

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

KARINA GONZALEZ, *Applicant*

vs.

**CITY OF LOS ANGELES, permissibly self-insured,
administered by INTERCARE, *Defendants***

**Adjudication Number: ADJ22325507
Los Angeles District Office**

**OPINION AND ORDER
DENYING PETITION
FOR RECONSIDERATION**

Applicant seeks reconsideration of the “Arbitrator’s Findings and Award” (F&A) issued on February 2, 2026, by the workers’ compensation arbitrator (WCA). The WCA found, in pertinent part, that applicant sustained a presumptive industrial injury to the lumbar spine, which resulted in applicant sustaining 13% permanent partial disability after reducing applicant’s award for apportionment under Labor Code¹ section 4664.

Applicant contends that apportionment under section 4664 is precluded by application of the anti-attribution clause under section 4663(e).

We have received an answer from defendant. The WCA 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, the Answer, and the contents of the WCJ’s Report. Based on our review of the record, and for the reasons stated in the WCA’s Report, which we adopt and incorporate, we will deny applicant’s petition for reconsideration.

¹ All future references are to the Labor Code unless noted.

DISCUSSION

I.

Former section 5909 provided that a petition for reconsideration was deemed denied unless the Appeals Board acted on the petition within 60 days from the date of filing. (Lab. Code, § 5909.) Effective July 2, 2024, section 5909 was amended to state in relevant part that:

(a) A petition for reconsideration is deemed to have been denied by the appeals board unless it is acted upon within 60 days from the date a trial judge transmits a case to the appeals board.

(b) (1) When a trial judge transmits a case to the appeals board, the trial judge shall provide notice to the parties of the case and the appeals board.

(2) For purposes of paragraph (1), service of the accompanying report, pursuant to subdivision (b) of Section 5900, shall constitute providing notice.

(§ 5909.)

Under section 5909(a), the Appeals Board must act on a petition for reconsideration within 60 days of transmission of the case to the Appeals Board. Transmission is reflected in Events in the Electronic Adjudication Management System (EAMS). Specifically, in Case Events, under Event Description is the phrase “Sent to Recon” and under Additional Information is the phrase “The case is sent to the Recon board.”

Here, according to Events, the case was transmitted to the Appeals Board on March 11, 2026, and 60 days from the date of transmission is Sunday, May 10, 2026, which by operation of law means this decision is due by Monday, May 11, 2026. (Cal. Code Regs., tit. 8, § 10600.). This decision is issued by or on May 11, 2026, so that we have timely acted on the Petition as required by section 5909(a).

Section 5909(b)(1) requires that the parties and the Appeals Board be provided with notice of transmission of the case. Transmission of the case to the Appeals Board in EAMS provides notice to the Appeals Board. Thus, the requirement in subdivision (1) ensures that the parties are notified of the accurate date for the commencement of the 60-day period for the Appeals Board to act on a petition. Section 5909(b)(2) provides that service of the Report and Recommendation shall be notice of transmission.

According to the proof of service for the Report and Recommendation by the WCA, the Report was served on March 9, 2026, however, and because this case involves arbitration, the Report was e-filed with the DWC District Office, which subsequently transmitted the petition to the Appeals Board on March 11, 2026. By receipt of this decision, the parties are provided with the notice of transmission required by section 5909(b)(1) as to the commencement of the 60-day period on March 11, 2026.

II.

In addition to the reasons stated by the WCA, we note the following observations.

The WCA, in significant part, based the opinion in this matter upon the recent panel decision of *Canto Shadoan v. City of San Diego*. (91 Cal.Comp.Cases 352, 2025 Cal.Work.Comp. P.D. LEXIX 435 (writ den.)). On April 29, 2026, the Fourth District Court of Appeal denied review in *Canto Shadoan* with an unpublished opinion expressing agreement with the logic of the case.

The WCA did not find apportionment based upon causation in this matter. Both of applicant's disabilities were rated using the exact same method contained in the AMA Guides, which was range of motion. Both AMEs in both cases found that applicant's impairment was 100% industrial in accordance with section 4663(e). Both disability awards are based upon a finding of 100% industrial causation. There is no issue of apportionment based upon causation presented in this case.

Impermissible apportionment based upon causation of disability under section 4663 would occur, for example, if the evaluator opined that the entirety of applicant's present disability was caused as a progression of the 2015 injury, and thus, applicant's present industrial disability is nothing. That would be apportionment based upon causation of disability, which is precluded under section 4663(e).

Here, the AME found applicant's present disability 100% industrial, without apportionment under section 4663. The fact that applicant has a prior award of industrial disability under the exact same table of the AMA Guides establishes factual overlap and warrants subtraction of the prior industrial disability from the present industrial disability under section 4664(b).

