WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

ROBERT FIEGE, *Applicant*

vs.

COUNTY OF LOS ANGELES, permissibly self-insured; THE OFFICERS GROUP; CIGA, on behalf of RELIANCE NATIONAL INSURANCE COMPANY, in liquidation, care of INTERCARE, *Defendants*

Adjudication Numbers: ADJ343423 (VNO0394377) - MF ADJ3947959 (VNO0295389); ADJ994817 (VNO0295392) Marina del Rey District Office

OPINION AND DECISION AFTER RECONSIDERATION

We previously granted reconsideration in order to further study the factual and legal issues. This is our Opinion and Decision After Reconsideration.[1]

Applicant seeks reconsideration of the "Findings and Award" (F&A) issued on June 24, 2021, by the workers' compensation administrative law judge (WCJ). The WCJ found, in pertinent part, that applicant sustained industrial injury to his low back on March 23, 1992, which resulted in an award of 30.5% permanent disability (ADJ994817). Applicant sustained injury to his low back during the cumulative period ending on April 23, 1992, which did not result in an award of disability (ADJ3947959). Applicant sustained industrial injury on July 17, 1999, to his right wrist, right knee, low back, and in the form of headaches, which resulted in applicant sustained 100% permanent total disability, however, the WCJ found apportionment to applicant's permanent total disability pursuant to Labor Code[2] section 4664(b), and reduced applicant's award to 70% permanent disability (ADJ343423).

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[1] Commissioner Lowe was on the panel that issued the order granting reconsideration. Commissioner Lowe no longer serves on the Appeals Board. A new panel member has been substituted in her place.

[2] All future references are to the Labor Code unless noted.

Applicant contends that the WCJ erred in applying apportionment under section 4664(b) because the finding of apportionment is not supported by substantial medical evidence establishing overlap between the disabilities.

We have received an Answer from defendant. The WCJ filed a Report and Recommendation on Petition for Reconsideration (Report) recommending that we deny reconsideration.

We have considered the allegations of the Petition for Reconsideration and the Answer, and the contents of the WCJ's Report. Based on our review of the record, as our Decision After Reconsideration, we will rescind the WCJ's June 24, 2021 F&A and return this matter to the trial level for further proceedings consistent with this decision. When the WCJ issues a new decision, any aggrieved person may timely seek reconsideration.

FACTS

Per the WCJ's Report:

> Applicant Robert Fiege was employed by the County of Los Angeles as a Sheriff when he sustained a specific injury on 4/23/92 to his back. There was also filed at that time a cumulative trauma ending on 4/23/92 for the back. It settled on 9/26/94 by Stipulation with Request for Award at 30.5% based on the findings of AME Dr. Stoltz who found only a specific injury, not a cumulative trauma, and only to the low back. (Exhibit MM) Mr. Fiege took a disability retirement with the County of Los Angeles. However, the low back grew progressively worse over the following years causing Mr. Fiege to have spine surgery on 6/3/98. This was about the same time as he was attempting to return to intermittent work as a private security guard, at Christies Auction House, and later at The Officers Group.
>
> The spine surgeon Dr. Cooper issued a report dated 2/23/99 that references the surgery and concludes that Mr. Fiege could not do the same work he did prior to his injury on 4/23/92. (Exhibit O)
>
> Then five months later, while employed as a bodyguard by The Officers Group, Applicant sustained a severe injury arising from a motor vehicle accident that involved his right wrist, neck, right knee. low back, headaches and psyche.
>
> Applicant was determined by the judge to be 100% permanently and totally disabled. However, he was awarded 70% permanent disability after the judge deducted the prior 30.5% Award under Labor Code Section 4664 and rounded up to reach a 70% life pension Award.

(WCJ's Report, p. 2.)

Applicant's prior injury to the low back resolved via Stipulations with Request for Award, which was approved on September 26, 1994. (Joint Exhibit MM.) The Award was based upon the following work restriction for applicant's low back: "The applicant has a work restriction precluding him from heavy lifting repeated bending and stooping." (*Ibid*.)

