

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

CHRISTINE SPERRY, *Applicant*

vs.

**SAN DIEGO UNIFIED PORT DISTRICT;
AMERICAN HOME ASSURANCE COMPANY, *Defendants***

**Adjudication Number: ADJ11046834
San Diego District Office**

**OPINION AND DECISION
AFTER RECONSIDERATION**

We previously granted reconsideration in this matter to provide an opportunity to further study the legal and factual issues raised by the Petition for Reconsideration. Having completed our review, we now issue our Decision After Reconsideration.

Applicant seeks reconsideration of the March 29, 2023 Second Findings, Award and Order (F&A), wherein the workers' compensation administrative law judge (WCJ) found that applicant, while employed as a police officer from November 3, 2004 to September 11, 2017, sustained industrial injury to the low back. The WCJ found that applicant's injury was presumptively compensable pursuant to Labor Code section 3213.2, that defendant sustained its burden of establishing overlap between applicant's present disability and a prior award, and that Labor Code section 4663(e) does not preclude apportionment to applicant's prior award.¹ Accordingly, the WCJ determined that applicant's current disability was equivalent to that sustained in the prior industrial injury, and because applicant sustained no new disability, the WCJ awarded future medical care without indemnity.

Applicant contends that the evidentiary record does not support overlap between applicant's past and present disability, and that section 4663(e) precludes apportionment to applicant's prior award under section 4664(b).

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

We have received an Answer from defendant. 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. For the reasons discussed below, we will rescind the F&A and restate the decision as Findings of Fact.

FACTS

Our April 12, 2022 Opinion and Decision After Reconsideration provided the following case background:

Applicant has a prior Award for injury to the back and right lower extremity from November 3, 2003 through November 3, 2004 (Case No. ADJ4121352 (SDO 0349771)).

Applicant received an Award of 30% permanent disability, approved May 19, 2008, based on the 13% impairment described by primary treating physician Larry Dodge, M.D. (Petition, at 2:14; Answer, at 2:4.) Dr. Dodge described his rating methodology as follows:

Under the AMA Guides of permanent impairment, Fifth Edition, this problem is not addressed in any kind of reasonable fashion. We really did not discuss impairment-related to piriformis syndrome. I reviewed the AMA Guides in detail and therefore it is my clinical judgment that based upon the impingement of the sciatic nerve, based upon the fact this patient did not require operative procedure to reduce pressure against the sciatic nerve it is equivalent to an individual who undergoes a decompression of nerve root in the lumbar spine. The level of impairment in my medical opinion would be similar. This would therefore place the patient into lumbar DRE category 3. This would reasonably correspond to 13% impairment of whole person.

(Ex. C, report of Larry Dodge, M.D., dated March 8, 2007, p.2.)

Applicant continued to work for the San Diego Unified Port District and alleged a new continuous trauma to the low back sustained from November 3, 2004 through September 11, 2017 (Case No. ADJ11046834). Beth Bathgate, M.D., acted as the Qualified Medical Examiner (QME), and evaluated applicant on November 9, 2018. Applicant provided a history of continued periodic flare-ups, noting ongoing requirements that she wear her duty belt. (*Ibid.*) Applicant's duties included driving in a vehicle with narrow seats, causing changes in her

posture while wearing the duty belt, and physically restraining individuals as necessary. (*Ibid.*) Dr. Bathgate also noted a 2016 MRI study, which revealed degenerative changes in applicant's low back. (Ex. A, report of Beth Bathgate, M.D., dated November 9, 2018, p.3.)

The QME concluded that applicant had sustained a new cumulative trauma injury through 2017, noting that applicant's "work duties are such that additional cumulative trauma was sustained." (Ex. A, report of Beth Bathgate, M.D., dated November 9, 2018, p.32.) The QME placed applicant's injury in Category III of the Diagnosis Related Estimate (DRE), and assigned low back impairment of 13% Whole Person Impairment (WPI), noting applicant to be post-surgery 2. Although two additional case numbers were listed on the May 19, 2008 Award, the applicant stipulated she did not sustain the specific injury claimed in Case No. ADJ2491991 (SDO 0330001), and further stipulated to "no liability" under Labor Code § 5500.5 in Case No. ADJ3869224 (SDO 0349770). 3 for radiculopathy. (*Id.* at p.34.) Dr. Bathgate apportioned 60% of the injury to applicant's prior cumulative trauma ending November 3, 2004, 20% to degenerative changes, and 20% to the cumulative trauma ending September 11, 2017. (*Id.* at p.35.)

The parties proceeded to trial on January 6, 2020, on the issues of permanent disability, attorney fees, "apportionment pursuant to Labor Code section 4664," and "Labor Code section 3213.2 and 4663(e) duty belt presumption and non-attribution clause." (Minutes of Hearing and Summary of Evidence (MOH), dated January 6, 2020, at 3:3.) Applicant testified that following her injury in 2004, her low back condition worsened. (*Id.* at 4:10.)

