WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

LUIS CARRILLO, *Applicant*

vs.

OAKVIEW DAIRY; CALIFORNIA LIVESTOCK PRODUCERS, INC., self-insured group, administered by INTERCARE INSURANCE SERVICES, *Defendant*

Adjudication Number: ADJ11533485
Fresno District Office

OPINION AND DECISION
AFTER RECONSIDERATION

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

Defendant seeks reconsideration of the "Findings of Fact, Award, Order, and Opinion on Decision" (F&A) issued on May 14, 2021, by the workers' compensation administrative law judge (WCJ). The WCJ found, in pertinent part, that applicant sustained industrial injury to his back, which based upon the opinion of the Agreed Medical Evaluator (AME) resulted in a period of temporary disability from August 28, 2018, through May 20, 2019, and which further resulted in applicant sustaining 8% whole-person impairment (WPI), and that applicant's permanent disability should be reduced by 40% non-industrial apportionment.

Defendant argues that the WCJ erred in awarding temporary disability because applicant's primary treater released applicant to periodic regular work and defendant offered modified work. Defendant further argues that the award of apportionment based upon Labor Code[2] section 4663 was in error as apportionment should have issued under section 4664 instead.[3]

We have not received an answer from applicant.

---

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

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

[3] We recognize that section 4664 contains multiple subsections, some of which do not involve apportionment. To the extent that this opinion refers to apportionment under section 4664, it refers to subsection 4664(b).

The WCJ filed a Report and Recommendation on Petition for Reconsideration (Report) recommending that we deny reconsideration.

We have considered the allegations of the Petition for Reconsideration, the Answer, and the contents of the WCJ's Report. Based on our review of the record, as our Decision After Reconsideration we will rescind the WCJ's 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 with applicant's correct wage rate, and finds that applicant's injury caused 2% permanent disability after apportionment.

FACTS

Applicant worked as a milker for Oakview Dairy when he sustained an admitted industrial injury to his back on May 30, 2018. (Minutes of Hearing and Summary of Evidence (MOH/SOE), October 5, 2020, p. 2, lines 7-9.) Applicant earned $35,646.48 in the year prior to his injury. (Defendant's Exhibit A, Wage Statement June 14, 2018.)

Applicant was evaluated by AME David Wood, M.D., who took the following history of injury: "On May 30, 2018, Mr. Carrillo states that he was walking the cows through a corral when he slipped on the wet floor with the right foot outstretching his right leg into the splits position and experienced an onset of low back and right leg pain." (Applicant's Exhibit 1, Report of AME David Wood, M.D., May 21, 2019, p. 2.)

Applicant was seen on June 1, 2018, and was placed on temporary total disability for one week. (Applicant's Exhibits 33 and 34.)

Defendant began payment of temporary disability on June 11, 2018. (Applicant's Exhibit 57.)

Applicant's work status changed to modified work on June 22, 2018. (Applicant's Exhibit 14.) Applicant's work restrictions varied over the next several months. Around the beginning of August applicant returned to work modified duties, but defendant had applicant perform the same work as before he was injured. (Minutes of Hearing and Summary of Evidence, November 18, 2020, p. 3, lines 14-23.) Applicant told his supervisor that he had more pain in his back. (*Ibid*.) The supervisor sent applicant home and told him to come back when he was feeling better. (*Ibid*.)

Applicant was released to regular duty on November 7, 2018. (Applicant's Exhibits 16 and 28.) Defendant terminated applicant on November 13, 2018. (Defendant's Exhibit B,

Termination Notice, November 13, 2018.) Defendant alleged that applicant was released to regular work, but refused to return to work. (*Ibid*.)

AME Dr. Wood found applicant permanent and stationary on May 21, 2019. (Applicant's Exhibit 1, *supra* at p. 20.) He assigned applicant 8% WPI to the back using the DRE Lumbar Category II table of the AMA Guides. (*Ibid*.)