For the 1999 injury, applicant was evaluated for orthopedic injury by AME Seymour Alban, M.D., who authored two reports in evidence and was deposed four times. (Joint Exhibits BB, DD, and EE through HH.) Dr. Alban took the following history of injury:

> On April 23, 1992, while at work for the Los Angeles County Sheriff's Department as a deputy sheriff, he had a slip and fall injury. He injured the lower back. He had pain in the low back radiating to the lower extremities. In 1993, he had an L5-S1 laminectomy which helped temporarily and on June 3, 1998, he underwent a lumbar spine hemilaminectomy.
>
> * * *
>
> In mid 1998, he began working for the Officers Group as a body guard. Patient states he worked for them for several days before the June 3, 1998 low back surgery. Patient then was off work until early 1999. By early 1999, his low back pain was 1 to 2. He was able to sit or stand for the entire shift of ten or 12 hours whenever needed plus the two hour commuting time from Apple Valley to Beverly Hills.
>
> On July 17, 1999, while at work for the Officers Group as a body guard, patient was a passenger in a Chevy truck. He was wearing a seat-belt. A semi-truck ran a red light at 60 miles and struck the Chevy truck right behind the driver's seat. He was jolted sharply and thrown forward and sideways. His neck and low back were jerked during the impact. He struck his right shoulder on the front seat and side door, his right arm and hand on the side door, his right knee on the glove box which he broke, the left side of his back and rib area on the arm rest and his abdomen on the seat belt. He tried to brace himself during the impact and injured his right ankle. He had greater pain in the low back radiating to both legs, mid back pain, neck pain radiating to the upper extremities and headaches. He abraded his right shoulder, knee and hand. He states he could not hold his toothbrush for two months due to right hand pain.

(Joint Exhibit DD, Report of AME Seymour Alban, M.D., March 13, 2008, pp. 2-3.)

> Applicant was ultimately diagnosed with the following:
>
> 1. Sequelae of cervical spine discectomy and arthrodesis at C3-4, followed by discectomy and arthrodesis at C5-6 and C6-7 of July 15, 2004.
>
> 2. Sequelae of lumbosacral disc protrusion treated by left-sided laminectomy and • discectomy in 1993, microdiscectomy at L5-S1 on the right on June 3, 1995, and finally L5-S1 discectomy and arthrodesis on March 26, 2002 with retained pedicle screws and horizontal bars.

3. Chronic strain of right knee.

4. Chronic strain of right ankle.

5. Chronic strain of right hand and wrist with tendon stenosing tendon sheath inflammation with triggering of right third and fourth fingers.

6. Depression and anxiety.

7. Thoracic spine strain with underlying osteoarthrosis.

8. Right wrist pain with stenosing flexor sheath synovitis producing triggering of ring and long fingers.

(Joint Exhibit BB, Report of AME Seymour Alban, M.D., October 25, 2013, p. 22.)

Dr. Alban opined that applicant was permanent and stationary in 2013, but provided no formal rating. (See *id*. at pp. 23-24.) Instead, Dr. Alban opined that "Mr. Fiege is not able to be employed in the open labor market because of his spine injuries and resulting pain." (*Id*. at p. 23.) Dr. Alban assigned permanent work restrictions as follows:

> He is not able to stand for a prolonged period of time, nor can he perform heavy activities with his upper extremities or fine manipulation because of sensory aberrations in his fingertips. . . The patient should avoid repetitive motion of the cervical spine in a fixed position. He should avoid repetitive over shoulder motion, heavy upper extremity motion stress, and avoid exposure to jarring such as by use of heavy vibratory equipment. . . The low back condition precludes the patient from repetitive bending, stooping, prolonged sitting and standing, and limits him to light activity.

(*Id*. at pp. 23-24.)

In deposition, Dr. Alban further commented upon work restrictions, noting that lifting should be limited to 25 pounds and that applicant should not perform heavy pushing, pulling, or lifting with the upper extremities. (Joint Exhibit FF, Deposition of AME Seymour Alban, M.D., April 10, 2014, p. 10, lines 20-21, p. 20, lines 17-20.)

Applicant was evaluated for psychological injury by agreed medical evaluator (AME) Donald Feldman, M.D., who authored two reports in evidence and was deposed twice. (Joint Exhibits AA, CC, II, and JJ.) Applicant was diagnosed with a major depressive disorder in partial remission, and with both pain and anxiety disorders. (Joint Exhibit AA, AME Donald Feldman, M.D., Report of p. 16.) Applicant's Global Assessment of Functioning (GAF) score was 58. (*Ibid*.)