The WCJ issued the F&A on February 27, 2020, awarding future medical care. The F&A did not make specific findings regarding apportionment under Labor Code sections 4663 or 4664, or their interaction with the anti-attribution provisions of section 3213.2. The WCJ stated in the Opinion on Decision, however, that the presumption of section 3213.2 defined the covered injury as impairment to the low back. (F&A, Opinion on Decision, p.3.) Because applicant's prior injury rated at 13% impairment, and the current injury also rated at 13% impairment, the defendant had met its burden of rebutting the presumption of impairment arising out of the 2017 injury.

(Opinion and Decision After Reconsideration, dated April 12, 2022, at pp. 2-3.)

Applicant sought reconsideration of the WCJ's determination, and on April 12, 2022, we issued our Decision After Reconsideration. Therein, we noted that the parties had framed various issues for decision, including "apportionment pursuant to Labor Code section 4664," and "Labor Code section 3213.2 and 4662(e) duty belt presumption and non-attribution clause." (Opinion and Decision After Reconsideration, dated April 12, 2022, at pp. 4-5, quoting the Minutes of Hearing, dated January 6, 2020, at 3:3.) We observed that the WCJ had not entered corresponding Findings

of Fact and thus returned the matter to the trial level for development of the record. (*Hamilton v. Lockheed Corporation* (2001) 66 Cal.Comp.Cases 473 (Appeals Bd. en banc).)

On March 28, 2023, the WCJ issued the instant F&A, determining that applicant sustained injury arising out of and in the course of employment, resulting in 13 percent impairment to the low back. (F&A, Findings of Fact Nos. 1 and 11.) The F&A determined that applicant received a prior award to the same body part which is the subject of this claim, and that at the time of applicant's prior award, applicant had a low back impairment of 13 percent as rated under the AMA Guides. (F&A, Findings of Fact Nos. 6, 12.) Accordingly, "the current cumulative trauma claim has not produced any increase in applicant's impairment or permanent partial disability beyond that which existed at the time of the prior award," and consequently, "applicant has not suffered any additional permanent impairment or resulting permanent partial disability from this industrial injury." (F&A, Findings of Fact Nos. 13, 14.) The WCJ thus entered the following legal conclusions:

1. Applicant's current level of disability results only from a prior cumulative trauma, and not from this current industrial injury claim. The apportionment opinions of QME Dr. Bathgate are not substantial evidence.
2. Defendant has met its burden of establishing a total overlap between past and current injuries necessary to sustain apportionment under section 4664(b), as set forth in *Kopping v. Workers' Comp. Appeals Bd.* (2006) 142 Cal.App.4th 1099, 1115 (71 Cal.Comp.Cases 1229).
3. Labor code sec. 4663(e) does not preclude a finding that applicant's prior industrial permanent disability exists at the time of this subsequent industrial injury.
4. Applicant's prior award resulted from a 13% AMA impairment, which is found to exist at the time of this industrial injury.

(F&A, at p. 3.)

The WCJ's Opinion on Decision acknowledged applicant's contention that because she is a member of the classes of employees to whom section 4663(e) is applicable, section 4664(b) apportionment is inapposite. However, the WCJ opined that such an interpretation might result in multiple awards for the same injury, an outcome that is inconsistent with legislative intent. (F&A, Opinion on Decision, at p. 10.) Accordingly, the WCJ concluded section 4663(e) precludes apportionment to preexisting nonindustrial injuries but does not preclude apportionment under section 4664(b) to pre-existing industrial injuries that have produced a monetary award of permanent disability. (*Ibid.*)

Applicant's Petition initially takes issue with the WCJ's finding that there is overlap between applicant's prior award and her current injury. Applicant avers the rating of 13 percent impairment by Dr. Dodge is speculative and does not conform to the AMA Guides and is therefore an improper basis upon which to find overlap under *Kopping v. Workers' Comp. Appeals Bd.* (2006) 142 Cal.App.4th 1099 [71 Cal.Comp.Cases 1229].) (Petition, at 6:12.)

Applicant also contends that the WCJ's decision inappropriately ignores our holdings in *Bates v. County of San Mateo* (2019) 84 Cal.Comp.Cases 648 [2019 Cal. Wrk. Comp. P.D. LEXIS 72] (*Bates*) and *Santiago v. Cal. Highway Patrol* (2022) 87 Cal.Comp.Cases 1011 [2022 Cal. Wrk. Comp. LEXIS 51] (*Santiago*).) (Petition, at 7:14.) Applicant avers that the legislative intent underlying the enactment of section 4663(e) was to insulate specific classes of public safety employees from all species of apportionment, including apportionment under section 4664. (*Id.* at 9:16.) Applicant concludes "there can be no question that the anti-attribution provisions of Labor Code Section 4663(e) are equally applicable to Labor Code Section 4664(b). Thus, Applicant's permanent disability in ADJ11046834 *cannot be apportioned.*" (Petition, at 9:16, italics original.)