Dr. Wood commented upon apportionment as follows:

> With respect to apportionment, Mr. Carrillo does have a history of two prior industrial injuries in 2008 and 2014. In 2008, while working for a Dairy Farm in [Tulare], he grabbed a cow by its neck to insert a tube of medication down its throat. As he did this the cow started to pull and jerk him, injuring his lower back. He was seen for a Qualified Medical Evaluation by Dr. Byrne following that injury on June 10, 2009, who released him from care with 8% Whole Person Impairment. This was settled via Compromise and Release on July 8, 2011.
>
> There is a July 30, 2013 Doctor's First Report of Occupational Injury or Illness by Theodore Wyman, M.D. noting a date of injury of July 28, 2013 when the patient was working when he slipped and now had pain in his lower back. He stated that he slipped and caught himself and afterwards he developed pain in his lower back.
>
> He stated that over the last couple of days the pain has not gone away and had actually increased with ambulation. He was diagnosed with a lumbosacral sprain and was prescribed medications and referred to physical therapy.
>
> In 2014, while working for a Bison Ranch in Hanford, California, he was on a machine used to feed the bison. There is also a November 16, 2015 Doctor's First Report of Occupational Injury or Illness by Dennis Miller, M.D. indicating a date of injury of April 3, when he was lifting a bale of alfalfa and hurt his back. He was diagnosed with lumbar radiculopathy. He was treated conservatively with therapy and epidural steroid injections following each injury. He was off work for about one year after each injury and states he was released back to full duties.
>
> I have also reviewed the September 23, 2014 MRI scan of the lumbar spine which showed disc desiccation at L3-4 through L5-S 1; annular fissure at L3-4 and L4-5 and at L2-L3, broad-based disc herniation abutting the thecal sac. The July 23, 2018 MRI scan showed similar findings.

> When considering the information provided, I find it is medically most probable that Mr. Carrillo's lumbar spine disability is due to a combination of preexisting factors including prior injuries and underlying degenerative changes, as well as further aggravation related to the May 2018 industrial injury. I find it is within reasonable medical probability that 40% of Mr. Carrillo's lumbar spine disability is due to preexisting factors outlined above, with the remaining 60% attributed to the May 30, 2018 injury which caused further aggravation accelerating his need for additional treatment.

(*Id*. at pp. 21-22.)

Judicial notice was taken of the Appeals Board's files in ADJ9585478, ADJ9698546, ADJ6488022, and ADJ648779. (Minutes of Hearing, October 5, 2020, p. 3, lines 4-6.)

Applicant sustained three injuries in 2007 and 2008, which were ultimately settled by Compromise and Release (C&R), which was approved on November 14, 2011. (ADJ6487826, ADJ6488022, and ADJ648779.) The C&R settled applicant's claims for $10,000.00 and contained a stipulation of permanent disability as follows: "P.D. rates 15.03.01.00 – 8 – (5) – 10 – 213F – 10 – 9%". The QME reporting filed with the C&R indicates that applicant was rated using the DRE Lumbar Category II table of the AMA Guides. (Report of Richard Byrne, M.D., August 14, 2009, p. 10.)[4]

Applicant sustained two injuries in 2014, for which stipulations at 3% were approved on September 1, 2016. (ADJ9585478, ADJ9698546). Those stipulations were for injury to the back and hips. The stipulation states: "Settlement based on Panel QME David Broderick reports dated 2/6/2016 and 3/25/2016 rated 15.03.01.00-7-[1.4] – 10 – 460H – 13 – 12%. Prior injury 9% = 3% PD = $2,610." While the parties filed the QME's March 25, 2016 supplemental report, the February 6, 2016 ratings report is not filed with the court.

DISCUSSION

A. Temporary Disability

A grant of reconsideration has the effect of causing "the whole subject matter [to be] reopened for further consideration and determination" (*Great Western Power Co. v. Industrial Acc. Com*. (*Savercool*) (1923) 191 Cal. 724, 729 [10 I.A.C. 322]) and of "[throwing] the entire

[4] "Upon approval of a Compromise and Release or Stipulations with Request for Award, all medical reports that have been filed as of the date of approval shall be deemed admitted in evidence and part of the record of proceedings." (Cal. Code Regs., tit. 8, § 10803(b).)

record open for review." (*State Comp. Ins. Fund v. Industrial Acc. Com*. (*George*) (1954) 125 Cal.App.2d 201, 203 [19 Cal.Comp.Cases 98].) Thus, once reconsideration has been granted, the Appeals Board has the full power to make new and different findings on issues presented for determination at the trial level, even with respect to issues not raised in the petition for reconsideration before it.

Defendant argues that temporary disability benefits should have ceased because applicant was released to regular duty on November 7, 2018. Defendant further argues that it subsequently terminated applicant for failing to return to regular duty.