Dr. Feldman opined that applicant's psychological disability was caused entirely by his industrial orthopedic injuries and that for purposes of psyche apportionment, the orthopedic injuries were inextricably intertwined. (*Id*. at p. 24.) The psychological injury caused applicant moderate disability in maintaining a normal work schedule and performing at a consistent pace. (*Id*. at p. 23.)

Work restrictions were not assigned per se, but instead, the AME opined: "Mr. Fiege is not, from a psychiatric perspective, capable of his usual and customary work, and a vocational rehabilitation assessment will be necessary to determine what type of work he may be capable of doing." (*Id*. at p. 25.)

Applicant retained a vocational expert, Nick Corso, who authored two reports in evidence. (Applicant's Exhibits 7 and 12.) Mr. Corso reviewed the work restrictions assigned and opined that applicant's restrictions preclude applicant from vocational rehabilitation. (Applicant's Exhibit 12, Report of Nick Corso, April 20, 2020, p. 16.) He concluded that applicant is not employable on the open labor market. (*Id*. at p. 19.)

Mr. Corso opined on apportionment as follows:

> Based on medical apportionment, consideration of *Target V. Estrada/WCAB*, and of issues considered under the *Montana* factors, I see no nonindustrial vocational limitations or barriers contributing to the applicant's total disability.
>
> From a vocational standpoint, I believe that the applicant is 100% disabled, and that this vocational disability is 100% % apportioned to the industrial injury. I have not applied any "impermissible" limitations in my analysis or conclusions in this case.

(*Id*. at p. 18.)

DISCUSSION

1. Standard for finding permanent total disability in accordance with the fact.

As our Supreme Court has explained:

> Permanent disability is understood as the irreversible residual of an injury. (Citation.) A permanent disability is one which causes impairment of earning capacity, impairment of the normal use of a member, or a competitive handicap in the open labor market. (Citation.) Thus, permanent disability payments are intended to compensate workers for both physical loss and the loss of some or all of their future earning capacity.

(*Brodie v. Workers' Comp. Appeals Bd*. (2007) 40 Cal.4th 1313, 1320.)

The court in *Ogilvie* further explained that the PDRS is rebuttable.

> Thus, we conclude that an employee may challenge the presumptive scheduled percentage of permanent disability prescribed to an injury by showing a factual error in the calculation of a factor in the rating formula or application of the formula, the omission of medical complications aggravating the employee's disability in preparation of the rating schedule, or by demonstrating that due to industrial injury the employee is not amenable to rehabilitation and therefore has suffered a greater loss of future earning capacity than reflected in the scheduled rating.

(*Ogilvie v. Workers' Comp. Appeals Bd*. (2011) 197 Cal.App.4th 1262, 1277 [76 Cal.Comp.Cases 624].)

The standard for finding permanent total disability via *Ogilvie* rebuttal follows:

> The proper legal standard for determining whether applicant is permanently and totally disabled is whether applicant's industrial injury has resulted in applicant sustaining a complete loss of future earning capacity. (§§ 4660.1, 4662(b); see also 2005 PDRS, pp. 1–2, 1–3.) …
>
> A finding of permanent total disability in accordance with the fact (that is complete loss of future earnings) can be based upon medical evidence, vocational evidence, or both. Medical evidence of permanent total disability could consist of a doctor opining on complete medical preclusion from returning to work. For example, in cases of severe stroke, the Appeals Board has found that applicant was precluded from work based solely upon medical evidence. (See i.e., *Reyes v. CVS Pharmacy*, (2016) 81 Cal. Comp. Cases 388 (writ den.); see also, *Hudson v. County of San Diego*, 2010 Cal. Wrk. Comp. P.D. LEXIS 479.)
>
> A finding of permanent total disability can also be based upon vocational evidence. In such cases, applicant is not precluded from working on a medical basis, per se, but is instead given permanent work restrictions. Depending on the facts of each case, the effects of such work restrictions can cause applicant to lose the ability to compete for jobs on the open labor market, which results in total loss of earning capacity. Whether work restrictions preclude applicant from further employment requires vocational expert testimony.
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> * * *

> … [P]er *Ogilvie* and as described further in *Dahl*, the non-amenability to vocational rehabilitation must be due to industrial factors. (*Contra Costa County v. Workers' Comp. Appeals Bd.*, (*Dahl*) 240 Cal.App.4th 746, 193 Cal. Rptr. 3d 7.)