Defendant's Answer contends the WCJ properly found overlap between applicant's injuries, and that the standard under *Kopping, supra*, 142 Cal.App.4th 1099 was met. (Answer, at 5:1.) Defendant further contends both *Bates* and *Santiago* were wrongly decided and that the decisions effectively rendered "section 4664 a subsection of 4663 without any support for doing so." (*Id.* at 9:25.) Defendant further avers the conclusive presumption of section 4664(b) is not subject to any limitations and is applicable irrespective of the anti-attribution requirements of section 4663(e). (*Id.* at 10:6.)

The WCJ's Report observes that a finding in applicant's favor would "set a legal precedent allowing applicant to potentially receive an unlimited amount of 13% awards as long as she continues to file new cumulative trauma claims during her employment." (Report, at p. 3.)

DISCUSSION

The WCJ has determined that section 4664(b) apportionment is available notwithstanding the anti-attribution provisions of section 4663(e), and that defendant met its affirmative burden of establishing overlap between the disability arising out of applicant's past and present injuries.

We begin our discussion with the interaction between sections 4663(e) and 4664(b). Section 4664 provides:

(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.

(c)

(1) 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.

(Lab. Code, § 4664.)

Sections 3212 through 3213.2 contain a series of statutory presumptions regarding the industrial nature of various injuries applicable to certain law enforcement personnel, specified first responders and other public safety employees. "Generally, the provisions rebuttably presume an industrial causation between various injuries and diseases—such as hernia, heart trouble, pneumonia, cancer, tuberculosis, meningitis, or Lyme disease—sustained by the enumerated classes of public safety officers while or within a specified period of time so employed." (*California Dept. of Corrections & Rehabilitation v. Workers' Compensation Appeals Bd. (Garza)* (2009) 74 Cal.Comp.Cases 134, 138 [2009 Cal. Wrk. Comp. LEXIS 18].)

Section 3213.2 provides such a presumption, applicable to certain public safety officers who meet various conditions of employment including wearing a duty belt. When a qualifying safety officer sustains a low back injury, section 3213.2 provides the injury “shall be presumed to arise out of and in the course of the employment.” (Lab. Code, § 3213.2(b).) The presumption “is disputable and may be controverted by other evidence, but unless so controverted, the appeals board is bound to find in accordance with it.” (*Ibid.*)

In addition, section 4663 provides:

- (a) Apportionment of permanent disability shall be based on causation.
- (b) A physician who prepares a report addressing the issue of permanent disability due to a claimed industrial injury shall address in that report the issue of causation of the permanent disability.
- (c) 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. If the physician is unable to include an apportionment determination in his or her report, the physician shall state the specific reasons why the physician could not make a determination of the effect of that prior condition on the permanent disability arising from the injury. The physician shall then consult with other physicians or refer the employee to another physician from whom the employee is authorized to seek treatment or evaluation in accordance with this division in order to make the final determination.
- (d) An employee who claims an industrial injury shall, upon request, disclose all previous permanent disabilities or physical impairments.
- (e) Subdivisions (a), (b), and (c) do not apply to injuries or illnesses covered under Sections 3212, 3212.1, 3212.2, 3212.3, 3212.4, 3212.5, 3212.6, 3212.7, 3212.8, 3212.85, 3212.9, 3212.10, 3212.11, 3212.12, 3213, and 3213.2.

(Lab. Code, § 4663.)

Here, there is no dispute that applicant qualifies for the presumptions of section 3213.2, and that section 3213.2 is among those sections subject to the anti-attribution provisions of section 4663(e). In other words, because applicant’s injury is subject to the presumption of section 3213.2,

section 4663(e) exempts applicant's low back injury from apportionment to causation that would otherwise be required under section 4663(a).

However, section 4664(a) also provides that the employer is only liable for the percentage of permanent disability directly caused by the injury arising out of and occurring in the course of employment. Pursuant to section 4664(b), applicant's prior low back disability is conclusively presumed to exist at the time of any subsequent industrial injury.

Accordingly, the issue before us involves whether the anti-attribution provisions of section 4663(e), which preclude apportionment based on causation, would also preclude the apportionment required under section 4664(b) to applicant's prior award of disability.

In *Bates*, *supra*, 84 Cal.Comp.Cases 648, the WCJ found that applicant sustained two consecutive cumulative injuries, the first from May 10, 2009 to May 10, 2010, and another beginning May 10, 2010 through April 18, 2012. Both injuries were subject to the "heart trouble" presumptions of section 3212. The WCJ entered one award of disability for both injuries but allowed credit for the dollar value of the prior industrial award. (*Id.* at p. 650.) Defendant petitioned for reconsideration, contending that section 4664(a) and *Benson v. Workers' Comp. Appeals Bd.* (2009) 170 Cal.App.4th 1535 [74 Cal.Comp.Cases 113] (*Benson*), required that each cumulative injury receive its own award. We observed, however, that:

[A]lthough *Benson* and the apportionment to causation provisions of section 4663, subdivisions (a) through (c), would *generally* require that permanent disability caused by two separate industrial injuries be awarded separately, the language of section 4663(e) expressly precludes apportionment to causation for injuries that are presumed compensable under sections 3212 through 3213.2. (*Dept. of Corrections and Rehabilitation v. Workers' Comp. Appeals Bd. (Alexander)* (2008) 166 Cal. App. 4th 911, 914-920 [82 Cal. Rptr. 3d 920, 73 Cal. Comp. Cases 1294] [holding that section 4663(e) precludes the application of the apportionment provisions of section 4663(a)-(c) to injuries or illnesses covered by section 3212.2 and, therefore, the WCAB properly declined to apportion correctional officer's heart and cardiovascular injury to non-industrial causation].)

