**WORKERS' COMPENSATION APPEALS BOARD**
**STATE OF CALIFORNIA**

**PATRICIA HARRISON, *Applicant***

**vs.**

**LOS ANGELES COUNTY CHILD SUPPORT, permissibly self-insured, adjusted by TRISTAR, *Defendants***

**Adjudication Number: ADJ12332626**
**Marina del Rey District Office**

# OPINION AND DECISION AFTER RECONSIDERATION

We granted reconsideration in order to further study the factual and legal issues in this case. This is our Opinion and Decision After Reconsideration.

Defendant seeks reconsideration of the Findings of Fact and Award (F&A) issued by the workers' compensation administrative law judge (WCJ) on June 2, 2022. By the F&A, the WCJ found that applicant's injury to the right shoulder and neck had caused 30% permanent disability. The WCJ also found that 20% of applicant's disability for the neck was attributable to other factors.

Defendant contends that the WCJ's decision failed to properly address apportionment under Labor Code[1] sections 4663 and 4664. Specifically, defendant contends that there must be apportionment to applicant's prior disability award for the neck under section 4664. Alternatively, defendant contends that there must be 45% apportionment to the prior injury under section 4663.

We received an answer from applicant. The WCJ issued a Report and Recommendation on Petition for Reconsideration (Report) recommending that we deny the Petition.

We have considered the allegations of defendant's Petition for Reconsideration, applicant's answer and the contents of the WCJ's Report with respect thereto. Based on our review of the record, and for the reasons stated in the WCJ's Report, which we adopt and incorporate, and for the reasons discussed below, we will affirm the F&A.

---

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

## FACTUAL BACKGROUND

Applicant claims injury to the right shoulder and neck on March 29, 2019 while employed as a child support officer II by Los Angeles County Child Support.

The parties have stipulated that applicant had a prior industrial injury on November 30, 2011 (ADJ8166410), which was resolved in March 2019 by Stipulations with Request for Award. This injury caused 41% permanent disability, 24% of which was attributed to the cervical spine. (Stipulations with Request for Award, March 20, 2019, Addendum A.) None of the medical reporting from this prior injury is in evidence.

Neil Halbridge, M.D. evaluated applicant as the orthopedic qualified medical evaluator (QME) for the 2019 injury. Dr. Halbridge found that applicant had sustained an industrial injury to her right shoulder and cervical spine as a result of the specific incident in 2019. (Joint Exhibit XX, Medical report from Neil Halbridge, M.D., September 20, 2019, p. 9.) Her condition was considered permanent and stationary as of May 29, 2020. (Joint Exhibit YY, Medical Report of Neil Halbridge, M.D., September 21, 2020, p. 6.) Dr. Halbridge provided 9% whole person impairment (WPI) to the right shoulder with an additional 2% add-on for pain and 16% WPI for the cervical spine per the ROM rather than the DRE method. (*Id.* at pp. 8-10.) Dr. Halbridge initially apportioned permanent disability for the cervical spine 80% to the 2019 injury, 10% to the prior 2011 industrial injury and 10% to natural progression of multilevel cervical spondylosis. (*Id.* at p. 8.)

Applicant filed a declaration of readiness to proceed (DOR) on December 17, 2020. Defendant filed an objection to applicant's DOR asserting that a supplemental report had been requested from Dr. Halbridge to clarify apportionment to the prior award.

Dr. Halbridge was provided with the reporting of the agreed medical evaluator (AME), Dr. Alexander Angerman, with respect to the 2011 injury. (Joint Exhibit ZZ, Medical Report of Neil Halbridge, M.D., March 24, 2021, p. 1.) Following review of the AME's reporting, Dr. Halbridge opined as follows regarding apportionment for the cervical spine:

> Apportionment of permanent disability with regard to the cervical spine is 45% apportioned to the specific work injury of March 30, 2019 when the door of an overhead cabinet fell on the examinee's right trapezius and the examinee had the onset of pain radiating down the right upper arm along the right trapezius to the right elbow. Forty-five percent (45%) of permanent disability with regard to the cervical spine is apportioned to a prior fall down the stairs at work on November

> 30, 2011 while working for the same employer following which the examinee had injuries that included the cervical spine and following completion of treatment the examinee had residual neck pain. Ten percent (10%) of permanent disability with regard to the cervical spine is apportioned to the natural progression of multilevel cervical spondylosis at the C3-C7 levels as noted on the MRI of the cervical spine performed on May 19, 2020. Normally, these types of changes take 10 or more years to develop, but the examinee worked for the employer for 19 years prior to the specific work injury of March 30, 2019 and that is the reason that only a small portion of permanent disability can be apportioned to the natural progression of an underlying or preexisting condition.
>
> (*Id.* at p. 8.)