(*Soormi v. Foster Farms*, 2023 Cal. Wrk. Comp. P.D. LEXIS 170, *11-12, citing *Wilson v. Kohls Dep't Store*, 2021 Cal. Wrk. Comp. P.D. LEXIS 322, *20–23.)

As explained above, the purpose of the AMA Guides is to assign impairment based upon a person's loss of ADLs. Most workers' compensation cases do not involve total disability. Most cases involve assignment of partial disability via the AMA Guides. Thus, doctors generally assign apportionment based on the causation of the rated impairment in the AMA Guides.

What appears to be a point of confusion in many cases is that the focus of causation and apportionment changes when using *Ogilvie* rebuttal *because how the impairment is defined changes*.

When applicant is seeking to rebut the PDRS using *Ogilvie*, disability is no longer rated as an impairment under the AMA Guides. Instead, the impairment is determined based on the *work restrictions* assigned to applicant from the industrial injury. The disability is the effect of those work restrictions on applicant's ability to rehabilitate and compete in the open labor market. Accordingly, causation and apportionment, when analyzed under an *Ogilvie* rebuttal, must focus on the ***cause of the work restrictions***. As applicant is seeking an award of 100% disability, the cause of the work restrictions contributing to applicant's inability to work must be 100% industrial, without apportionment.

Where applicant seeks to rebut the PDRS and prove permanent total disability, applicant must prove the following:

1) Applicant has been assigned a work restriction(s), which requires substantial **medical** evidence.

2) The work restriction(s) precludes applicant from rehabilitation into another career field, which requires **vocational** expert evidence.

3) The work restriction(s) precludes applicant from competing on the open labor market, which requires **vocational** expert evidence.

4) **The cause of the work restriction(s) is 100% industrial**, which requires substantial **medical** evidence.

To be clear, we are focused only on those restrictions that contribute to the vocational expert's findings. An applicant may have multiple work restrictions, some of which are non-industrial or prior industrial restrictions. If the industrial work restrictions as a result of the subject injury, standing alone, preclude applicant from rehabilitation and preclude applicant from competing on the open labor market, applicant has met their burden on causation of disability. If applicant's preclusion from rehabilitation and work is caused or contributed by either non-industrial work restrictions or partially industrial work restrictions, applicant fails their burden on causation of disability.

In the en banc decision in *Nunes v. State of California, Dept. of Motor Vehicles* (June 22, 2023) 2023 Cal. Wrk. Comp. LEXIS 30 [88 Cal.Comp.Cases 741] ("*Nunes I*"), the Appeals Board held that section 4663 requires a **reporting physician** to make medical determinations in a case, including determinations on the issue of apportionment. The Board further held that vocational evidence may be used to address issues relevant to the determination of permanent disability, and that vocational evidence must address apportionment, but that a vocational evaluator may not opine on issues that require expert medical evidence. The Board affirmed these holdings in *Nunes v. State of California, Dept. of Motor Vehicles* (August 29, 2023) 23 Cal. Wrk. Comp. LEXIS 46 [88 Cal.Comp.Cases 894] ("*Nunes II*").

Defendant does not challenge that the combined effect of applicant's injuries have rendered applicant 100% disabled. The sole issue on reconsideration is whether defendant met their burden to establish apportionment of said disability.

2. The legal standard for establishing apportionment under section 4664.

Section 4663 requires any report addressing permanent disability to address apportionment of disability. Defendant carries the burden of proof on apportionment. (§ 5705.)

Section 4664(b) permits apportionment to prior awards. The history of section 4664 was previously discussed by the Appeals Board in dual en banc decisions as follows:

> The apportionment of pre-existing permanent disability has been a fixture of California workers' compensation law since its inception. The original Workmen's Compensation, Insurance and Safety Act of 1917 (the 1917 Act) contained a provision stating: "The percentage of permanent disability caused by any injury shall be so computed as to cover the permanent disability caused by that particular injury without reference to any injury previously suffered or any permanent disability caused thereby." (Stats. 1917, ch. 586, p. 839, § 9; see also, Stats. 1919, ch. 471, p. 916, § 4; Stats. 1925, ch. 354, p. 643, § 1.) In 1929, the Legislature amended the 1917 Act to provide:

> ""The fact an employee has suffered previous disability or received compensation therefor shall not preclude compensation for a later injury . . . ; . . . provided, however, that an employee who is suffering physical impairment and shall sustain permanent injury thereafter shall not receive compensation for a later injury in excess of the compensation allowed for such injury when considered by itself and not in conjunction with or in relation to the previous disability or impairment. The employer shall not be liable for compensation to such employee for the combined disability but only for that portion due to the later injury as though no prior disability or impairment had existed." (Stats. 1929, ch. 222, p. 420, § 1.)"