To constitute substantial evidence ". . . a medical opinion must be framed in terms of reasonable medical probability, it must not be speculative, it must be based on pertinent facts and on an adequate examination and history, and it must set forth reasoning in support of its conclusions." (*Escobedo v. Marshalls* (2005) 70 Cal.Comp.Cases 604, 621 (Appeals Board en banc).) "When the foundation of an expert's testimony is determined to be inadequate as a matter of law, we are not bound by an apparent conflict in the evidence created by his bare conclusions." (*People v. Bassett* (1968) 69 Cal.2d 122, 139.)

The November 7, 2018 opinion on return to full duty is a conclusory opinion. It contains no discussion as to the records reviewed in reaching its conclusion. It contains minimal reasoning, only to say that an orthopedic spine physician had discharged applicant. Thus, the primary treater's opinion does not constitute substantial medical evidence and the WCJ was correct not to rely upon it.

Instead, the WCJ followed the opinion of the AME. The parties presumably choose an AME because of the AME's expertise and neutrality. (*Power v. Workers' Comp. Appeals Bd.* (1986) 179 Cal.App.3d 775, 782 [51 Cal.Comp.Cases 114].) The Appeals Board will follow the opinions of the AME unless good cause exists to find the opinion unpersuasive. (*Ibid*.) We find the AME's opinion persuasive.

In addressing temporary disability, we found two issues not raised by the parties that must be corrected to reissue the temporary disability award. First, applicant testified that he returned to work briefly in early August. To the extent that defendant paid wages for this period, defendant is entitled to credit.

Next, the issue of applicant's temporary disability rate was raised as an issue at trial. In the F&A, the WCJ found that "No evidence supporting the claim for a higher weekly wage was presented[.]" (F&A, p. 2.) The WCJ awarded temporary disability at the rate of $323.01 per week.

Defendant's own wage statement states that applicant's annual earnings were $35,646.48 in the year prior to applicant's injury. (Defendant's Exhibit A.) Applicant's average weekly wage prior to his injury was $683.63 per week. ($35,646.48 divided by 52.1429) Thus, applicant's temporary disability rate is $455.75 per week. ($683.63 x .66666) The WCJ's finding of fact was clearly in error.

Defendant has sought reconsideration of applicant's temporary disability award. As we are reissuing the temporary disability award, we must issue it at the correct temporary disability rate and award appropriate credits. Accordingly, we have corrected the temporary disability award to account for these errors.

B. Permanent Disability and Apportionment

Section 4664 allows apportionment to prior awards and precludes the accumulation of awards to certain body regions from exceeding 100% over the course of one's life. (§ 4664.)

The history of section 4664 was previously discussed by the Appeals Board in dual en banc decisions as follows:

> The apportionment of pre-existing permanent disability has been a fixture of California workers' compensation law since its inception. The original Workmen's Compensation, Insurance and Safety Act of 1917 (the 1917 Act) contained a provision stating: "The percentage of permanent disability caused by any injury shall be so computed as to cover the permanent disability caused by that particular injury without reference to any injury previously suffered or any permanent disability caused thereby." (Stats. 1917, ch. 586, p. 839, § 9; see also, Stats. 1919, ch. 471, p. 916, § 4; Stats. 1925, ch. 354, p. 643, § 1.) In 1929, the Legislature amended the 1917 Act to provide:
>
> > ""The fact an employee has suffered previous disability or received compensation therefor shall not preclude compensation for a later injury . . . ; . . . provided, however, that an employee who is suffering physical impairment and shall sustain permanent injury thereafter shall not receive compensation for a later injury in excess of the compensation allowed for such injury when considered by itself and not in conjunction with or in relation to the previous disability or impairment. The employer shall not be liable for compensation to such employee for the combined disability but only for that portion due to the later injury as though no prior disability or impairment had existed." (Stats. 1929, ch. 222, p. 420, § 1.)"

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

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

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

(*Sanchez v. County of Los Angeles* (2005) 70 Cal. Comp. Cases 1440, 1444-1445 [Appeals Board en banc opinion] disapproved on another ground in *Kopping v. Workers' Comp. Appeals Bd*. (2006), 142 Cal.App.4th 1099.)