Accordingly, we deny applicant's petition for reconsideration.

For the foregoing reasons,

IT IS ORDERED that applicant's petition for reconsideration of the Arbitrator's Findings and Award issued on February 2, 2026, by the WCJ is **DENIED**.

WORKERS' COMPENSATION APPEALS BOARD

/s/ KATHERINE A. ZALEWSKI, CHAIR

I CONCUR,

/s/ CRAIG L. SNELLINGS, COMMISSIONER

/s/ JOSEPH V. CAPURRO, COMMISSIONER



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

MAY 11, 2026

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

**KARINA GONZALEZ
LEWIS, MARENSTEIN, WICKE, SHERWIN & LEE
OFFICE OF THE CITY ATTORNEY 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

**CITY OF LOS ANGELES & THE LOS ANGELES POLICE PROTECTIVE LEAGUE
ALTERNATIVE DISPUTE PREVENTION AND RESOLUTION PROGRAM**

KARINA GONZALEZ,

Applicant,

vs.
CITY OF LOS ANGELES, PERMISSIBLY
SELF-INSURED

Defendant.

ADR No.: LAPPL-ADR-16561

Claim No.: 4064807

ARBITRATOR'S REPORT AND
RECOMMENDATION ON
RECONSIDERATION

I.

INTRODUCTION

The above-captioned matter was set for Arbitration on December 16, 2025, before Mark L. Kahn, Arbitrator and the parties reached Stipulations, and Issues, admitted Exhibits into evidence and the parties agreed to submit this matter on the present record.

On February 2, 2026, the Arbitrator issued the following Findings and Awards as follows:

FINDINGS:

1. Karina Gonzalez, while employed during the period July 24, 2006 through July 24, 2022, at Los Angeles, California, by the City of Los Angeles Police Department, as Police Officer, Group Number 490, sustained an injury arising out of and occurring in the course of employment in the form of sepsis and claims to have sustained an injury arising out of and occurring in the course of employment to the lumbar spine.

2. On the date of injury, the employer was permissibly self-insured.

3. At the time of injury, the employees' earnings were maximum.

4. Defendant has paid Labor Code §4850 benefits in the total amount of \$122,792.04 for the period from November 6, 2022, through December 6, 2023.

The defendants have paid state rate temporary total disability of \$80,572.93, paid for the period December 7, 2023, through December 6, 2024.

5. The defendant has paid permanent disability of advances of \$13,671.43.

6. The parties stipulate that the low back presumption of Labor Code §3213.2 applies to this case.

7. The Arbitrator found permanent disability based on the Medical Reports of Phillip H. Conwisar, M.D., Agreed Medical of a total Whole Person Impairment of 19%.

The Arbitrator rated and found that the applicant's permanent disability is based on the following formula.

15.03– 19 – (1.4)27 – 490I – 35 – 35% PD

8. The Arbitrator found a final permanent disability of 13% payable at \$290.00 per week beginning December 7, 2024, in the total sum of \$12,252.50, less credit for such payments previously made, less reasonable attorney fees.

9. The Arbitrator found that, based on the case of *Kopping*, apportionment in accordance with Labor Code §4664 is allowed by the subtraction method because there is a prior award which overlaps the present award. In this case, the defendant has met their burden of proof by submitting the prior Award, as set forth above, of 22% permanent disability, and based on the medical reports set forth above, including the Agreed Medical Evaluator in this case, there is overlap between the prior Award and the present Award. Therefore, apportionment is allowed by the subtraction method to the prior award of 22% permanent disability.

10. The Arbitrator found the reasoning in the case of *Shadoan v. City of San Diego* more persuasive than the prior cases and chooses to follow this case.

11. The Arbitrator found in accordance with the recent case of *Shadoan v. City of San Diego*, as set forth above, that Labor Code §4664 apportionment does apply to a presumption injury case pursuant to Labor Code §3213.2.

12. The Arbitrator found apportionment pursuant to Labor Code §4664 by the subtraction method is allowed.

13. The Arbitrator found apportionment pursuant to Labor Code §4664 by the subtraction method is allowed. The applicant has a current disability of 35% and subtracting the prior Award of 22% leads to a final permanent disability of 13% permanent disability, after apportionment to the prior award pursuant to Labor Code §4664.

14. The Arbitrator found that the applicant is in need of future medical treatment.

15. The Arbitrator found that a reasonable attorney fee is found 15% equaling \$1,838.00.

16. The Arbitrator found that the issue of credit is left to be adjusted between the parties with the Arbitrator retaining jurisdiction in case of a dispute.

