

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

**LETICIA RIVERA GUTIERREZ, *Applicant***

**vs.**

**LABORNOW INC;  
GALLAGHER BASSETT GOLD RIVER, *Defendants***

**Adjudication Numbers: ADJ12239828 (MF); ADJ12514900  
Van Nuys District Office**

**OPINION AND ORDER  
GRANTING PETITION FOR  
RECONSIDERATION  
AND DECISION AFTER  
RECONSIDERATION**

We have considered the allegations of the Petition for Reconsideration and the contents of the report of the workers' compensation administrative law judge (WCJ) 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, we will grant reconsideration, amend Findings of Fact 8 in case numbers ADJ12239828 (MF) and ADJ125149008, and otherwise affirm the findings and award.

For the foregoing reasons,

**IT IS ORDERED** that reconsideration of the decision of January 27, 2023 is **GRANTED**.

**IT IS FURTHER ORDERED** as the Decision After Reconsideration of the Workers' Compensation Appeals Board that the Findings and Award of January 27, 2023 in case number ADJ12239828 is **AMENDED** as follows:

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Finding of Fact: 8. A reasonable attorney fee is \$5,698.50 to be taken from the far-end of the award and a reasonable attorney's fee of 15% of the amount due on temporary disability, to be held in trust pursuant to agreement of the parties or order of the court.

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**IT IS FURTHER ORDERED** as the Decision After Reconsideration of the Workers' Compensation Appeals Board that the Findings and Award of January 27, 2023 in case number ADJ12514900 is **AMENDED** as follows:

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Finding of Fact 8: A reasonable attorney fee is \$913.50, to be taken from the far-end of the award, to be held in trust pursuant to agreement of the parties or order of the court.

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**WORKERS' COMPENSATION APPEALS BOARD**

**/s/ KATHERINE WILLIAMS DODD, COMMISSIONER**

**I CONCUR,**

**/s/ KATHERINE A. ZALEWSKI, CHAIR**

**/s/ JOSEPH V. CAPURRO, COMMISSIONER**



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

**April 17, 2023**

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

**LETICIA RIVERA GUTIERREZ  
ROWEN, GURVEY & WIN  
LEWIS BRISBOIS**

**LN/pm**

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

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

INTRODUCTION

Defendant filed a timely, verified Petition for Reconsideration, dated February 15, 2023, based upon the Opinion on Decision and Findings of Fact and Order, dated January 27, 2023. This matter came on for trial on November 30, 2022, the issues were framed, and exhibits entered into the record. Testimony was elicited by applicant on her own behalf. (Minutes of Hearing and Summary of Evidence, EAMS Doc ID. 76195406.)

STIPULATED FACTS ADJ12239828 (MF)

Leticia Rivera Gutierrez, while employed on 2/15/2019, as a machine operator, Occupational Group No. 320, at Huntington Park, California, by Labornow, Inc., sustained injury arising out of and in the course of employment to the cervical spine. Applicant claims to have sustained injury arising out of and in the course of employment to bilateral shoulders and wrists. At the time of injury, the employer's workers' compensation carrier was Old Republic. At the time of injury, the employee's earnings were \$474.00 per week, warranting indemnity rates of \$316.00 for temporary disability and pursuant to code for permanent disability. The carrier/employer has paid compensation as follows: temporary disability at the weekly rate of \$316.00 a week for the period of 4/4/2020 through 8/19/2020; and the period of 11/11/2021 through 12/22/2021; and for the period of 2/11/2021 through 10/27/2021; and for the additional period of 9/11/2019 through 12/11/2019 for a total of \$2,500.00 (this period only). Permanent disability was paid at \$290.00 a week for the period of 11/7/2020 through 9/10/2021, and the periods of 12/23/2021 through 2/2/2021 and for the periods of 10/28/2021 through 11/10/2021.

ISSUES AT TRIAL

1. Parts of body injured. 2. Temporary disability, with the employee claiming the following periods of 11/20/2020 through 6/29/2022. 3. Permanent and stationary date, with the employee claiming 6/29/2022 based on Dr. Bakshian, and the employer claiming 9/21/2020 based on PQME Dr. Sheibani-Rad. 4. Permanent disability. 5. Apportionment. 6. Need for further medical treatment. 7. Liability for self-procured medical treatment. 8. Issue of liens shall be deferred. 9. Attorney fees. 10. Defendant claims credit for TTD overpayment. 11. Defendant contends medical reports of Dr. Bakshian are not substantial medical evidence.

## STIPULATED FACTS ADJ12514900

Leticia Rivera Gutierrez, while employed on 6/3/2019, as a machine operator, Occupational Group No. 320, at Huntington Park, California, by Labornow, Inc., sustained injury arising out of and in the course of employment to the lumbar spine. Applicant claims to have sustained injury arising out of and in the course of employment to the bilateral hips. At the time of injury, the employer's workers' compensation carrier was Old Republic. At the time of injury, the employee's earnings were \$470.00 per week, warranting indemnity rates of \$316.00 for temporary disability and pursuant to code for permanent disability. The employer has furnished some medical treatment. The primary treating physician is Sam Bakshian, M.D.

