neither side may withdraw except upon a  
12 showing of good cause); *Robinson v. Workers’ Comp. Appeals Bd.* (1987) 194 Cal.App.3d 784 [52  
13 Cal.Comp.Cases 419] (stipulations are conclusive upon the parties, and the truth of the facts  
14 contained therein cannot be contradicted, except there is good cause to be relieved from the  
15 stipulation).) Thus, if a WCJ approves a permanent disability stipulation (see *Draper v. Workers’*  
16 *Comp. Appeals Bd.* (1983) 147 Cal. App. 3d 502, 507 [48 Cal.Comp.Cases 748] (“If the stipulation  
17 does not adequately reflect the disability of the applicant, it should not be accepted by the [WCJ]  
18 as the basis for his or her award”)), the WCAB will know at that time – and it will know in the  
19 future – exactly what the parties were contemplating with respect to the permanent disability issue,  
20 without having to engage in an occult divination process.<sup>9</sup>

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23 <sup>8</sup> About one-third of workers’ compensation claims are resolved by stipulated Findings and Awards.  
(<http://www.dir.ca.gov/dwc/98Charts.pdf>.)

24 <sup>9</sup> There are many reasons why the parties may choose to submit a stipulation with request for an  
25 award, rather than a compromise and release. With a stipulated Award, the injured employee retains the  
26 right to reopen his or her case within five years of the date of injury, in case there is increased disability.  
(Lab. Code, §§ 5410, 5803, 5004.) Further, if the injured employee needs further medical treatment, then  
27 the right to such treatment is preserved for his or her lifetime under a stipulated Award. Also, a defendant  
may prefer to pay out permanent disability through periodic payments spread over time (see Lab. Code, §  
4658), rather than converting them into a lump sum as part of a compromise and release.

1           There are significant policy reasons why an award of permanent disability is  
2 distinguishable from a C&R. An approved C&R is ordinarily paid in a lump sum. The Legislature  
3 has specifically provided that an “award of permanent disability” is to be paid in periodic  
4 installments at a particular weekly rate, depending on the level of permanent disability. (Lab.  
5 Code, §§ 4650(b) & (c), 4658.) This statutory requirement for the “payment [of permanent  
6 disability indemnity] *in installments of a fixed and definite sum of money*” has long been  
7 recognized. (*Smith v. Industrial Acc. Com.* (1955) 44 Cal.2d 364, 367 [20 Cal.Comp.Cases 82]  
8 (emphasis added); *Postal Tel. Cable Co. v. Industrial Acc. Com. (Coen)* (1931) 213 Cal. 544, 550  
9 [17 I.A.C. 320].) One of the purposes of these periodic payments of permanent disability  
10 indemnity is “to assist the injured worker in his adjustment in returning to the labor market.”  
11 (*Dept. of Rehabilitation v. Workers’ Comp. Appeals Bd. (Lauher)* (2003) 30 Cal.4th 1281, 1291  
12 [68 Cal.Comp.Cases 831]; *Sea-Land Service, Inc. v. Workers’ Comp. Appeals Bd. (Lopez)* (1996)  
13 14 Cal.4th 76, 87 [61 Cal.Comp.Cases 1360].)<sup>10</sup> Or, as stated by the Court of Appeal:

14           “Section 4650 not only provides for scheduled indemnity payments,  
15 it is also a procedure for ensuring financial support to injured  
16 workers during the recovery period following an industrial injury.  
17 [Citation omitted.] [¶] Temporary disability indemnity is intended to  
18 replace lost wages, and permanent disability indemnity provides  
19 compensation for loss of earning capacity or physical impairment.  
20 [Citations omitted.] Under section 4650, subdivision (a), the  
21 Legislature provided for indemnity or financial support while  
22 dependent injured workers are temporarily unable to work and  
23 without wages. The Legislature also provided for financial support  
24 to continue during the period of adjustment for loss of earning  
25 capacity or physical impairment. This financial support is in the  
26 form of permanent disability indemnity, which, under subdivision  
27 (b), follows payment of temporary disability indemnity. [¶¶] [Thus],  
section 4650 is intended to provide a continuous flow of temporary  
and permanent disability indemnity during the recovery period.”  
(*Rivera v. Workers’ Comp. Appeals Bd.* (2003) 112 Cal.App.4th  
1124, 1135-1136 [68 Cal.Comp.Cases 1460].)

