

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

ALBERT BAILEY, *Applicant*

vs.

**CITY OF SAN BERNARDINO, permissibly self-insured,
administered by ADMINSURE, *Defendants***

**Adjudication Number: ADJ13528971
San Bernardino District Office**

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

Applicant Albert Bailey seeks reconsideration of the March 7, 2024 Findings and Award, wherein the workers' compensation administrative law judge (WCJ) found that defendant met its burden to establish that applicant had prior awards totaling 63% (prior 21% permanent disability for cancer in the neck and skin plus 42% permanent disability for heart disease) in the same region as the current injuries pursuant to Labor Code,¹ section 4664(c)(1), and that applicant's current permanent disability for malignant melanoma with widespread metastasis, coronary heart disease, pulmonary emboli and peripheral veins, is therefore limited to 37% permanent disability under the statute.

Applicant contends that the cancer and heart injuries should be treated as separate body regions such that only 21% permanent disability should be subtracted from applicant's current 100% permanent disability for melanoma cancer, resulting in 79% permanent disability for cancer. Additionally, the current 52% permanent disability for the heart need not be reduced because adding the prior 42% heart permanent disability is less than the 100% permanent disability cap of § 4664(c)(1). Applicant then contends that the 79% permanent disability for cancer and 52% permanent disability for the heart should then be added or combined, resulting in either 100%

¹ All future statutory references are to the Labor Code unless otherwise indicated.

permanent disability or 90% permanent disability, respectively. Applicant also contends that development of the record is warranted as to the bilateral lungs, pulmonary emboli, and lower extremity veins, as well as whether the multiple injuries should be added or combined.

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

We have considered the Petition for Reconsideration, the Answer, and the contents of the Report, and we have reviewed the record in this matter. Based on the Report, which we adopt and incorporate, except for the discussion on the development of the record (commencing on p. 4, last paragraph, and ending on the paragraph starting with “Accordingly” on p. 5; and commencing on p. 5, the phrase “and development of the record is not warranted” at the end of the second full paragraph; and commencing on p. 6, first paragraph starting with the word “Therefore” and ending with the word “same,”) and for the reasons set forth below, we grant reconsideration and return the matter to the trial level for further proceedings consistent with this opinion.

We agree with the WCJ that section 4664(c)(1) limits the award for applicant’s malignant melanoma, coronary heart disease, and pulmonary emboli, as all these conditions fall under the “catch-all” region in section 4664(c)(1)(G). However, applicant’s injury to his lower extremity veins arguably fall under a different body region under section 4664(c)(1)(F). We, thus, grant reconsideration and return this matter to the trial level to develop the records as to applicant’s injury to his lower extremity veins. (*Tyler v. Workers’ Comp. Appeals Bd.* (1997) 56 Cal. App.4th 389, 393-395 [62 Cal.Comp.Cases 924]; *McClune v. Workers’ Comp. Appeals Bd.* (1998) 62 Cal.App.4th 1117, 1121-1122 [63 Cal.Comp.Cases 261]; see §§ 5701 and 5906 and *McDuffie v. Los Angeles County Metropolitan Transit Authority* (2001) 67 Cal.Comp.Cases 138 (Appeals Bd. en banc).)

For the foregoing reasons,

IT IS ORDERED that applicant Albert Bailey's Petition for Reconsideration of the March 7, 2024 Findings and Award is **GRANTED**.

IT IS FURTHER ORDERED, as the Decision After Reconsideration of the Workers' Compensation Appeals Board, that the March 7, 2024 Findings and Award is **AMENDED** as follows and the matter is **RETURNED** to the trial level for further proceedings.

FINDINGS OF FACT

...

10. Defendant met their burden to establish applicant had prior awards totaling 63% in the same region as the current injuries to the heart, both lungs in the form of pulmonary emboli, and cancer in the form of malignant melanoma with metastasis, pursuant to Labor Code, section 4664(c)(1)(G).
11. Applicant's current permanent disability for the malignant melanoma with widespread metastasis, coronary heart disease, and pulmonary emboli, is limited by Labor Code, section 4664(c)(1)(G). The issue of whether applicant's injury to his peripheral veins in the form of bilateral lower extremity thrombophlebitis is limited by Labor Code, section 4664(c)(1)(G), is deferred.
12. The issue of permanent disability is deferred.
13. The issue of attorney's fees is deferred.
14. Applicant requires further medical treatment to cure or relieve from the effects of the industrial injuries sustained herein.