## ISSUES AT TRIAL

1. Parts of body injured.
2. Temporary disability, with the employee claiming the following periods of 11/20/2020 through 6/29/2022.
3. Permanent and stationary date, with the employee claiming 6/29/2022 based on Dr. Bakshian, and the employer claiming 9/21/2020 based on PQME Dr. Sheibani-Rad.
4. Permanent disability.
5. Apportionment.
6. Need for further medical treatment.
7. Liability for self-procured medical treatment.
8. Issue of liens shall be deferred.
9. Attorney fees.
10. Defendant claims credit for TTD overpayment.
11. Defendant contends medical reports of Dr. Bakshian are not substantial medical evidence.

## PETITIONER'S CONTENTIONS

1. The WCALJ's omission of any reference to the Compromise and Release and medical reports from the Board's file for the prior claim ADJ189384 is inconsistent with the requirement of Labor Code 5313.
2. The WCALJ's Award for attorney fees does not address the prior Applicant Attorney's standing as a lien claimant on both claims. (Petition for Reconsideration, dated February 15, 2023, EAMS Doc ID 45105679, p. 2.)

## DISCUSSION

Regarding Judicial Notice of ADJ189384, an OACR captioned as LAO 0855880, Against T-Tops Sports Wear, listing injury on 03/02/2006 to left shoulder, left arm, left hand, face, head, neck, back, both knees and psyche. Page 3 has a series of string ratings based upon Dr. Berman's AME report, dated 06/20/2006. Dr. Berman's report does not appear in EAMS.

In ADJ12239828 injury was found to cervical spine, bilateral shoulders and wrists, arising out of and occurring in the course of employment on 2/15/2019. In ADJ12514900 injury was accepted to the lumbar spine.

So, what defendant does is ask for judicial notice of a 15 year old OACR and apparently wants the WCJ to make their case for apportionment.

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, supra*, 70 Cal.Comp.Cases at p. 613, *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).) Physicians are required to address apportionment when evaluating permanent impairment. (Lab. Code, § 4663(b)-(c).) Section 4663(c) provides in pertinent part as follows: In order for a physician's report to be considered complete on the issue of permanent disability, the report must include an apportionment determination. A physician shall make an apportionment determination by finding what approximate percentage of the permanent disability was caused by the direct result of injury arising out of and occurring in the course of employment and what approximate percentage of the permanent disability was caused by other factors both before and subsequent to the industrial injury, including prior industrial injuries.

#### APPORTIONMENT OF PRIOR AWARD UNDER LC §4664(b)

Labor Code §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."

#### DEFENDANT'S TWO-PRONG BURDEN OF PROOF UNDER LC §4664(b).

Case law has repeatedly held that defendant has a two-prong burden of proof regarding apportionment under LC §4664(b):

- (1) Defendant must first prove that a prior award to the same body part exists,  
AND
- (2) Defendant must also prove that there is "overlap" of permanent disability (PD) between the initial and subsequent injury.

This legal standard was set forth in the 3rd DCA case of *Kopping v. WCAB* (2006) 71 Cal Comp Cases 1229. Ed Kopping was a California Highway Patrol (CHP) officer who had suffered two industrial injuries to his spine. The first

injury occurred in 1996. The AME in that case found 29% PD, based on “factors of disability such as restrictions in spinal motion and subjective complaints of intermittent to frequent slight to moderate pain.”

The second industrial injury to Officer Kopping’s spine occurred in 2002. The AME in that case determined a 27% level of PD, based on a PD level "approximately halfway between a disability precluding repetitive motions of the back and a disability precluding heavy lifting."

The DCA provided an extensive analysis of the seemingly contradictory language of LC §4664(b) and came up with the only interpretation that made sense to them, which was that the defendant has a two-prong burden of proof under LC §4664(b) as follows:

“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....  
“... The burden of proving overlap is part of the employer's overall burden of proving apportionment, which was not altered by section 4664(b), except to create the conclusive presumption that flows from proving the existence of a prior permanent disability award.”

The DCA in the *Kopping* case concluded, “SCIF, the adjusting agency for Kopping's employer, has the burden of proving overlap between the current disability and the previous disability in order to establish its right to apportionment of Kopping's permanent disability.” Therefore, the DCA disallowed LC §4664 apportionment, because defendant failed to prove overlap between the prior award and the current industrial injury. The WCAB affirmed this two-prong analysis for defendant’s burden of proof under LC §4664(b) in the panel decision of *Laster v. City and County of San Francisco*, 2014 Cal. Wrk. Comp. PD LEXIS 201.

Therefore, it is defendant’s burden to prove, not only that there was a prior award to the same body part, but ALSO that there is “overlap” between the prior industrial injury and the current industrial injury. Defendant failed to meet their burden.

### **RECOMMENDATION**

The undersigned WCJ respectfully recommends that Petition for Reconsideration, dated February 15, 2023, be partially granted and partially denied.

It is recommended that ADJ12239828 (MF) Findings and Award be amended to:

Finding of Fact: 8. A reasonable attorney fee is \$5,698.50 to be taken from the far-end of the award and a reasonable attorney's fee of 15% of the amount due on temporary disability, to be held in trust pursuant to agreement of the parties or order of the court.

ADJ125149008

Finding of Fact 8: A reasonable attorney fee is \$913.50, to be taken from the far-end of the award, to be held in trust pursuant to agreement of the parties or order of the court.

As to the issue of apportionment, the undersigned recommends that their petition be denied.

DATED: February 24, 2023

ROBERT SOMMER  
Workers' Compensation  
Administrative Law Judge