AWARD

Award is made in favor of Karina Gonzalez against the City of Los Angeles of:

A. Temporary disability indemnity in accordance with Paragraph 4 above.

B. Permanent disability indemnity in accordance with Paragraph 7-13 above, payable beginning December 7, 2024, less credit for such payments previously made, less the sum

\$1,838.00 payable to Lewis, Marenstein, Wicke, Sherwin & Lee, payable as the reasonable value of services rendered.

C. Further medical treatment in accordance with paragraph 11 above.

D. The Arbitrator of credit is left to be adjusted between the parties, with the Arbitrator retaining jurisdiction in case of a dispute.

The applicant now files this Petition for Reconsideration on the issue of apportionment, making the argument that Labor Code §4663(e) in a case involving a presumptively compensable low back injury injury pursuant to Labor Code §3213.2 precludes apportionment pursuant to Labor Code §4664 (b).

II. **FACTS**

Karina Gonzalez, born [REDACTED], while employed during the period July 24, 2006 through July 24, 2022, at Los Angeles, California, by the City of Los Angeles Police Department, as Police Officer, Group Number 490, sustained an injury arising out of and occurring in the course of employment in the form of sepsis and claims to have sustained an injury arising out of and occurring in the course of employment to the lumbar spine.

The matter proceeded to Arbitration on December 16, 2025, before Mark L. Kahn, Arbitrator and the parties reached Stipulations, and Issues, admitted Exhibits into evidence and the parties agreed to submit this matter on the present record.

On February 2, 2026, the Arbitrator issued a Findings and Award based upon the medical report of Philip Conwisar finding injury to the low back and permanent disability of 13%.

The 13% permanent disability award was found by a finding of 35% permanent disability and by subtracting a prior award of permanent disability of 22% resulting in a final permanent disability award of 13%.

The applicant now Petitions for Reconsideration on the issue of apportionment for the reasons set forth above.

III. **DISCUSSION**

A.

INTRODUCTION

The issue presented is apportionment to a prior low back award, the issue being does Labor Code §4663(e) in a case involving a presumptively compensable low back injury pursuant to Labor Code §3213.2 precludes apportionment pursuant to Labor Code §4664 (b).

It is not disputed that the applicant is a Police Officer with the City of Los Angeles who sustained a low back injury during the period July 24, 2006, through July 24, 2022.

The low back presumption of Labor Code §3213.2 applies to this case.

The parties stipulated that Karina Gonzales while employed as a Police Officer on April 21, 2015, sustained an injury arising out of an occur in the course of her employment to her low back.

The Arbitrator found 35% permanent disability based on the report of the Agreed Medical Evaluator and is not disputed.

The Arbitrator then subtracted the 22% prior Award pursuant to Labor Code §4664 (b), resulting in a final permanent disability award of 13% for this injury.

Applicant argues based on Labor Code §4663(e) and the cases of Santiago (87CCC101), Zapatka (2024 Cal. Wrk. Comp. P.D. LEXIS 286) and Bates (84 CCC 648) that apportionment pursuant to Labor Code §4664 (b) is not allowed in Presumptive injury cases.

The Arbitrator allowed the apportionment pursuant to Labor Code §4664 (b) and in accordance with the cases of *Kopping v. Workers' Comp. Appeals Bd.*, 71 Cal. Comp. Cases 1229), and *Shadoan v. City of San Diego* (2025 Cal. Wrk. Comp. P.D. LEXIS 435).

The Arbitrator recognized the split in authority the cases before the Appeals Board, and after reviewing all the cases decided to allow the apportionment in accordance *Shadoan* case.

B.

RELEVANT EVIDENCE

Prior Stipulations with requests for Award case ADJ10194978:

The parties stipulated that Karina Gonzales while employed as a Police Officer on April 21, 2015 sustained an injury arising out of an occur in the course of her employment to her low back resulting in permanent disability of 22% based on the medical report of the Agreed Medical Evaluator Dr. Latteri which rated according to the formula **15.03 - 12(1.4) - 17 - 490I - 23 - 22.**

Medical reports of Alexander Latteri M.D. case ADJ10194978

Medical report of Alexander Latteri, M.D., dated November 12, 2015:

The report finds the applicant sustained an industrial injury to low back on April 21, 2015.

The applicant is still experiencing marked lumbar pain due to an L5-S1 disc herniation.

The applicant has been receiving temporary disability benefits as she has been off work since the date of injury.

The applicant is still under medical care.

The report finds the applicant is not MMI and needs continued medical treatment.

The applicant is presently not MMI and temporarily totally disabled.

As to apportionment 100% of the disability is apportioned to the injury of April 21, 2015.