AWARD

AWARD IS MADE in favor of Albert Bailey and against City of San Bernardino as follows:

- a. Further medical treatment to cure or relieve from the effects of the injury herein.

WORKERS' COMPENSATION APPEALS BOARD

/s/ CRAIG SNELLINGS, COMMISSIONER

I CONCUR,

/s/ KATHERINE WILLIAMS DODD, COMMISSIONER

/s/ JOSEPH V. CAPURRO, COMMISSIONER



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

May 28, 2024

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

**ALBERT BAILEY
LAW OFFICES OF SMITH AND GARFUNKEL, LLP
GOLDMAN MAGDALIN STRAATSMA, LLP**

LSM/oo

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

**REPORT AND RECOMMENDATION ON
PETITION FOR RECONSIDERATION**

I. INTRODUCTION

Identity of Petitioner: Applicant, through his Attorney,
Law Offices of Smith and Garfunkel, LLP

Timeliness: The petition was filed timely.

Verification: The petition was properly verified.

Date of Issuance of Findings & Award: March 7, 2024

II. CONTENTIONS

1. By the Order, Decision or Award made and filed by the Workers' Compensation Administrative Law Judge, the Appeals Board acted without or in excess of its powers.
2. The evidence does not support the Findings of Fact.
3. The Findings of Fact do not support the Order, Decision or Award.

III. FACTS

Applicant, Albert Bailey, while employed during the period September 9, 1987 through August 4, 2014, as a firefighter, Occupational Group Number 490 at San Bernardino, California, by City of San Bernardino, claims to have sustained injury arising out of and in the course of employment to the following: 1) cancer malignant melanoma with metastasis; 2) heart; 3) lower extremity veins; 4) both lungs pulmonary emboli. The undersigned found that applicant met his burden to establish injury arising out of and in the course of his employment with the City of San Bernardino to the heart, lower extremity veins, both lungs in the form of pulmonary emboli and cancer in the form of malignant melanoma with metastasis.

The parties utilized Dr. Ernest Levister as an AME and jointly offered his reports dated July 27, 2021, October 18, 2022 and March 9, 2023. (Joint Exhibit X, Y and Z.) Dr. Levister utilized Table 5-11 on page 106 to rate applicant's malignant melanoma with widespread metastasis and assigns 80% whole person impairment. (Joint Exhibit Y page 26.) The undersigned rated this impairment at 100% per the following rating string: 05.03.00.00-80-[1.4]-112-490I-100-100% permanent disability. Dr. Levister assigned 25% whole person impairment for the heart due to coronary heart disease per Table 3-6a on page 26. (Joint Exhibit Y page 25.) The undersigned rated this impairment at 52% based on the following rating string: 03.02.00.00-25-[1.4]-35-490I-44-52% permanent disability. Combining 100% with 52% renders a value of 100%.

Judicial notice was taken of ADJ1600181, which the undersigned opined reflected applicant had a prior award of 21% for a cancer-type sarcoma of the neck and skin cancer, which fell into Section (G) of Labor Code Section 4664(c)(1). The undersigned also took judicial notice of the Award in ADJ9538168, which the undersigned found contained 13% impairment for

coronary heart disease and 33% for hypertensive cardiovascular disease. Accordingly, the undersigned found the portion of the Award in ADJ9538168 that fell into Section (G) had a combined value of 42%. Consistent with the methodology in McGowen, the undersigned added 21% to 42% for a value of 63% to obtain the value of prior awards in the region defined in Section (G) of Labor Code Section 4664(c)(1). Thereafter, the undersigned determined applicant's current award would be limited to a maximum of 37% for disability falling into region (G). Since the entirety of the disability in applicant's current claim, including the unrated pulmonary emboli and peripheral veins, fell into region (G), the undersigned found that the current award was statutorily limited to 37% pursuant to Labor Code Section 4664(c)(1). Accordingly, applicant was awarded permanent disability of 37% payable at the rate of \$290.00 per week for 180 weeks, which equals \$52,200; less reasonable attorney's fees.

By verified Petition for Reconsideration dated and filed March 29, 2024, applicant, by and through his attorney of record, Law Offices of Smith and Garfunkel, timely seeks reconsideration of the March 7, 2024 Findings and Award. On April 8, 2024 defendant, through their attorney of record, Goldman, Magdalin, Straatsma, timely filed their Answer to Petition for Reconsideration which was signed on April 5, 2024.