(*Id.* at pp. 653-654, italics original.)

We further observed that "[a]lthough *Alexander* involved apportionment between industrial and non-industrial causation, there is nothing in section 4663(e)'s language that suggests it permits apportionment of permanent disability between two or more industrial injuries that are presumed compensable under section 3212 et seq." (*Id.* at p. 654.) We acknowledged that by its own terms, section 4663(e) addressed apportionment under section 4663, subdivisions (a) through

(c). However, we explained that for several reasons, the general “apportionment to causation” provisions of section 4664(a) would not supersede the later-enacted and specific provisions of section 4663(e):

First, section 4664(a) is a general statute authorizing apportionment to causation, while section 4663(e) is a specific statute precluding apportionment to causation in cases involving public safety members whose injuries are presumed compensable under section 3212 et seq. It is well-established that where a general statute conflicts with a specific statute, the specific statute controls over the general one. (*Fuentes v. Workers’ Comp. Appeals Bd.* (1976) 16 Cal.3d 1, 7-8 [128 Cal. Rptr. 673, 547 P.2d 449, 41 Cal.Comp.Cases 42].)

Second, “where two statutes deal with the same subject matter, the more recent enactment prevails as the latest expression of legislative will.” (*Sears v. Baccaglio* (1998) 60 Cal.App.4th 1136, 1161-1162, 70 Cal.Rptr.2d 769.) The language of section 4664(a) was enacted by Senate Bill 899 (SB 899), which became effective on April 19, 2004. (Stats. 2004, ch. 34, § 35.) The language of section 4663(e), however, was added later by Assembly Bill 1368 (AB 1368), effective January 1, 2007. (Stats. 2006, ch. 836, § 1.)

Third and most importantly, the courts have long viewed the apportionment to causation provisions of section 4663 and 4664(a) as manifesting a single unified legislative approach to apportionment. (See, e.g., *Brodie v. Workers’ Comp. Appeals Bd.* (2007) 40 Cal.4th 1313, 1327 [57 Cal.Rptr.3d 644, 156 P.3d 1100, 72 Cal.Comp.Cases 565] (“[T]he Legislature’s purpose in adopting a revised section 4663 and a new section 4664 ... [was to create a] new regime of apportionment based on causation ...”); *Benson, supra*, 170 Cal.App.4th at p. 1549 [74 Cal.Comp.Cases 113] (“[T]he plain language of the new statutory scheme requires apportionment to each cause of a permanent disability, including each distinct industrial injury. This conclusion is compelled by ... the plain language of current sections 4663 and 4664”); *Kleemann v. Workers’ Comp. Appeals Bd.* (2005) 127 Cal.App.4th 274, 284 [25 Cal.Rptr.3d 448, 70 Cal.Comp.Cases 133] (“new sections 4663, subdivision (a) and 4664 are primarily substantive changes [establishing that] [p]ermanent disability is now apportioned on the basis of causation”).) It would be inconsistent with the Legislature’s unified scheme of apportionment based on causation to conclude that section 4664(a) somehow overrides the specific and later enacted provisions of section 4663(e). Indeed, any such reading of section 4664(a) would effectively render the provisions of section 4663(e) null and void. It is a basic principle of statutory construction that “[a]n interpretation that renders statutory language a nullity is obviously to be avoided.” (*Tuolumne Jobs & Small Business Alliance v. Superior Court* (2014) 59 Cal.4th 1029, 1039, 175 Cal.Rptr.3d 601, 330 P.3d 912 (internal quotation marks omitted) [additional citations omitted].”

(*Bates, supra*, at 656.)

Accordingly, we affirmed the WCJ's determination that applicant was entitled to one award for both injuries.

In *Santiago v. California Highway Patrol* (May 23, 2022, ADJ11644990) [2022 Cal. Wrk. Comp. P.D. LEXIS 155], writ den. sub nom. *Cal. Highway Patrol v. Workers' Comp. Appeals Bd. (Santiago)* (2022) 87 Cal.Comp.Cases 1011 [2022 Cal. Wrk. Comp. LEXIS 51] (*Santiago*), applicant sustained an original presumptively compensable cumulative injury ending June 7, 2011, for which he received an award of 43 percent, of which 18 percent was attributable to "heart trouble." Applicant later claimed a subsequent cumulative injury ending September 24, 2018, which the parties agreed rated at 55 percent disability, attributable solely to heart trouble. Applicant contended that section 4664(b) apportionment was unavailable to defendant because of section 4663(e), which in turn obviated apportionment to causation under section 4663(a). The WCJ determined that section 4663(e) precluded apportionment to causation, including section 4664(b)'s apportionment to prior awards of disability. In response to defendant's petition seeking reconsideration, we noted that "it would be illogical to find the anti-attribution provision in section 4663(e) applies to apportionment under section 4664(a) but not to apportionment under section 4664(b)." (*Id.* at p. 1014.) We further observed that the conclusive presumption of 4664(b) would not attach in the first instance because of the apportionment preclusion mandated under section 4663(e). (*Ibid.*) Accordingly, we affirmed the WCJ's award of disability without apportionment to the prior award. Defendant's petition for writ of review was subsequently denied.