The applicant is to return for reevaluation in four months.

Medical report Alexander Latteri, M.D., dated July 23, 2018:

The report found present complaints of daily low back throbbing pain. The lower back pain increased with bending, lifting, and laying on her stomach. There was increase low back with pain with prolonged sitting or standing. She had occasional radiation of cramping or tingling sensation to L.E. the applicant had difficulty sleeping due to low back symptoms.

The medical report found a 12% WPI for the lumbar spine using ROM.

The medical report found in 11% WPI for the lower back by DRE.

The MRI of December 21, 2016, found a left L3-4-disc extrusion and 6mm central herniated nucleus pulposus L5-S. Decreased range of motion in the lower back, positive left leg sensory deficit, and status post two rhizotomies. Multilevel disc injuries.

The physician concludes the applicant sustained an injury to her lower back on April 21, 2015.

The report finds the applicant is working at full duty as of February 14, 2018. The report finds the applicant is in need of further medical treatment.

As to permanent disability, the physician finds a 12% WPI for the lumbar spine using ROM. A 11% WPI for the low back using DRE.

The disability is considered 100% related to the injury of April 21, 2015. There is no basis for apportionment to nonindustrial factors of disability.

Medical Reports of Phillip H. Conwisar, M.D., Agreed Medical Evaluation case LAPPL-ADR-16561.

Medical report of Phillip H. Conwisar, M.D., dated May 3, 2023:

The applicant reports present complaints to the low back with radiating pain to the right buttock, hip and right thigh.

The applicant had a 2015 injury to the lumbar spine that settled by way of the Stipulation with Request for Award.

The diagnosis was lumbar spondylolysis and rule out lumbar disc herniation/lumbar radiculopathy.

The applicant wore a heavy gun belt, she performed bending, stooping and lifting, she does physical training and tactical training, and her work activities are vigorous in nature.

The physician opines within reasonable medical probability that the applicant's work activities caused and contributed to the injury involving the lumbar spine. He would consider the injury industrial and causation due to the cumulative trauma injury.

She had a prior industrial injury involving the lumbar spine in 2015. Apportionment will be indicated when the applicant is permanent stationery and has reached Maximum Medical Improvement.

The medical report found the applicant was temporarily totally disabled in need of medical treatment and was not permanent and stationary and had not reached MMI status.

Medical report of Phillip H. Conwisar, M.D., dated June 11, 2025:

The applicant has present complaints in the low back and the pain that radiates to the buttocks.

The diagnosis is lumbar spondylolysis with disc protrusions, L3-4, L4-5, L5-S1.

The applicant was re-evaluated today.

As to causation, the physician opined the applicant's lumbar spine, causation is industrial due to the cumulative trauma injury through October 20, 2022, arising out of his employment with the LAPD.

The report found the applicant was permanent and stationary and at Maximum Medical Improvements of today's date.

The report found the applicant was in need of future medical treatment.

As for apportionment, the physician found the applicant had a prior industrial injury

involving the lumbar spine on April 21, 2015. The claim apparently settled with permanent disability. Apportionment is by subtraction of previously determined permanent disability from her current level of permanent disability.

The physician found a total Whole Person Impairment of 19%.

Medical report of Phillip H. Conwisar, M.D., dated September 26, 2015:

The report was written for clarification regarding the issue of apportionment as to the lumbar spine.

It was noted that the applicant had a prior industrial injury involving the lumbar spine on April 21, 2015.

In his opinion the appropriate method to determine apportionment is by subtraction of previously determined permanent disability related to the industrial injury of April 21, 2015, from the current level of permanent disability due to acumen of trauma injury through October 20, 2015.

In his opinion there is overlap between these injuries. An MRI the lumbar spine performed on May 1, 2015, as described in Dr. Lateri in his July 23, 2018, AME report shows a 5mm disc protrusion at L5-S1 and mild disc bulges at L3-L4 and as disc bulge at L4-5. These are the same three levels that are involved as noted in the MRI of April 16, 2024, and April 21, 2023. It is important to note that the disc protrusion at L3-4 increased in size during this period of time, which is attributable to the cumulative trauma injury through October 20, 2022. Dr. Lateri determined permanent impairment using the Range of Motion method. In his opinion this is the appropriate method and is consistent with the AMA Fifth Edition Guides. There are three main levels of involvement. There is a specific injury and cumulative trauma injury. The range of motion methods

is appropriate to use in these instances. Additionally, since the range of motion method was used previously, it is more accurate comparison of permanent disability when using the same method to determine permanent disability.

C.