This is the entirety of Dr. Halbridge's discussion of apportionment for the cervical spine in this report.

The matter was set for trial at the April 26, 2021 mandatory settlement conference per the parties' joint request. (Minutes of Hearing, April 26, 2021.) The trial proceeded on August 4, 2021. The parties stipulated at trial to the prior award for applicant's 2011 injury. (Minutes of Hearing, August 4, 2021, p. 2.) The issues at trial included permanent disability, apportionment and the applicability of section 4664 for the prior 2011 award. (*Id.*) Exhibits admitted at trial included two reports from applicant's primary treating physician and three reports from Dr. Halbridge offered as joint exhibits. None of the medical reporting from the prior 2011 injury were provided as evidence at trial.

The WCJ issued the F&A as outlined above.

## DISCUSSION

While the employee holds the burden of proof regarding the approximate percentage of permanent disability directly caused by the industrial injury, the employer holds the burden of proof to show apportionment of permanent disability. (Lab. Code, § 5705; see also *Escobedo v. Marshalls* (2005) 70 Cal.Comp.Cases 604, 613 (Appeals Board en banc), *Pullman Kellogg v. Workers' Comp. Appeals Bd.* (*Normand*) (1980) 26 Cal.3d 450 [45 Cal.Comp.Cases 170].) To meet this burden, the employer "must demonstrate that, based upon reasonable medical probability, there is a legal basis for apportionment." (*Gay v. Workers' Comp. Appeals Bd.* (1979) 96 Cal.App.3d 555, 564 [44 Cal.Comp.Cases 817]; see also *Escobedo*, *supra*, 70 Cal.Comp.Cases at p. 620.)

"Apportionment of permanent disability shall be based on causation." (Lab. Code, § 4663(a).) Determining apportionment requires looking "at the current disability and parcel[ing] 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 [72 Cal.Comp.Cases 565].) Physicians are required to address apportionment when evaluating permanent disability. (Lab. Code, § 4663(b)-(c).)

"Apportionment is a factual matter for the appeals board to determine based upon all the evidence." (*Gay*, *supra*, 96 Cal.App.3d at p. 564.) Thus, the WCJ has the authority to determine the appropriate amount of apportionment, if any. It is also well established that decisions by the Appeals Board must be supported by substantial evidence. (Lab. Code, §§ 5903, 5952(d); *Lamb v. Workmen's Comp. Appeals Bd.* (1974) 11 Cal.3d 274 [39 Cal.Comp.Cases 310]; *Garza v. Workmen's Comp. Appeals Bd.* (1970) 3 Cal.3d 312 [35 Cal.Comp.Cases 500]; *Le Vesque v. Workmen's Comp. Appeals Bd.* (1970) 1 Cal.3d 627 [35 Cal.Comp.Cases 16].) Therefore, the WCJ must determine if the medical opinions regarding apportionment constitute substantial evidence. (See *Zemke v. Workmen's Comp. Appeals Bd.* (1968) 68 Cal.2d 794, 798 [33 Cal.Comp.Cases 358].)

As outlined in *Escobedo*:

> [I]n the context of apportionment determinations, the medical opinion must disclose familiarity with the concepts of apportionment, describe in detail the exact nature of the apportionable disability, and set forth the basis for the opinion, so that the Board can determine whether the physician is properly apportioning under correct legal principles.
>
> (*Escobedo*, *supra*, 70 Cal.Comp.Cases at p. 621, citations omitted.)

The Court of Appeal has similarly held in relevant part:

> It is certain the mere fact that a report addresses the issue of causation of the permanent disability, and makes an apportionment determination by finding the approximate relative percentages of industrial and nonindustrial causation does not necessarily render the report one upon which the Board may rely.
>
> (*E.L. Yeager Construction v. Workers' Comp. Appeals Bd.* (*Gatten*) (2006) 145 Cal.App.4th 922, 927-928 [71 Cal.Comp.Cases 1687].)

The WCJ explained in her Report that she did take into account the prior award from

applicant's November 30, 2011 injury in determining disability.[2] The 20% of apportionment to other factors for permanent disability to the neck includes 10% attributed to the 2011 injury in Dr. Halbridge's September 21, 2020 report. The WCJ thus did apply apportionment to the prior injury per section 4663 as she explains in her Report.