More recently, however, a panel of the Appeals Board reached a different conclusion in *Cantil Shadoan v. City of San Diego* (2025) 91 Cal.Comp.Cases 352 [2025 Cal. Wrk. Comp. P.D. LEXIS 435] (*Shadoan*). Therein, applicant received an award of permanent disability of 9 percent for a low back injury in 2010. Applicant subsequently sustained an additional cumulative injury ending in 2017, and the combined prior and current injuries resulted in 24 percent aggregate permanent partial disability. The parties stipulated that the presumptions and anti-attribution provisions of sections 3213.2 and 4663(e) applied to applicant. While applicant in *Shadoan* further conceded that section 4664 applied generally, the parties disputed the mechanics of how to calculate the apportionment afforded under section 4664. The WCJ issued an award that deducted the dollar value of applicant's prior award rather than the percentage of permanent disability previously awarded. Defendant sought reconsideration averring the holding in *Brodie v. Workers' Comp. Appeals Bd.* (2007) 40 Cal.4th 1313 [72 Cal.Comp.Cases 565] (*Brodie*) required the

deduction of the percentage of permanent disability of the prior award rather than the dollar value of the award.

The panel's analysis in *Shadoan* began with a comprehensive review of the history of legal apportionment in California, noting that it has long been the law in California that "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." (*Shadoan, supra*, 91 Cal.Comp.Cases at p. 357.) The *Shadoan* panel further noted that while the mechanics of how disability is rated have evolved under reform legislation in 2004, it remains defendant's burden to prove both the existence of a prior award of disability and that the prior disability overlaps with the current disability. (*Id.* at p. 358, citing *Kopping v. Workers' Comp. Appeals Bd.* (2006) 142 Cal.App.4th 1099, 1158 [71 Cal.Comp.Cases 1229].)

Set against this legal backdrop, the Appeals Board observed that the applicant in *Shadoan* did not challenge the applicability of section 4664(b) apportionment, only the method by which the apportionment should be calculated. (*Id.* at p. 362.) The Appeals Board observed:

When apportionment is proven pursuant to section 4664, the correct method for calculating apportionment was decided by the Supreme Court in *Brodie, supra*. The percentage of disability attributable to the new injury is calculated by subtracting the old rating from the new rating, then awarding the difference. (*Brodie, supra* 40 Cal. 4th 1322.) The *Brodie* court expressly rejected the formula used by the WCJ in this case, which was to subtract the dollar amount of the prior disability from the dollar amount of the present disability. (*Ibid.*)

The WCJ based their opinion, in part, upon the Appeals Board holding in *Bates v. County of San Mateo*, 2019 Cal. Wrk. Comp. P.D. LEXIS 72.2 In *Bates*, the Appeals Board addressed a novel argument raised by defendant, that apportionment based upon causation was allowed notwithstanding section 4663(e) because section 4664(a) states: "(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." (§ 4664(a).) The employer argued that section 4664(a) was outside section 4663 and thus apportionment based upon causation was permissible notwithstanding 4663(e)'s non-attribution clause. The Appeals Board rejected this argument and held that section 4664(a) states a general principle of apportionment and the more specific section of 4663(e) excluding apportionment based upon causation for certain presumed injuries was controlling. (*Bates, supra*, at *17–19.)

The Appeals Board further noted that apportionment under *Benson* is also not permitted when dealing with presumptive injuries as *Benson* apportionment necessarily involves apportionment based upon causation under section 4663. (*Id.* at *12–13.)

We continue to find the holding in *Bates* persuasive. The inclusion of a general principle of apportionment in section 4664(a), does not override the more specific exclusion of apportionment based upon causation contained in 4663(e). However, the *Bates* opinion did not address the dispute in this matter. The question here is whether the non-attribution clause of section 4663(e) in any way impacts the apportionment calculation under section 4664(b) and *Brodie*. It does not.

In reaching our conclusion, we must address another panel decision, *Thomas Santiago v. California Highway Patrol*, which expanded our holding in *Bates* and found that presumptive injuries contained in 4663(e) are not subject to apportionment under section 4664(b). (2022 Cal.Wrk.Comp. LEXIS 51; 87 Cal Comp.Cases 1011.) However, we do not find the holding in *Santiago* persuasive as it does not adequately explain why section 4664(b) is preempted by section 4663(e).

Section 4663(e) precludes apportionment based upon *causation of disability*. *Apportionment under 4664(b) is not apportionment based upon causation, but instead is apportionment to a prior award of disability, which overlaps with the current award.*

That is, like section 4663(e), section 4664 requires an analysis of whether the two disabilities overlap, but that analysis **does not involve causation of the disability**. This is because a prior award necessarily reflects only that portion of the disability that was found industrial. When examining a prior award of disability, any analysis under section 4663 has already occurred.