In 1937, the 1917 Act and its amendments were codified in the Labor Code. At that time, the Legislature adopted former section 4750, whose language was substantially similar to the 1929 law, *supra*. For the next 67 years, the language of former section 4750 remained essentially unchanged, until its repeal on April 19, 2004 by SB 899. (Stats. 2004, ch. 34, § 37.) At the time of its repeal, former section 4750 provided:

> ""An employee who is suffering from a previous permanent disability or physical impairment and sustains permanent injury thereafter shall not receive from the employer compensation for the later injury in excess of the compensation allowed for such injury when considered by itself and not in conjunction with or in relation to the previous disability or impairment.
>
> "The employer shall not be liable for compensation to such an employee for the combined disability, but only for that portion due to the later injury as though no prior disability or impairment had existed." (Stats. 1937, ch. 90, p. 285; amended by Stats. 1945, ch. 1161, p. 2209, § 1.) "

One long-standing purpose of former section 4750 was to encourage employers to hire people with disabilities; the Legislature recognized that employers might refrain from hiring the disabled if, upon a subsequent injury, the employer would become obligated to compensate the employee for the pre-existing disability. (Citations.) Thus, under former section 4750, when an employee who had pre-existing permanent disability sustained an industrial injury that also resulted in permanent disability, the employer or its insurer was not liable for the combined disability, but only for that portion attributable to the subsequent industrial injury, considered alone. (.)

(*Sanchez v. County of Los Angeles* (2005) 70 Cal.Comp.Cases 1440, 1444-1445 [Appeals Board en banc] disapproved on another ground in *Kopping v. Workers' Comp. Appeals Bd*. (2006) 142

Cal.App.4th 1099; see also *Strong v. City and County of San Francisco* (2005) 70 Cal.Comp.Cases 1460 [Appeals Board en banc] disapproved on another ground in *Kopping*, *supra*.)

Under SB 899, section 4664 was added to the Labor Code in place of former section 4750 and it states, in pertinent part:

> (a) The employer shall only be liable for the percentage of permanent disability directly caused by the injury arising out of and occurring in the course of employment.
>
> (b) If the applicant has received a prior award of permanent disability, it shall be conclusively presumed that the prior permanent disability exists at the time of any subsequent industrial injury. This presumption is a presumption affecting the burden of proof.

Over the years since its enactment in 2004, multiple cases have interpreted how apportionment is established pursuant to section 4664(b).

First, defendant must prove that a prior award of disability exists. (*Pasquotto v. Hayward Lumber* (2006) 71 Cal.Comp.Cases 223 [Appeals Board en banc]; see *Sanchez*, *supra*; see also *Strong*, *supra*.) This burden requires the production of a prior Stipulations with Request for Award, or a prior Compromise and Release, where the parties agreed to applicant's level of permanent disability in the settlement. (*Pasquotto*, *supra*, at p. 230.)

Once a prior award of permanent disability is established, the disability in that award is conclusively presumed to exist.

> When the defendant has established the existence of any prior permanent disability award(s) relating to the same body region, the permanent disability underlying any such award(s) is conclusively presumed to still exist, i.e., the applicant is not permitted to show medical rehabilitation from the disabling effects of the earlier industrial injury or injuries[.]

(*Sanchez*, *supra*, 70 Cal.Comp.Cases at p. 1442; *Strong*, *supra*, 70 Cal.Comp.Cases at p. 1462; see also *Brodie*, *supra*, 40 Cal.4th 1313, 1327 ["[S]ection 4664, subdivision (b) was intended to reverse the rule based on former section 4750 that permitted an injured employee to show rehabilitation of an injury for which a permanent disability award had already been issued. (Citation.)")