IV. DISCUSSION

1. Calculation of Permanent Disability Subject to Labor Code Section 4664(c)(1).

Applicant contends that adding all disabilities falling within Labor Code Section 4664(c)(1)(G) together before subtracting from 100% does not meet the statutory meaning of Labor Code Section 4664(c)(1).

Labor Code Section 4664(c)(1) states:

“The accumulation of all permanent disability awards issued with respect to any one region of the body in favor of one individual employee shall not exceed 100 percent over the employee's lifetime unless the employee's injury or illness is conclusively presumed to be total in character pursuant to Section 4662. As used in this section, the regions of the body are the following:

- (A) Hearing.
- (B) Vision.
- (C) Mental and behavioral disorders.
- (D) The spine.
- (E) The upper extremities, including the shoulders.
- (F) The lower extremities, including the hip joints.
- (G) The head, face, cardiovascular system, respiratory system, and all other systems or regions of the body not listed in subparagraphs (A) to (F), inclusive.

(2) Nothing in this section shall be construed to permit the permanent disability rating for each individual injury sustained by an employee arising from the same industrial accident, when added together, from exceeding 100 percent.”

Applicant asserts the disability for the cancer and the heart should be considered separate “regions.” He contends the proper method of calculation is to determine the individual impairment values prior to determining whether the accumulation of all permanent disability awards issued with respect to any one region exceeds 100%. Applicant contends that cancer is one “region” and therefore, the prior 21% award for the cancer-type sarcoma of the neck and skin cancer in ADJ1600181 should be deducted from the current cancer disability of 100% for a new award of 79% in relation to applicant’s cancer disability. With respect to the heart, applicant asserts the prior award of 42% and the current award of 52% total 94% when added together. Therefore, he contends that since 94% falls below the maximum accumulation of more than 100% permanent disability for the heart “region”, Labor Code Section 4664(c)(1) does not warrant a reduction of the current award. Accordingly, applicant asserts the present award should have been 79% for cancer and 52% for the heart, which produce a combined value of 90%.

Applicant relies on *Sanchez* and cites “the WCAB must consider whether the disability caused by a new injury overlaps the disability that was the subject of a prior award. (*Sanchez v. County of Los Angeles* 70 Cal. Comp Cases 1440 at 1449.) However, applicant misapplies *Sanchez* when he suggests applicant’s prior awards should be evaluated separately because “[t]he issue of whether there is overlap between the prior and current permanent disability is not applicable where the 100% lifetime cap is reached.” (*Russell v. County of LA* 2021 Cal. Work. Comp. PD Lexis 152 at 9.) The panel in *Russell* distinguishes *Sanchez* in cases where the awards reach 100% and states “the lifetime cap did not apply [in *Sanchez*] since the current level of permanent disability was 7% and the prior permanent disability was 22%.” (*Russell*, supra at 9.) Additionally, “the lifetime limitation on awards for any one region of the body applies even if there is no overlap.” (*Russell*, supra at 7.) Accordingly, *Sanchez* found that “for purposes of section 4664(c)(1), applicant now has a total of 29% permanent disability (i.e., 22% plus 7%) for the lower extremities region.” (*Sanchez* at 1458.)

As discussed above, applicant’s argument that the heart and cancer permanent disability should be considered separately is not supported case law. In *Russell*, it was found that applicant had 100% permanent disability in relation to his new claim for colon cancer which fell into Labor Code Section 4664(c)(1)(G). The WCJ in *Russell* found applicant had a prior award of 34% for body parts which fell into Labor Code Section 4664(c)(1)(G), and therefore subtracted that 34% prior award value from the new 100% permanent disability for his colon cancer. The Appeals Board panel in *Russell* cited *McGowan* and noted that “panel affirmed the application of the lifetime cap based on adding the permanent disability from two prior awards, injury to the heart, and cancer of the bladder, where the applicant argued that the lifetime cap was inapplicable due to the absence of overlap between the prior and his current award for recurrent bladder cancer.” (*Russell*, supra at 10.) *Russell* is also contrary to applicant’s argument that the value of the prior awards should be calculated with the combined values chart prior to reduction. *Russell* cites to *McGowan* and notes the “WCJ and the panel rejected applicant’s argument that the prior awards should have been combined rather than added together, which would have lowered the award, to calculate the amount of the prior awards to be deducted from the current award.” (*Russell*, supra at 11.) Even the restriction in Labor Code Section 4663(e) does not render the lifetime limitation inapplicable based on the panel finding in *Hunt*. (*Hunt (Matthew) v. California Highway Patrol*, 2024 Cal. Wrk. Comp. P.D. LEXIS 27.) The Appeals Board in *Hunt* imposed the Labor Code Section 4664(c)(1) limitation for a presumptive injury despite Labor Code Section 4663(e) precluding apportionment. (See *Hunt*, supra.)