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

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

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

First, defendant must prove that a prior award of disability exists. (*Pasquotto v. Hayward Lumber* (2006) 71 Cal. Comp. Cases 223 [Appeals Board en banc opinion]; see also, *Sanchez*, *supra*; see also, *Strong v. City and County of San Francisco* (2005) 70 Cal. Comp. Cases 1460 [Appeals Board en banc opinion], disapproved on another ground in *Kopping v. Workers' Comp. Appeals Bd*. (2006), 142 Cal.App.4th 1099.) 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 at p. 230.)

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

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

(*Sanchez*, *supra* 70 Cal. Comp. Cases at p. 1442; *Strong*, *supra* 70 Cal. Comp. Cases at p. 1462; see also *Brodie v. Workers' Comp. Appeals Bd*. (2007) 40 Cal.4th 1313, 1327, ["[S]ection 4664, subdivision (b) was intended to reverse the rule based on former section 4750 that permitted an injured employee to show rehabilitation of an injury for which a permanent disability award had already been issued. (Citation.)")

Section 4664 contains contradictory language, indicating that it operates as both a conclusive presumption and a rebuttable presumption. In dual en banc opinions, the Appeals Board initially interpreted this contradiction as a burden-shifting mechanism, which required defendant to establish the existence of a prior award of disability, but permitted applicant to rebut the conclusive presumption by proving that the prior award did not overlap with applicant's current disability. (*Sanchez*, *supra* 70 Cal. Comp. Cases at p. 1442; *Strong*, *supra* 70 Cal. Comp. Cases at p. 1462.) However, the Court of Appeal rejected this burden-shifting approach, and instead required that defendant prove both the existence of a prior award of disability and that the prior

award of disability overlaps with the current award of disability. (*Kopping*, *supra* 142 Cal.App.4th at p. 1115.)

Accordingly, and following the decisions in *Sanchez* and *Strong* as modified by *Kopping*, where defendant proves that a prior award of disability exists and proves that the prior award of disability overlaps with the current award, defendant is entitled to subtract the prior award of overlapping permanent disability from applicant's current award. (*Brodie*, supra 40 Cal.4th 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*, *supra* 70 Cal. Comp. Cases at p. 1457; *Strong*, *supra* 70 Cal. Comp. Cases at p. 1477.)

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

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

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

> In applying former section 4750, when the permanent disability resulting from a new injury included factors of disability that were the same as ones that already existed as the result of a prior injury or condition, the disabilities were said to "overlap." (Citations.) If all of the factors of permanent disability attributable to the subsequent industrial injury already existed as a result of the prior injury or condition, then there was "total" overlap, and the employee was not entitled to any additional permanent disability indemnity; if, however, the subsequent industrial injury caused some new factors of permanent disability that were not pre-existing, then there was "partial" overlap, and the employee was entitled to permanent disability indemnity to the extent the subsequent industrial injury further restricted his or her earning capacity or ability to compete. (*Mercier v. Workers' Comp. Appeals Bd.*, *supra*, 16 Cal.3d 711 (employee had prior back disability precluding heavy lifting and repetitive bending, and then sustained a new industrial injury to his

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

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

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

Accordingly, in analyzing overlap we are looking at the factors of disability that constitute the rating.

Under the 1997 Permanent Disability Rating Schedule (PDRS), impairment was assigned through objective limitations, such as amputations, and through preclusions upon the ability to work. (Cal. Dept. of Industrial Relations, Div. of Workers' Comp., Schedule for Rating Permanent Disabilities (1997) p. 1-2.) For example, a disability to the spine could be described through a work restriction chart which progressively increased beginning with a preclusion from substantial work, and ending with a limitation to sedentary work only. (*Id*. at p. 2-15.)

However, 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. (*Id*. at p. 6.)

> 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 common 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[.]

(*Ibid*.)

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. In some cases, a doctor may deviate from using the same chart to rate the subsequent injury. For example, a doctor may rate an injury by analogy using other charts or tables in the AMA Guides. (*Milpitas Unified School Dist. v. Workers' Comp. Appeals Bd*. (*Almaraz-Guzman*) (2010) 187 Cal.App.4th 808, 822 [75 Cal.Comp.Cases 837].) Another example could occur where a low back injury is rated disparately using a Diagnosis Related Estimate in one case, and the Range of Motion method in another.

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 overlap 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. (See also, *Escobedo v. Marshalls* (2005) 70 Cal. Comp. Cases 604, 621 (Appeals Board en banc) [wherein the Appeals Board required that apportionment under section 4663 be established

by substantial medical evidence].) "[T]he 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*) (1965) 234 Cal. App. 2d 831, 839 ["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.