Section 4664 contains contradictory language, indicating that it operates as both a conclusive presumption and a rebuttable presumption. In dual en banc opinions, the Appeals Board initially interpreted this contradiction as a burden-shifting mechanism, which required defendant

to establish the existence of a prior award of disability, but permitted applicant to rebut the conclusive presumption by proving that the prior award did not overlap with applicant's current disability. (*Sanchez*, *supra*, 70 Cal.Comp.Cases at p. 1442; *Strong*, *supra*, 70 Cal.Comp.Cases at p. 1462.) However, the Court of Appeal rejected this burden-shifting approach, and instead required that defendant prove both the existence of a prior award of disability and that the prior award of disability overlaps with the current award of disability. (*Kopping*, *supra*, 142 Cal.App.4th at p. 1115.)

Accordingly, and following the decisions in *Sanchez* and *Strong* as modified by *Kopping*, where defendant proves that a prior award of disability exists and proves that the prior award of disability overlaps with the current award, defendant is entitled to subtract the prior award of overlapping permanent disability from applicant's current award. (*Brodie*, *supra*, 40 Cal.4th at p. 1332 [deciding that the proper method of calculating apportionment is to subtract the prior disability from the present].)

The Appeals Board noted in both *Sanchez* and *Strong* that the principles of proving overlap are substantially the same principles of overlap applied prior to the enactment of SB 899. (*Sanchez*, *supra*, 70 Cal.Comp.Cases at p. 1457; *Strong*, *supra*, 70 Cal.Comp.Cases at p. 1477.)

> We state that apportionment shall be determined "substantially" in accordance with historical overlap principles because we recognize that, in future cases, the differences between how permanent disability is determined under the April 1997 Schedule for Rating Permanent Disabilities and how it is determined under the January 2005 Schedule for Rating Permanent Disabilities may present novel overlap questions. None of these questions are presented here, however, and we will not speculate on them.

(*Sanchez*, *supra*, 70 Cal.Comp.Cases at p. 1457; *Strong*, *supra*, 70 Cal.Comp.Cases at p. 1477.)

The Appeals Board explained the historical principles of overlap within its decisions in *Sanchez* and *Strong*:

> In applying former section 4750, when the permanent disability resulting from a new injury included factors of disability that were the same as ones that already existed as the result of a prior injury or condition, the disabilities were said to "overlap." (Citations.) If all of the factors of permanent disability attributable to the subsequent industrial injury already existed as a result of the prior injury or condition, then there was "total" overlap, and the employee was not entitled to any additional permanent disability indemnity;

if, however, the subsequent industrial injury caused some new factors of permanent disability that were not pre-existing, then there was "partial" overlap, and the employee was entitled to permanent disability indemnity to the extent the subsequent industrial injury further restricted his or her earning capacity or ability to compete. (*Mercier v. Workers' Comp. Appeals Bd*., *supra*, 16 Cal.3d 711 (employee had prior back disability precluding heavy lifting and repetitive bending, and then sustained a new industrial injury to his heart resulting in a limitation between light work and semi-sedentary work and in a need to avoid strenuous activities and severe emotional stress; *held*, all factors of disability attributable to the back were included in or subsumed by the factors attributable to the heart injury, resulting in total overlap, and it was proper to deduct the rating for the back disability from the rating for the heart disability); *State Comp. Ins. Fund v. Industrial Acc. Com.* (*Hutchinson*), *supra*, 59 Cal.2d 45 (employee had prior neck disability consisting of constant slight pain, becoming slight with overhead work and climbing, and becoming moderate with lifting over 30 pounds, and then sustained a new injury to his low back resulting in disability consisting of minimal pain increasing to slight pain on heavy work; *held,* disability from neck injury was held to overlap the disability from back injury because the latter resulted in pain when performing certain work activities); *Edson v. Industrial Acc. Com*. (1928) 206 Cal. 134 [273 P. 572] [15 I.A.C. 193] (employee had previously lost 30/50ths of the sight of each eye, and then sustained new industrial injury resulting in an additional 17-&1/2/50ths loss of the sight of his left eye; *held*, employee entitled to compensation only for the latter impairment); *Gardner v. Industrial Acc. Com.*, *supra*, 28 Cal.App.2d 582 (employee had prior left ankle disability resulting in partial stiffness of the ankle joint, and then sustained a new industrial injury resulting in amputation of left leg between knee and hip joint; *held*, rating for loss of leg properly reduced by rating for ankle).) As can be seen from these cases, it was not the part of the body involved in the subsequent industrial injury that was important; rather, it was the nature of the disability resulting from the new injury in relation to the pre-existing disability that was determinative. (Citation.) Thus, the fact that the pre-existing disability and the new disability involved two different anatomical parts of the body, while relevant, did not in itself preclude apportionment using the rules of overlap. (Citations) **The mechanics of rating overlap generally provided that each separate factor of permanent disability for both the new industrial injury and the pre-existing condition be set forth, so it could be determined what elements, if any, of one disability were included in the other**. (*State Comp. Ins. Fund v. Workers' Comp. Appeals Bd.* (*Gaba*), *supra*, 72 Cal.App.3d 13 (rating