Labor Code Section 4664(c)(1) is a legislatively created 100% lifetime cap on the total amount of permanent disability a worker may accumulate in any one of the designated regions. In the present matter applicant had prior awards valued at 63% that fell within the region of Labor Code Section 4664(c)(1)(G). Pursuant to Labor Code Section 4664(c)(1)(G), applicant cannot accumulate awards of permanent disability in excess of 100% permanent disability for injuries involving the “head, face, cardiovascular system, respiratory system, and all other systems or regions of the body not listed in subparagraphs (A) to (F), inclusive.” Accordingly, despite the current award value exceeding 37%, the maximum amount that may be awarded is an additional 37% for body parts falling within the region defined in 4664(c)(1)(G).

2. Development of the Record

Applicant also contends the record should be reopened to inquire whether applicant should be deemed to have permanent total disability in accordance with the fact pursuant to Labor Code Section 4662. Applicant bears the burden of proving the level of permanent disability caused by the injury. (*South Coast Framing v. Workers’ Comp. Appeals Bd.* (Clark) (2015) 61 Cal.4th 291, 297-298.) Labor Code Section 3202 requires liberal construction of the law in favor of the injured worker, not the facts and “does not relieve a party from meeting its evidentiary burden of proof.” (*Rogers v. Workers’ Comp. Appeals Bd.* (1985) 172 Cal. App. 3d 1195, 1202; *Livitsanos v. Superior Court* (1992) 2 Cal. 4th 744, 753.) This matter was placed on the Mandatory Settlement Conference calendar pursuant to applicant attorney’s Declaration of Readiness, noting their reliance on the reporting of Dr. Ernest Levister, to “frame stipulations and issues for Trial should settlement ultimately fail.” (EAMS # 47630093.) At the Mandatory Settlement Conference held on October 11, 2023 the parties jointly requested a Trial date. (EAMS # 77244271.) The matter ultimately proceeded to Trial and was submitted on January 16, 2024. Applicant was the moving party, who jointly requested trial to include the issue of permanent disability and made no objection on the day of Trial that further discovery was needed. The first time applicant takes issue with the medical reporting is on reconsideration. Defendant raised the limitations of Labor Code Section 4664(c)(1) on the Pre-Trial Conference statement and yet, there was no objection to proceeding to Trial on the current record. Therefore, while a WCJ may have a duty to develop the record where the entire record is inadequate to enable a decision, this duty does not permit a judge to rescue a party from their obligation of developing their own case and obtaining medical evidence. (*see San Bernardino Community Hospital v WCAB (McKernan)*(1999) 64 CCC 986). In light of the above, and as discussed in the Opinion on Decision, the undersigned finds the reporting of the AME Dr. Levister to be substantial medical evidence on the issue of permanent disability.

In addition to the lack of diligence on applicant’s part to develop the record initially, a finding of permanent total disability in accordance with the fact pursuant to Labor Code Section 4662 would not change the overall award. Labor Code Section 4662 states:

“(a) Any of the following permanent disabilities shall be conclusively presumed to be total in character:

- (1) Loss of both eyes or the sight thereof.
- (2) Loss of both hands or the use thereof.
- (3) An injury resulting in a practically total paralysis.
- (4) An injury to the brain resulting in permanent mental incapacity.

(b) In all other cases, permanent total disability shall be determined in accordance with the fact.”

Consequently, even if applicant was successful in establishing disability in accordance with the fact pursuant to Labor Code Section 4662(b), the limitation of Labor Code Section 4664(c)(1) would still act to reduce the award because such a finding is not a *conclusively* presumed to be total under 4662. Since there is no evidence to establish applicant’s current “injury or illness is conclusively presumed to be total in character pursuant to Section 4662(a), the sum of the permanent disability awards for any one body region cannot exceed 100%.

V. RECOMMENDATION

It is respectfully recommended that the Petition for Reconsideration dated March 29, 2024 be denied in its entirety.

Dated: April 12, 2024

Heather L. Hirsch
WORKERS’ COMPENSATION
ADMINISTRATIVE LAW JUDGE