Defendant contends that the evidence supports a finding of apportionment to the prior award pursuant to section 4664. Section 4664(b) provides:

> 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.
>
> (Lab. Code, § 4664(b).)

The employer must make the following showing in order to prove apportionment for a prior permanent disability award is warranted under section 4664:

> First, the employer must prove the existence of the prior permanent disability award. Then, having established by this proof that the permanent disability on which that award was based still exists, the employer must prove the extent of the overlap, if any, between the prior disability and the current disability. Under these circumstances, the employer is entitled to avoid liability for the claimant's current permanent disability only to the extent the employer carries its burden of proving that some or all of that disability overlaps with the prior disability and is therefore attributable to the prior industrial injury, for which the employer is not liable.
>
> (*Kopping v. Workers' Comp. Appeals Bd.* (2006) 142 Cal.App.4th 1099, 1115; see also *Pasquotto v. Hayward Lumber* (2006) 71 Cal.Comp.Cases 223 (Appeals Board en banc).)

Defendant therefore bears the burden of proving the existence of the prior award and that there is overlap between applicant's prior disability and current disability for the cervical spine for there to be apportionment per section 4664 to the previous industrial injury.

The parties stipulated at trial that there was a prior award from March 2019 for applicant's 2011 injury. This constitutes evidence of the existence of a prior award for the cervical spine. (See *Sanchez v. County of Los Angeles* (2005) 70 Cal.Comp.Cases 1440, 1451 (Appeals Board en

[2] Although the WCJ cited Dr. Halbridge's March 24, 2021 report in support of her apportionment findings for the neck in her Report, the record reflects that she followed the apportionment opinion provided in Dr. Halbridge's September 21, 2020 report.

banc) [employer can submit a copy of a prior award of permanent disability as evidence or request judicial notice of it].)[3]

"Overlap is not proven merely by showing that the second injury was to the same body part because the issue of overlap requires a consideration of the factors of disability or work limitations resulting from the two injuries, not merely the body part injured." (*Contra Costa County Fire Protection Dist. v. Workers' Comp. Appeals Bd.* (*Minvielle*) (2010) 75 Cal.Comp.Cases 896, 901-902 (writ den.).) Defendant contends that although the AME for the 2011 injury rated applicant's cervical spine impairment using the DRE method and Dr. Halbridge rated the spinal impairment using the ROM method, this is irrelevant per *Hom v. City and County of San Francisco* (April 15, 2020; ADJ10658104) 2020 Cal. Wrk. Comp. P.D. LEXIS 124 [overlap of disability found per section 4664 although lumbar spine impairment was rated using different methodologies in the AMA Guides]. None of the medical reports from applicant's 2011 injury were placed in evidence.[4] The evidentiary record in this matter thus does not contain Dr. Angerman's reporting and we are unable to compare his evaluation of impairment to Dr. Halbridge's reporting. In *Hom*, the AME had expressly opined that apportionment per section 4664 can be applied. In this matter, the QME Dr. Halbridge did not provide any discussion regarding how applicant's prior permanent disability for the cervical spine overlaps with her current permanent disability for this body part. Consequently, we agree with the WCJ that defendant failed to meet its burden of proof to show overlap and apportionment per section 4664 is not warranted.

In conclusion, we will affirm the Findings of Fact and Award.

---

[3] The Court of Appeal in *Kopping* disapproved of the *Sanchez* decision regarding whether applicant has the burden of disproving overlap, but did not reject the Appeals Board's opinion that a copy of a prior award or judicial notice of it may constitute evidence of that prior award.

[4] The parties' stipulation to the prior award does not render the AME's reports from that case part of the evidentiary record in this matter.

For the foregoing reasons,

**IT IS ORDERED** as the Decision After Reconsideration of the Workers' Compensation Appeals Board that the Findings of Fact and Award issued by the WCJ on June 2, 2022 is **AFFIRMED**.