CASE LAW

Shadoan v. City of San Diego (2025 Cal. Wrk. Comp. P.D. LEXIS 435)

The WCJ found the applicant sustained an industrial injury because of the cumulative trauma to her back that resulted in 24% permanent disability. The WCJ further found the applicant qualified for the duty-belt presumption of Labor Code §3213.2 and therefore her disability was not subject to apportionment under Labor Code §4663(e). The WCJ found that the applicant's prior specific injury the back in 2010, which resulted in 9% permanent partial disability, warranted apportionment under Labor Code §4664. The WCJ did not deduct the percentage of disability but instead deducted the monetary value of the prior disability to the application of the non-attribution clause of section 4663 (e).

Defendants filed a Petition for Reconsideration.

The WCAB granted reconsideration and issued new findings and award for disability of 15% permanent disability (24% -9%) after apportionment under Labor Code §4664.

The WCAB found that it was stipulated that applicant's injury was presumptive under labor code section 3213.2. Accordingly, section 4663 does not apply, and they cannot apportion the applicant's disability based upon causation.

The WCAB stated that 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 the defendant to establish the existence of a prior Award of disability, but permitted the applicant to for about the conclusive presumption by proving the prior award did not overlap with the applicant's current disability. However, the Court of Appeal rejected this burden-shifting approach, and instead required defendants 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 v. Workers' Comp. Appeals Bd., 71 Cal. Comp. Cases 1229)

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.

In cases where the disabilities not rating using a progression within the same chart or table, overlap is a factual issue requiring medical evidence establishing overlap between the two disabilities. In some cases, the doctor may deviate from using the same chart to rate the subsequent injury.

Where the disability is not rated using a progression within the same chart or table, overlap may be shown when the medical evidence demonstrates the following: (1) the impacts of the ADLs from the prior award of disability are to the same body region (2) the impacts of the ADLs from the current award of disability overlap the impacts to the ADLs measured in the prior disability.

The presence of factual overlaps requires medical reporting. The requirement for expert medical evidence exists throughout Workers Compensation proceedings, including the determination of temporary disability, permanent disability, apportionment, and causation of injury, to name a few.

When apportionment is proven pursuant to Labor Code §4664, the correct method of calculating apportionment was decided in Brody. The percentage of disability attributable to the new injury is calculated by subtracting the old rating from the new rating, then awarding the difference.

The court in Brody explicitly rejected the method formerly 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.

The WCAB citing the case of Bates (2019 Cal. Wrk. Comp. P.D. LEXIS 72) , 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 an occur in the course of employment. The employer argued that section 4664 (a) was outside section 4663 and thus apportionment based on causation was permissible notwithstanding 4663 (e) non-attribution clause. The Appeals Board rejected this argument and held that Labor Code §4664 (a) states a general principle of apportionment in the more specific section of 4663 (e), excluding apportionment based upon causation for soup and preserved injuries

was control. 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.

The WCAB then stated that they continue to find that the holding in Bates is persuasive. The inclusion of a general principle of apportionment under section 4664 (a) does not override the more specific exclusion of apportionment based upon causation contained in LC 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 Labor Code §4664 (b). It does not.

In reaching this conclusion, the Board had to address another panel decision, Santiago (87 CCC 1011), which expanded the holding in Bates and found the presumptive injuries contained in Labor Code §4663 (e) are not subject to apportionment under Labor Code §4664 (b).

The WCAB found did not find the holding in Santiago as it did not adequately explain why section 4664 (b) is preempted by section 4663 (e).

Section 4663 (e) precludes apportionment based upon causation disability. Apportionment under 4664 (b) is not apportionment based on causation, but instead is apportionment to a prior award of disability, which overlaps 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 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 4663 has already occurred.

As a basis for apportionment under Labor Code §4664(b) does not analyze the cause of the disability, section 4663 (e) does not preclude its application. When calculating apportionment under section 4664 (b) the WCAB found no reason to disregard the holding in Brody, even where the injury is subject to anti-attribution clause of section 4663.

Accordingly, the decision of the WCJ was rescinded and a new FNA was substituted finding the applicant's disability after apportionment under 4664 is 15% permanent disability (24% -9%).

KOPPING v. Workers' Comp. Appeals Bd. (142 Cal. App. 4th 1099):

Apportionment according to Labor Code §4664 (b) requires proof of a prior Award and overlapping disability between the current and prior award.

Carrillo v. Oakview Dairy (2026 Cal. Wrk. Comp. P.D. LEXIS 3, 2026 LX 33726)

The WCAB based on their review of the record, granted Reconsideration rescinded the WCJ's May 14, 2021 F&A and issue a new F&A, which affirms the WCJ's findings as to the period of temporary disability, but corrects the findings to conform the applicants' correct wage rate, and finds that applicant's injury caused 2% permanent disability after apportionment.