(*Id.* at p. 362-363, italics and emphasis original.)

The decision in *Shadoan* thus addressed both *Bates* and *Santiago* as necessary to a complete discussion of the issues raised therein, including why section 4664(b) and the holding in *Brodie* would apply notwithstanding the applicability of section 4663(e). The panel in *Shadoan* observed that while it continued to find the reasoning in *Bates* persuasive as it applied to apportionment under section 4664(a) and *Benson, supra*, it could not agree that the same reasoning would extend to section 4664(b) as did the panel in *Santiago, supra*. The Appeals Board noted that fundamentally, section 4663 apportions to the *causation* of a disability, whereas section 4664 apportions to *a prior award* of disability insofar as it overlaps a present disability. Because “the basis for apportionment under section 4664(b) does not analyze the cause of the disability, section

4663(e) does not preclude its application.” (*Id.* at p. 363.) Accordingly, we concluded that when calculating apportionment under section 4664(b), the subtraction of the percentage of the prior award was required under *Brodie, supra*, even where the injury is subject to the anti-attribution clause of section 4663(e). (*Ibid.*)

Applicant’s Petition for Writ of Review was subsequently denied by the Court of Appeal for the Fourth Appellate District on April 29, 2026. (*Canto Shadoan v. Workers’ Comp. Appeals Bd.* (2026) 91 Cal.Comp.Cases 527 [2026 Cal. Wrk. Comp. LEXIS 2].)

With this jurisprudence in mind, we turn to the present matter. Applicant’s Petition contends the legislature intended the anti-attribution provisions of section 4663(e) to preclude apportionment to causation under section 4663 as well as apportionment to prior awards of disability under section 4664. (Petition, at p. 9:16.) Applicant cites to the WCJ’s Report in *Santiago, supra*, for the proposition that the Legislature created a single, unified approach to apportionment, one that supports a complete bar to apportionment for injured workers subject to the public safety officer presumptions at sections 3212 et seq. (*Id.* at p. 8:1.) Applicant thus asserts that the WCJ’s application of apportionment under section 4664(b) “flies in the face of the legislative history of AB1368 and Labor Code §4663(e) and is otherwise barred by the mandates of clear statutory construction.” (*Id.* at p. 9:21.)

Defendant responds that “the fundamental rule of statutory construction is to effectuate the Legislature’s intent.” (Answer, at p. 8:16, citing *DuBois v. Workers’ Comp. Appeals Bd.* (1993) 5 Cal.4th 382, 387 [58 Cal.Comp.Cases 286, 289].) Defendant observes that the limitations of the anti-attribution provisions of section 4663(e) are clearly set forth in the statute, and are limited to subdivisions (a), (b) and (c) of section 4663. (*Id.* at p. 9:18.) In contrast, the application of section 4664(b) is not similarly limited, and that section 4664(b) is “apportionment based on legal presumption,” rather than apportionment to causation as set forth in section 4663. (*Id.* at p. 10:6.)

We acknowledge that there are relevant factors both supporting and detracting from the argument that the Legislature intended that section 4663(e) obviate section 4664(b) apportionment to prior awards of disability. As we observed in *Bates*, “where two statutes deal with the same subject matter, the more recent enactment prevails as the latest expression of legislative will.” (*Bates, supra*, at p. 656, citing *Sears v. Baccaglio* (1998) 60 Cal.App.4th 1136, 1161-1162.) As relevant herein, section 4664 was enacted by Senate Bill 899 (SB 899), which became effective on April 19, 2004. (Stats. 2004, ch. 34, § 35.) The language of section 4663(e), however, was

added later by Assembly Bill 1368 (AB 1368), effective January 1, 2007. (Stats. 2006, ch. 836, § 1.) Thus, insofar as sections 4663 and 4664 both deal with the same subject matter of apportionment, the later statutory pronouncement of section 4663(e) better reflects underlying legislative intent.

While both sections 4663 and 4664 ostensibly address issues of apportionment, however, our analysis in *Shadoan* distinguishes between the *apportionment to causation of a disability* required under section 4663(a) and the longstanding principle of *apportionment to prior awards of disability* embodied in former section 4750 and now in section 4664(b). We noted that it has long been the law in California that an employer is only responsible for industrial disability arising out of and occurring during their employment and not for preexisting disability. (*Shadoan, supra*, 91 Cal.Comp.Cases at 356.) Sections 4663 and 4664 were enacted to reach individual legislative goals, and each statute has its own requirements and burden of proof to be carried by the employer in establishing entitlement to such apportionment. Our decision in *Shadoan* thus reasoned that section 4663(e) and 4664(b) are not fundamentally concerned with the same subject matter.