> instructions for subsequent industrial heart injury described employee's disability as "moderate" but omitted any heart-related work restrictions; WCAB's decision was annulled and the matter remanded to delineate work preclusions for heart and to determine extent, if any, to which employee's heart disability overlapped pre-existing back disability resulting in a limitation to light work).) The issue of apportionment would be resolved by determining the percentage of combined disability after the new injury, and then subtracting the percentage of disability due to the prior injury which overlapped—either partially or totally—the disability resulting from the new injury. (Citations.)
>
> If, however, successive injuries produced separate and independent disabilities—i.e., if the disabilities did not fully or partially overlap because they did not affect the *same* abilities to compete and earn—then each was rated separately. (*Mercier v. Workers' Comp. Appeals Bd*., *supra*, 16 Cal.3d at p. 714; *State Comp. Ins. Fund. v. Industrial Acc. Com*. (*Hutchinson*), *supra*, 59 Cal.2d at p. 53; *Fresno Unified School Dist. v. Workers' Compensation Appeals Bd*. (*Humphrey*) (2000) 84 Cal.App.4th 1295, 1310, fn. 3 [101 Cal. Rptr. 2d 569] [65 Cal.Comp.Cases 1232].) Thus, for example, where an employee, who had a childhood disease that resulted in the amputation of one leg above the knee, later sustained an industrially-related cerebral vascular accident that resulted in hearing loss, loss of the use of his left arm, decreased vision, loss of memory, and learning disabilities, the employee was entitled to the full rating for the industrial disabilities because they did not overlap the pre-existing loss of his leg. (*Newman v. Workers' Comp. Appeals Bd*. (1984) 152 Cal.App.3d 219, 223 [199 Cal. Rptr. 422] [49 Cal.Comp.Cases 126].)

(*Sanchez*, *supra*, 70 Cal.Comp.Cases at pp. 1445-1447, emphasis added; *Strong*, *supra*, 70 Cal.Comp.Cases at pp. 1465-1468.)

Accordingly, in analyzing overlap we look to the *factors* of disability that constitute the rating.

Under the 1997 Permanent Disability Rating Schedule (PDRS), impairment was assigned through objective limitations, such as amputations, and through preclusions upon the ability to work. (Cal. Dept. of Industrial Relations, Div. of Workers' Comp., Schedule for Rating Permanent Disabilities (1997) pp. 1-2.) Here, applicant's 1992 injury was rated using the Spine and Torso Guidelines, which precluded applicant from heavy lifting repeated bending and stooping. (*Id*. at p.

2-14.) Section 4664(b) precludes applicant from arguing that he rehabilitated from this work restriction.

Where the disability is rated using a progression within the same chart or table, overlap is *factual* issue requiring medical evidence establishing overlap between the two disabilities. However, here, no formal rating was obtained. It is not entirely clear what applicant's rating is from the 1999 injury.

The current record is deficient in multiple ways. First, no party has obtained medical opinions assigning causation of work restrictions as between the three dates of injury. Next, we must presume that applicant is precluded from heavy lifting and repeated bending and stooping from the 1992 injury. If defendant wishes to establish apportionment under section 4664(b), it must establish that the finding of 100% disability in the 1999 claim is based, in part, upon the 1992 work restrictions or a progression of those restrictions within the same chart or table in the 1997 PDRS. If applicant wishes to establish 100% permanent total disability without apportionment, applicant generally must establish that he is precluded from vocational rehabilitation and precluded from competing on the open labor market, based on work restrictions assigned to a single injury. In other words, applicant must exclude consideration of the 1992 work restrictions from the 1999 analysis.