In this case dealing with Labor Code §4664 (b) apportionment citing the case of *Kopping v. Workers' Comp.* Appeals Bd.(2006), 142 Cal.App.4th 1099.), The WCAB held defendant must prove that a prior award of disability exists. (*Pasquotto v. Hayward Lumber* (2006) 71 Cal. Comp. Cases 223 [Appeals Board en banc opinion.

This requires the production of a prior Stipulations with Request for Award, or a prior Compromise and Release, where the parties included applicant's level of permanent disability in the settlement. (*Pasquotto*, supra 71 Cal. Comp. Cases

After a prior Award of permanent disability is established, the disability in that Award inconclusively 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.

In accordance with *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 1313,1332 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* the principles of proving overlap are substantially the same principles of overlap applied prior to the enactment of SB 899. (*Sanchez*, 70 Cal. Comp. Cases at p. 1457; *Strong*, 70 Cal. Comp. Cases at p. 1477.)

The WCAB stated 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, the board would not speculate on them. (*Sanchez, and Strong*).

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

Under SB 899 the mechanics of rating permanent disability significantly changed. The Legislature adopted and incorporated the American Medical Association Guides to the Evaluation of Permanent Impairment, 5th Edition (2001) (AMA Guides). Impairment under the AMA Guides is designed to reflect how a disability affects a person's activities of daily living (“ADLs”) (Self-care, communication, physical activity, sensory function, non-specialized hand activities, travel, sex, and sleep). (AMA Guides, pp. 2 9.)

Unlike the prior PDRS, the AMA Guides expressly excludes work from the impairment analysis. Impairment percentages or ratings developed by medical specialists are consensus derived estimates that reflect the severity of the medical condition and the degree to which the impairment decreases an individual’s ability to perform commonly activities of daily living (ADL), excluding work.

Impairment ratings were designed to reflect functional limitations and not disability. The Whole Person Impairment percentages listed in the Guides estimate the impact of the impairment on the individual’s overall ability to perform activities of daily living, excluding work.

Thus, similar to the 1997 PDRS, overlap under the 2005 PDRS is shown on a *legal* basis when the subsequent impairment is simply a progression of a prior rated impairment utilizing the exact same chart or table within the AMA Guides.

In cases where the disability is not rated using a progression of the same chart or table, overlap is *factual* issue requiring medical evidence establishing overlap between two disabilities.

Where the disability is not rated using a progression within the same chart or table, overlap is shown when the medical evidence demonstrates the following:

1. The impacts to the ADLs from the prior award of disability are to the same body region.
2. The impacts to the ADLs from the current award of disability overlap the impacts to the ADLs measured in the prior disability.

The presence of factual overlaps requires medical reporting. The requirement for expert medical evidence exists throughout workers' compensation proceedings, including determination of temporary disability, permanent disability, apportionment, and causation of injury to name a few.

The medical cause of an ailment is usually a scientific question, requiring a judgment based upon scientific knowledge and inaccessible to the unguided rudimentary capacities of lay arbiters. (*Peter Kiewit Sons v. Industrial Acci. Com. (McLaughlin)*).

In a field which forces the experts into hypothesis, unaided lay judgment amounts to nothing more than speculation. We see no reason to deviate from this requirement when analyzing application of section 4664(b).

Here, defendant requested, and the court took judicial notice of a prior Compromise and Release (C&R) and a prior Stipulations with Request for Award executed by applicant.

Unlike *Pasquotto*, the Compromise and Release here expressly included a rating string upon which the settlement was based. The Stipulations with Request for Award further rated applicant's lumbar spine to 12% and included apportionment of 9% under section 4664 for the prior C&R. Although the AME found medical apportionment of 40% non-industrial causation, defendant correctly argues that it is entitled to *legal* apportionment under section 4664(b) as applicant's current award of disability to the lumbar spine represents a progression of a prior rated impairment utilizing the exact same chart or table within the AMA Guides.

Defendant proved overlap between the prior awards and the present award as they involved the same body part which was rated using the exact same method.

The applicant's current permanent disability rates as follows: **15.03.01.00 - 8 - [1.4]11 - 491H - 14 = 14%**.

Applicant's disability rating does not require the assistance of a DEU rater in this case. (See *Blackledge v. Bank of America* (2010), 75 Cal. Comp. Cases 613, 624-625 (Appeals Board en banc).)

After apportionment under section 4664, applicant's permanent disability award in this case is 2% (14% - 12%).

Accordingly, as our Decision After Reconsideration we will rescind the WCJ's May 14, 2021 F&A and issue a new F&A, which affirms the WCJ's findings as to temporary disability, and finds that applicant's injury caused 2% permanent disability after apportionment.