We have reached a similar conclusion as it relates to the interaction between section 4663(e) and the lifetime disability limits described in section 4664(c). (*Hunt v. California Highway Patrol* (2024) 89 Cal.Comp.Cases 371 [2024 Cal. Wrk. Comp. P.D. LEXIS 27] [notwithstanding applicant's entitlement to multiple anti-attribution conditions, lifetime limits of section 4664(c) apply]; *Russell v. County of Los Angeles* (June 9, 2021, ADJ12319674) [2021 Cal. Wrk. Comp. P.D. LEXIS 152] (writ den.) [section 3212.1 presumption does not preclude application of prior award of 34 percent against lifetime regional maximum under section 4664(c)(1)(G)]; *Ross v. California Highway Patrol* (2020) 86 Cal.Comp.Cases 99) [2020 Cal. Wrk. Comp. P.D. LEXIS 331] [section 3212.5 heart presumption does not preclude application of prior awards totaling 59 percent against lifetime regional maximum under section 4664(c)(1)(G)]; *Varga v. City of Los Angeles* (July 10, 2019, ADJ11278324) [2019 Cal. Wrk. Comp. P.D. LEXIS 253] [section 3212.1 cancer presumption does not obviate the application of 4664(c) in principle, but lifetime cap not applied due to failure of quantum of proof]; *McGowan v. City of Los Angeles* (January 7, 2015, ADJ7912683) [2015 Cal. Wrk. Comp. P.D. LEXIS 24] [section 3212.1 presumption does not preclude application of prior awards totaling 87 percent against lifetime regional maximum under section 4664(c)(1)(G)].)

While both sections 4663 and 4664 ostensibly deal with issues of apportionment, the legislative goals underlying sections 4663(e) and 4664(c) and their respective threshold requirements and burdens of proof weighs against divining legislative intent based on the later enacted statute because the statutes do not fundamentally address the same subject matter.

We also observe that when the Legislature amended section 4663(e) in 2007, it specified that the anti-attribution requirements of qualifying conditions would extend only to the apportionment otherwise required under subdivisions (a), (b) and (c) of section 4663. (Lab. Code, § 4663(e).) It is a well-established rule of statutory construction that where exceptions to a general rule are specified by statute, other exceptions are not to be implied or presumed in the absence of a clear legislative intent to the contrary. (*People v. Guillen* (2013) 212 Cal.App.4th 992 [51 Cal.Rptr.3d 514]; *People v. Palacios* (2007) 41 Cal.4th 720, 732 [62 Cal.Rptr.3d 145]; *Collins v. Superior Court* (2001) 89 Cal.App.4th 1244 [66 Cal.Comp.Cases 706].) Had the Legislature in 2007 intended the apportionment provisions of section 4663(e) to preclude apportionment under section 4664(b), it would have included section 4664(b) among the specified exemptions. The lack of clear statutory intent in this instance militates against extending the apportionment protections of section 4663(e) beyond the subdivisions specifically identified by the Legislature. (See also *People v. Henson* (2002) 13 Cal.5th 574, 598 [296 Cal.Rptr.3d 331] [canon of statutory interpretation violated where one statute silently modifies another].)

Accordingly, and having considered the entire evidentiary record as well as the applicable caselaw including prior Appeals Board panel decisions and the legislative history and intent relevant to both sections 4663(e) and 4664(b), we are persuaded that the anti-attribution provisions of section 4663(e) do not otherwise preclude the apportionment to prior awards available under section 4664(b). Based on the foregoing considerations, and based on our analysis in *Shadoan*, *supra*, whose reasoning we find persuasive and applicable herein, we will affirm the WCJ's determination that the anti-attribution provisions of section 4663(e) do not generally preclude apportionment under section 4664(b).

Notwithstanding the general availability of apportionment under section 4664(b), defendant nonetheless bears the burden of establishing entitlement to such apportionment. (Lab. Code, § 5705; *Kopping v. Workers' Comp. Appeals Bd.* (2006) 142 Cal.App.4th 1099 [48 Cal.Rptr.3d 618].) As we discussed at length in *Shadoan*, "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." (*Shadoan, supra*, 91 Cal.Comp.Cases at p. 358, citing *Brodie v. Workers' Comp. Appeals Bd.* (2007) 40 Cal.4th 1313 [72 Cal. Comp. Cases 565].) We explained that in evaluating the question of overlap, we must identify the underlying "factors of disability that constitute the rating." (*Id.* at p. 360.) While overlap may be established through a variety of medical and factual inquiries, "overlap under the 2005 PDRS is shown on a legal basis when the second impairment is simply a progression of the first impairment utilizing the exact same chart or table within the AMA Guides." (*Id.* at p. 361.)