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<sup>10</sup> See also, *City of Martinez v. Workers’ Comp. Appeals Bd. (Bonito)* (2000) 85 Cal.App.4th 601, 610  
[65 Cal.Comp.Cases 1368] (stating that where an injured employee becomes permanent and stationary with  
residual disability, “a finite number of permanent disability payments would commence to help ease the  
employee’s return to the labor market”).

1 Accordingly, permanent disability awards – unlike C&Rs – serve the function of providing  
2 continuing financial support to injured employees as they adjust in returning to the labor market  
3 after their injuries.

4 The Legislature has allowed for permanent disability awards to be commuted in some  
5 circumstances (Lab. Code, § 5100), but it has done so only when it “is necessary for the protection  
6 of the [applicant]” or is in “the best interest of the applicant.” (Lab. Code, § 5100.) In determining  
7 whether a commutation is in the best interest of the applicant, the WCAB must consider “the  
8 applicant’s ability to live without periodic indemnity payments.” (Lab. Code, § 5100(a).) In this  
9 regard, since the very beginning of the workers’ compensation system, the WCAB has recognized  
10 that the policy of the law is to pay compensation in installments and that commutations are  
11 contrary to that policy. The WCAB has long regarded its power to order the commutation of  
12 periodic payments as one “to be exercised with great care and discretion and only in cases of very  
13 great urgency.” (*Wilson v. Gallegher* (1914) 1 I.A.C. 306, 308.) As stated by the Court of Appeal  
14 some 30 years ago:

15 “[C]ommutation will not be granted without a showing of an  
16 immediate and necessary requirement of funds in excess of the  
17 installment payments, such as a need to pay pressing or emergency  
18 debts. ... [¶¶] ... [T]he Legislature ... has not intended that the  
19 [commutation] device should be employed except in the urgency  
20 situations to which the [WCAB] ha[s] limited it, upon a case-by-case  
basis, for more than a half century.” (*Hulse v. Workers’ Comp.  
Appeals Bd.* (1976) 63 Cal.App.3d 221, 227, 229 [41  
Cal.Comp.Cases 691].)

21 Thus, the mere fact that, in rare and very limited circumstances, an award of permanent disability  
22 may be commuted into a lump sum – either in whole or in part – does not cause a C&R to be  
23 legally analogous to an award of permanent disability indemnity.

24 Finally, the only effect of determining that an order approving a compromise and release  
25 agreement can *never* be a “prior award of permanent disability,” within the meaning of section  
26 4664(b), is to deprive the defendant of a presumption that whatever industrially-related permanent  
27 disability – if any – that may have existed at the time of the compromise is not *conclusively*

1 presumed to still exist. (See *Sanchez v. County of Los Angeles* (2005) 70 Cal.Comp.Cases 1440,  
2 1452 (Appeals Board en banc); *Strong v. City and County of San Francisco* (2005) 70  
3 Cal.Comp.Cases 1460, 1472 (Appeals Board en banc).) This appears to be of no critical import,  
4 because: (1) under section 4663, the medical reports and other evidence relating to a prior  
5 industrial injury that was settled by a compromise and release may be relevant in determining  
6 whether any of the permanent disability found after a subsequent industrial injury was caused by  
7 “other factors” (see Parts II-B and II-C of the majority’s opinion, with which I fully concur); and  
8 (2) under section 4664, an injured worker could avoid apportionment in any event by  
9 demonstrating that the prior permanent disability and the current permanent disability affect  
10 different abilities to compete and earn, either in whole or in part. (*Sanchez v. County of Los*  
11 *Angeles, supra*, 70 Cal.Comp.Cases at pp. 1453-1457; *Strong v. City and County of San*  
12 *Francisco, supra*, 70 Cal.Comp.Cases at pp. 1473-1477.)

13  
14 /s/ **Frank M. Brass**  
15 **FRANK M. BRASS, Commissioner**

16 **DATED AND FILED AT SAN FRANCISCO, CALIFORNIA**

17 **2/27/06**

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

20 **NPS/ams**