D.

Discussion Apportionment

1.

Overall Permanent Disability

The Arbitrator found permanent disability based on the Medical Reports of Phillip H. Conwisar, M.D., Agreed Medical Evaluation as follows:

The diagnosis was lumbar spondylolysis with disc protrusions, L3-4, L4-5, L5-S1.

As to causation, the physician opined that the applicant's lumbar spine, causation is industrial due to the cumulative trauma injury through October 20, 2022, arising out of his employment with the LAPD.

The report found the applicant was permanent and stationary and at Maximum Medical Improvement.

The physician found a total Whole Person Impairment of 19%.

The Arbitrator found a final Whole Person Impairment of 19%.

The Arbitrator rated the applicant's permanent disability as follows:

15.03 – 19 – (1.4)27 – 490I – 35 – 35%

The Arbitrator found a final permanent disability of 35%.

2.

Discussion Apportionment and the *Kopping* case.

The parties stipulated in case ADJ10194978 that Karina Gonzales while employed as a Police Officer on April 21, 2015 sustained an injury arising out of an occur in the course of her employment to her low back resulting in permanent disability of 22% based on the medical report of the Agreed Medical Evaluator Dr. Latteri which rated according to the formula **15.03 – 12 (1.4) – 17 – 490I – 23 – 22.**

Alexander Latteri, M.D., evaluated the applicant for the injury in case ADJ10194978 and reported as follows:

In his medical report dated July 23, 2018, Dr. Latteri reported as follows:

The report found present complaints of daily low back throbbing pain. The lower back pain increased with bending, lifting and lying on her stomach. There was increased low back with pain

with prolonged sitting or standing. She had occasional radiation of cramping or tingling sensation to L.E. the applicant had difficulty sleeping due to low back symptoms.

The MRI of December 21, 2016, found a left L3-4-disc extrusion and 6mm central herniated nucleus pulposus L5-S. Decreased range of motion in the lower back, positive left leg sensory deficit, and status post two rhizotomies. Multilevel disc injuries in SSR. He used ROM method for rating the back disability.

The physician concludes the applicant sustained an injury to her lower back on April 21, 2015.

The report finds the applicant is working at full duty as of February 14, 2018.

The report finds the applicant is in need of further medical treatment.

As to permanent disability, the physician finds a 12% WPI for the lumbar spine using ROM. A 11% WPI for the low back using DRE.

The disability is considered 100% related to the injury of April 21, 2015.

There is no basis for apportionment to nonindustrial factors of disability.

Phillip H. Conwisar, M.D., the Agreed Medical Evaluation in case LAPPL-ADR-16561 reported as to apportionment as follows:

As for apportionment, the AME found the applicant had a prior industrial injury involving the lumbar spine on April 21, 2015. The claim apparently settled with permanent disability. Apportionment is by subtraction of previously determined permanent disability from her current level of permanent disability

It was noted that the applicant had a prior industrial injury involving the lumbar spine on April 21, 2015.

In his opinion the appropriate method to determine apportionment is by subtraction of previously determined permanent disability related to the industrial injury of April 21, 2015, from the current level of permanent disability due to acumen of trauma injury through October 20, 2015. In his opinion, there is overlap between these injuries. An MRI of the lumbar spine performed on May 1, 2015, as described in Dr. Latteri in his July 23, 2018, AME report, shows a 5mm disc protrusion at L5-S1 and mild disc bulges at L3-L4 and a disc bulge at L4-5. These are the same three levels that are involved, as noted in the MRI of April 16, 2024, and April 21, 2023. It is important to note that the disc protrusion at L3-4 increased in size during this period, which is attributable to the cumulative trauma injury through October 20, 2022. Dr. Latteri determined

permanent impairment using the Range of Motion method. In his opinion, this is the appropriate method and is consistent with the AMA Fifth Edition Guides. There are three main levels of involvement.

In the case of (*Kopping v. Workers' Comp. Appeals Bd.*, 71 Cal. Comp. If the same rating method is used on the prior award of the current award, the defendant has met the burden of proof regarding the issue of apportionment pursuant to Labor Code §4664.

In the case of *Carrillo vs. Oakview Dairy* (ADJ11533485) ((2026 Cal. Wrk. Comp. P.D. LEXIS 3, 2026 LX 33726), it was held under the AMA guides if the current Award and prior Award the same rating method subtraction method is used without the need for expert medical evidence or a formal rating. In this case both the prior award was based on the ROM method and the current award is based on the ROM method for rating back disability.