Here, applicant sustained a prior cumulative injury to the back and right lower extremity with the same employer November 3, 2003 to November 3, 2004. The WCJ analyzed the issue of overlap as follows:

[T]he employer has offered exhibit C, which is a report of Dr. Larry Dodge dated March 8, 2007. Dr. Dodge was the primary treating physician in regards to a prior claim of cumulative injury to applicant's back during the period November 3, 2003 through November 3, 2004. The prior claim settled with a permanent disability award under the pre-2004 permanent disability rating schedule. However, in assessing the permanent disability due to this prior claim, Dr. Dodge also provided his opinion of applicant's impairment utilizing the AMA guides:

"I reviewed the AMA guides in detail and therefore it is my clinical judgment that based upon the impingement of the sciatic nerve, based upon the fact that this patient did not require operative procedure to reduce pressure against the sciatic nerve, it is equivalent to an individual who undergoes a decompression of the nerve root in the lumbar spine. The level of impairment in my medical opinion would be similar. This would therefore place the patient into a lumbar DRE category 3. This would reasonably correspond to 13% impairment of the whole person." (Joint exhibit C, pg. 2.)

(Opinion on Decision, at p. 4.)

The WCJ further notes that current orthopedic QME Dr. Bathgate has similarly rated applicant's lumbar spine impairment at 13 percent, based on her status as "post-surgery for radiculopathy," placing the applicant within Table 15-3, DRE Lumbar Category III of the AMA Guides. (Ex. A, Report of Beth Bathgate, M.D., dated November 9, 2018, at pp. 34-35.) Given the presence of direct overlap in the ratings methodology and the resulting ratings for applicant's

former and current injuries, the WCJ concluded that “[d]efendant has met its burden of establishing a total overlap between past and current injuries necessary to sustain apportionment under section 4664(b), as set forth in *Kopping v. Workers' Comp. Appeals Bd.* (2006) 142 Cal.App.4th 1099, 1115 [71 Cal.Comp.Cases 1229].) (Conclusion of Law, No. 2.)

Following our review of the entire record, including the reporting of PTP Dr. Dodge and QME Dr. Bathgate, we find no good cause to disturb the WCJ’s conclusions regarding the existence of complete overlap as between applicant’s former and current injuries and their resulting disability.

Although we generally affirm the WCJ’s analyses herein, we observe that in workers’ compensation proceedings, binding decisional authority issues only from en banc decisions of the Workers’ Compensation Appeals Board or from California appellate courts. (Cal. Code Regs., tit. 8, § 10305(k) [“En Banc decision” means a decision of the Appeals Board as a whole, issued in order to achieve uniformity of decision or in a case presenting novel issues, that is binding on panels of the Appeals Board and workers' compensation judges as legal precedent under the principle of stare decisis.].) Thus, while en banc decisions of the Appeals Board are mandatory authority on subsequent panels of the Appeals Board and on WCJs, decisions of *individual panels* of the Appeals Board have no stare decisis effect. Accordingly, we decline to adopt or incorporate the WCJ’s “conclusions of law” herein, as only an en banc decision may embody the legal conclusions of the Appeals Board. We will therefore rescind and restate the F&A as Findings of Fact.

For the foregoing reasons,

IT IS ORDERED, as the Decision After Reconsideration of the Workers' Compensation Appeals Board, that the March 29, 2023 Second Findings, Award and Order is **RESCINDED**, and the following **SUBSTITUTED** therefor:

FINDINGS OF FACT

1. Christine Sperry, while employed during the period November 3, 2004 through September 11, 2017, as a police officer, occupational group number 490, at San Diego California by the San Diego Unified Port District, sustained an injury arising out of and in the course of employment to the low back.
2. At the time of injury, the employer's workers compensation insurance carrier was American Home Assurance.
3. At the time of injury, the employee's earnings were sufficient for the statutory maximum for permanent disability.
4. Applicant has been adequately compensated for all periods of temporary disability.
5. The employer has furnished all medical care. The primary treating physician is Larry Dodge, M.D.
6. Applicant received a prior award to the same body part that is the subject of this claim. The award consisted of 30 percent permanent partial disability for cumulative injury from November 3, 2003 through November 3, 2004. The permanent disability was calculated under the pre-2005 permanent disability rating schedule.
7. Based on the opinion of primary treating physician Larry Dodge, M.D., applicant has 13 percent whole person impairment to her lumbar spine under the AMA Guides for the cumulative injury from November 3, 2003 through November 3, 2004.
8. Based on the opinion of qualified medical examiner Beth Bathgate, M.D., applicant's cumulative injury from November 3, 2004 through September 11, 2017 caused whole person impairment of 13 percent under the AMA Guides.
9. Defendant has met its burden of establishing a total overlap between past and current injuries and thus has met its burden to show apportionment under section 4664(b).
10. Applicant has not suffered any additional permanent impairment or resulting permanent partial disability from the November 3, 2004 through September 11, 2017 industrial injury.

AWARD

AWARD IS MADE in favor of applicant, Christine Sperry, and against defendant, American Home Assurance Company of the following:

1. Further medical care to cure or relieve from the effects of the industrial injury.

WORKERS' COMPENSATION APPEALS BOARD

/s/ KATHERINE A. ZALEWSKI, CHAIR

I CONCUR,

/s/ JOSÉ H. RAZO, COMMISSIONER

/s/ ANNE SCHMITZ, DEPUTY COMMISSIONER



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

July 22, 2026

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

**CHRISTINE SPERRY
O'MARA & HAMPTON
LAW OFFICES OF BRADFORD & BARTHEL**

SAR/abs

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