**WORKERS' COMPENSATION APPEALS BOARD**

**/s/ MARGUERITE SWEENEY, COMMISSIONER**

**I CONCUR,**

**/s/ CRAIG SNELLINGS, COMMISSIONER**

**/s/ ANNE SCHMITZ, DEPUTY COMMISSIONE**

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

**November 10, 2022**

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

**LAW OFFICE BRUCE KORDIC**
**OFFICE OF THE COUNTY COUNSEL (LOS ANGELES)**
**PATRICIA HARRISON**

**AI/pc**

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

**REPORT AND RECOMMENDATION**
**ON PETITION FOR RECONSIDERATION**

## I
## INTRODUCTION

| | | |
|---|---|---|
| 1. | Date of Injury: | 3/29/2019 |
| | Parts of Body Injured: | Right Shoulder and Neck |
| 2. | Identity of Petitioner: | **Defendant** filed the Petition. |
| | Timeliness: | The petition was timely filed. |
| | Verification: | The petition was properly verified. |
| 3. | Date of issuance of Findings and Award: | June 2, 2022 |
| 4. | **Petitioner's contentions:** | |

A. The Award fails to address the issue of apportionment.

B. Apportionment is appropriate because of Applicant's prior award.

## II
## FACTS

Applicant, Patricia Harrison, sustained an admitted injury to her right shoulder and neck while employed as a Child Support Officer II by the Los Angeles County Child Support. At the time of the trial, it was specifically noted in the Minutes of Hearing that a prior Stipulated Award had been approved by the Honorable Elliot Borska for a specific date of injury (11/30/2011 – case number ADJ8166410 under Applicant's former name – Patricia Carter). Parties also stipulate that Applicant was permanent and stationary on May 29, 2020 based upon the medical report of Panel Qualified Medical Examiner Dr. Neil Halbridge dated March 24, 2021.

Limited issues were identified for adjudication as follows:

1. Permanent disability.
2. Apportionment.
3. Need for further medical treatment.
4. Liability for self-procured medical treatment
5. Attorney fees.
6. Applicant proposes permanent disability per Labor Code section 5502(d) based upon the attached permanent disability rating in the Pre-trial Conference Statement.
7. Applicability of Labor Code section 4664 to Applicant's cervical spine permanent disability per the prior award in ADJ8166410 – the 11/30/2011 –specific date of injury.

The parties jointly offered medical reports from Panel Qualified Medical

Evaluator Dr. Neil Halbridge. Applicant placed into evidence medical reports from the treating doctor – Michel Schiffman, M.D. - without objection.

No testimony was taken or offered.

The Findings of Fact and Award issued on January 13, 2022. It was rescinded on June 10, 2022 after Defendant filed a Petition for Reconsideration, indicating, among other things, the lack of service of the Formal Rating and Instructions. Pursuant to Defendant's Declaration of Readiness to Proceed, this matter was set for a Rating Conference. After the conference, a Findings of Fact and Award issue on June 2, 2022. It is from this Findings and Award that Defendant is aggrieved and has filed a Petition for Reconsideration. Applicant has filed an Answer to the Petition for Reconsideration.

## III
## DISCUSSION

Defendant is aggrieved by the determination by the amount of apportionment applied in this case.

It should be noted that the Opinion on Decision clearly states the basis for each issue decided. All medical reporting, transcript and documentary evidence relied upon is clearly identified. However, to the extent that the Opinion on Decision may seem skeletal, pursuant to Smales v. WCAB (1980) 45 CCC 1026, this Report and Recommendation cures that defect.

Disability and apportionment were based on the medical reporting of Panel Qualified Medical Evaluator Dr. Neil Halbridge dated March 24, 2021[1] As indicated in the Decision, based upon that report, it was determined that 10% of the disability to Applicant's right shoulder and 20% of the disability attributable to Applicant's neck were due to nonindustrial causes and/or factors.

Defendant disagrees with rating and the apportionment and asserts that determination of disability does not taken into account the prior award. However, the determination of disability did taken into account the prior award. Apportionment, as found, was the only substantial evidence of non-industrial disability that was supported by the record. Dr. Halbridge's reporting was not substantial medical evidence on disability attributable to any other causes, including the prior award. Dr. Halbridge's opinion was conclusory and fail to set forth his reasoning as required in well-established law. There is no how or why, as required, for any apportionment (including the prior award), except for the apportionment as given. Without clear and concise language addressing the how and why of additional apportionment was appropriate, the apportionment sought by defense is not merited. While it may have been possible to remedy this defect, no deposition or additional reporting was sought or obtained.

[1] All of Dr. Neil Hallbridge's reports were marked as joint exhibits

## IV
## RECOMMENDATION

It is respectfully recommended that the Defendant' Petition for Reconsideration be denied for the reasons stated above.

DATED: 8/3/2022

JACQUELINE A. WALKER
Workers' Compensation Administrative Law Judge