In this case, the defendant has met their burden of proof of a prior Award of permanent disability, submitting into evidence the prior Award of permanent disability of 22%, as set forth above.

The defendant has met their burden of proof on the issue of overlap between the prior Award of permanent disability and current permanent disability from this injury based on the medical reports of the Agreed Medical Evaluator, Dr. Conwisar, discussed above, and the medical report of Dr. Latteri and the evidence from the prior case, that the permanent disability from both injures overlap.

Again, both Awards were the same part of the body low back, both ratings use the same Method of rating AMA rating the ROM method and therefore based on the medical reports of Dr. Conwisar and Dr. Latteri, defendant has met their burden of proof on the issue of overlap.

Therefore, apportionment is allowed by the subtraction method to the prior Award of 22% permanent disability pursuant to the case of *Kopping v. Workers' Comp. Appeals Bd.*

4.

Does the anti-attribution clause of Labor Code §4663 (e) preclude apportionment in presumptive injury cases (Labor Code §3213.2) pursuant to Labor Code §4664 (b)

The next issue raised regarding apportionment is whether Labor Code §4664 apportionment does not apply in a presumptive injury case pursuant to Labor Code §§3213.2 and 4663 (e).

The parties stipulated the Labor Code §3213.2 low back duty belt presumption applies to the facts of this case.

The Arbitrator finds that apportionment pursuant to Labor Code §4664 applies in this case under the subtraction method, consistent with the holding in *Kopping*, unless apportionment is precluded by the duty belt presumption's anti-attribution clause.

The applicant argues that Labor Code §4664(b) apportionment is precluded in a presumption case pursuant to Labor Code §4663 (e).

The defendant argues that the Labor Code § 4664 apportionment is proper in a presumption case. Defendant argues that the only apportionment precluded by Labor Code §4463(e) is apportionment pursuant to Labor Code §4663 and not apportionment pursuant to Labor Code §4664.

Prior case law has found that in a presumption case, the anti-attribution clause of Labor Code §4663(e) precludes apportionment pursuant to the Labor Code §4664.

In the recent case of *Shadoan v. City of San Diego* the panel majority held that 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 Labor Code §4664 (b). It does not.

In reaching this conclusion, the Board had to address another panel decision, *Santiago* (87 CCC 1011), which expanded the holding in *Bates* and found the presumptive injuries contained in Labor Code §4663 (e) are not subject to apportionment under Labor Code §4664 (b).

The WCAB found did not find the holding in *Santiago* as it did not adequately explain why section 4664 (b) is preempted by section 4663 (e).

Section 4663 (e) precludes apportionment based upon causation disability. Apportionment under 4664 (b) is not apportionment based on causation, but instead is apportionment to a prior Award of disability, which overlaps 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 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.

As a basis for apportionment under Labor Code §4664(b) does not analyze the cause of the disability, Section 4663 (e) does not preclude its application. When calculating apportionment under Section 4664 (b) the WCAB found no reason to disregard the holding in *Brody*, even where the injury is subject to anti attribution clause of Section 4663.

Accordingly, the decision of the WCJ was rescinded and a new F and A was substituted finding the applicant's disability after apportionment under Section 4664 is 15% permanent disability (24% -9%).

The Arbitrator finds the reasoning in the case of *Shadoan v. City of San Diego* more persuasive than the prior cases cited by the applicant attorney.

The Arbitrator finds in accordance with the recent case of *Shadoan v. City of San Diego*, as set forth above, that Labor Code §4664 apportionment does apply to a presumption injury case pursuant to Labor Code §3213.2 and Labor Code §4663(e).

The Arbitrator finds that although the applicant qualified for the duty-belt presumption of Labor Code §3213.2, her disability is subject to apportionment under Labor Code §4664(b).

The Arbitrator finds apportionment pursuant to Labor Code §4664 by the subtraction method is allowed.

The applicant has a current disability of 35% permanent disability and subtracting the prior award of 22% leads to a final permanent disability of 13% permanent disability, after apportionment to the prior Award pursuant to Labor Code § 4664, in this case.

As set forth in the *Carrillo vs. Oakview Dairy* where a prior award uses the same AMA rating as the present Award it is proper for the Arbitrator to rate the cases out and apply the subtraction method without using the expertise of a Disability Evaluation Specialist

In addition, as set forth in the *Carrillo vs. Oakview Dairy* medical evidence is not needed on overlap, in cases where the AMA ratings of the prior award in the current Award are the same, however, in this case the medical evidence and method of rating both support overlap as discussed by Dr. Conwisar.

IV. **RECOMMENDATION**

For the foregoing it is recommended that reconsideration be denied.

DATED: March 9, 2026

MARK L. KAHN,
ARBITRATOR