Next, the psychological AME has opined that causation is intertwined. In our en banc opinion in *Benson*, we explained that limited situations may exist where a joint and several award of permanent disability may issue across multiple dates of injury. (*Benson v. Permanente Med. Group*, (2007), 72 Cal.Comp.Cases 1620, 1634 (Appeals Board en banc), (emphasis added); aff'd *Benson v. Workers' Comp. Appeals Bd*. (2009) 170 Cal.App.4th 1535.) Where some aspects of the industrially caused permanent disability form two or more separate industrial injuries that cannot reasonably be parceled out, then a combined joint and several award of permanent disability must issue even though other aspects of the industrially caused permanent disability from those injuries can be parceled out with reasonable medical probability. (See, e.g. *Alea North American Insurance Co. v. Workers' Comp. Appeals Bd*. (*Herrera*) (2018) 84 Cal.Comp.Cases 17 [2018 Cal. Wrk. Comp. LEXIS 123] (writ den.); *Flowserve Corp. v. Workers' Comp. Appeals Bd*. (*Espinoza*) (2016) 81 Cal.Comp.Cases 812 [2016 Cal. Wrk. Comp. LEXIS 92] (writ den.); *Northrop Grumman Systems v. Workers' Comp. Appeals Bd*. (*Dileva*) 80 Cal.Comp.Cases 749 [2015 Cal. Wrk. Comp. LEXIS 78] (writ den.); *Christiansen v. Facey Med. Found*., 2024 Cal. Wrk. Comp.

P.D. LEXIS 2, *12.) However, an opinion establishing intertwined disability must constitute substantial medical evidence and the physician may not merely conclude that such disability is intertwined without an adequate explanation.

If applicant establishes that psychiatric work restrictions contribute to preclude applicant from vocational rehabilitation and gainful employment, and applicant establishes through substantial medical evidence that such restrictions cannot be parceled out, applicant would be entitled to a joint and several award of 100% disability.

However, it is not possible to determine on the present medical record whether applicant's impairment to the psyche was caused by applicant's 1992 injuries, or the 1999 injury. No substantial opinion explains the cause of disability. Dr. Feldman provided a conclusory opinion that the disability is intertwined, which does not constitute substantial medical evidence. Dr. Feldman must explain why it is not possible to parse out the causes of psychological disability and/or work preclusions.

The WCJ and the Appeals Board have a duty to further develop the record where there is insufficient evidence on an issue. (*McClune v. Workers' Comp. Appeals Bd.* (1998) 62 Cal.App.4th 1117, 1121-1122 [63 Cal.Comp.Cases 261].) The Appeals Board has a constitutional mandate to "ensure substantial justice in all cases." (*Kuykendall v. Workers' Comp. Appeals Bd.* (2000) 79 Cal.App.4th 396, 403 [65 Cal.Comp.Cases 264].) The Board may not leave matters undeveloped where it is clear that additional discovery is needed. (*Id.* at p. 404.) The preferred procedure is to allow supplementation of the medical record by the physicians who have already reported in the case. (*McDuffie v. Los Angeles County Metropolitan Transit Authority* (2003) 67 Cal.Comp.Cases 138 (Appeals Board en banc).) As explained above, upon return the WCJ should consider how best to develop the record so that the determination as to applicant's permanent disability is based on substantial medical evidence.

Accordingly, as our Decision After Reconsideration, we rescind the Findings and Award and return the matter to the trial level for further proceedings consistent with this decision. When the WCJ issues a new decision, any aggrieved person may timely seek reconsideration.

For the foregoing reasons,

IT IS ORDERED as the Decision After Reconsideration of the Workers' Compensation Appeals Board that the Findings and Award issued on June 24, 2021, by the WCJ is **RESCINDED**.

IT IS FURTHER ORDERED that this matter is **RETURNED** to the trial level for further proceedings consistent with this decision

WORKERS' COMPENSATION APPEALS BOARD

/s/ CRAIG L. SNELLINGS, COMMISSIONER

I CONCUR,

/s/ JOSEPH V. CAPURRO, COMMISSIONER

/s/ KATHERINE A. ZALEWSKI, CHAIR

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

DECEMBER 22, 2025

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

ROBERT FIEGE
LAW OFFICES OF RICHARD MARK BAKER
LAW OFFICES OF ANDREA R. HERMAN
LEWIS MARENSTEIN
LAUGHLIN, FALBO, LEVY & MORESI
OFFICE OF THE COUNTY COUNSEL – LOS ANGELES

EDL/mt

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