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.

For the foregoing reasons,

IT IS ORDERED as the Decision After Reconsideration of the Workers' Compensation Appeals Board that the Findings of Fact, Award, Order, and Opinion on Decision issued on May 14, 2021is **RESCINDED**, with the following **SUBSTITUTED** in its place:

FINDINGS OF FACT

1. Applicant, Luis Carrillo, while working as a milker, occupational group number 491, at Oakview Dairy on May 30, 2018, sustained injury arising out of and occurring in the course of employment to his lumbar spine.

2. At all times relevant herein Oakview Dairy was insured for workers' compensation coverage by California Livestock Producers, Inc., a self-insured group, administered by Intercare Insurance Services.

3. Applicant received Temporary Disability, at the weekly rate of $323.01, for the period June 4, 2018 through August 27, 2018;

4. Applicant reached maximum medical improvement on May 21, 2019.

5. Applicant is entitled to temporary disability for the period of June 1, 2018 through May 21, 2019, at the rate of $455.75 per week, less credit for temporary disability paid on account thereof, less credit for wages earned during this period, and less duplicative periods paid by Employment Development Department (EDD), and less a reasonable attorney's fee, all of which are deferred to the parties to adjust with jurisdiction reserved at the trial level in the event of a dispute.

6. Applicant's permanent disability, before apportionment, rates as follows: 15.03.01.00 - 8 - [1.4]11 - 491H - 14 = 14%

7. Applicant received a prior award of permanent disability to the lumbar spine of 12% permanent disability, which overlaps applicant's present award of permanent disability.

8. After apportionment under section 4664, applicant's permanent disability is 2%.

9. Applicant's attorney has performed services reasonably valued at 15% of the permanent disability benefits obtained.

10. Applicant is in need of future medical care to cure or relieve from the effects of the industrial injury.

AWARD

AWARD IS MADE in favor of LUIS CARRILLO, against OAKVIEW DAIRY, CALIFORNIA LIVESTOCK PRODUCERS, INC. as follows:

a) Future medical care to cure or relieve from the effects of the industrial injury.

b) Temporary disability for the period of June 1, 2018 through May 21, 2019, at the rate of $455.75 per week, less credit for temporary disability paid on account thereof, less credit for wages earned during this period, and less duplicative periods paid by Employment Development Department (EDD), and less a reasonable attorney's fee, all of which is deferred to the parties to adjust with jurisdiction reserved in the event of a dispute.

c) Permanent partial disability of 2%, after apportionment, which equates to $1,740.00 of benefits payable at the rate of $290.00 per week for 6 weeks beginning on May 22, 2019, and less attorney's fees of 15% ($261.00) payable to Grossman Law Offices.

IT IS FURTHER ORDERED that this matter is **RETURNED** to the trial level.

WORKERS' COMPENSATION APPEALS BOARD

/s/ JOSÉ H. RAZO, COMMISSIONER

I CONCUR,

/s/ ANNE SCHMITZ, DEPUTY COMMISSIONER

I CONCUR, (SEE SEPARATE CONCURRING OPINION)

/s/ JOSEPH V. CAPURRO, COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

January 20, 2026

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

LUIS CARRILLO
RHO LAW GROUP
GROSSMAN LAW
HANNA, BROPHY, MACLEAN, MCALEER & JENSEN

EDL/mt

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

CONCURRING OPINION OF COMMISIONER JOSEPH V. CAPURRO

I concur with the judgment; however, I write separately to address the application of *Pasquotto v. Hayward Lumber* (2006) 71 Cal. Comp. Cases 223 [Appeals Board en banc opinion]. The majority suggests that a prior award may exist where a Compromise and Release includes applicant's level of permanent disability written into the settlement. I respectfully disagree and interpret both section 4664(b) and *Pasquotto* as requiring a prior **award** of disability. I interpret an award of disability as including applicant's level of disability on the award itself, which in cases of Compromise and Release, requires the reviewing judge to make a finding as to applicant's level of permanent disability on the Order Approving Compromise and Release (OACR). Here the prior OACR contained no finding as to applicant's level of disability, and thus I would not have found that an award of disability existed based solely upon the OACR.

However, in this case, applicant sustained injury subsequent to the OACR and that injury resolved through Stipulations and Award, which included applicant's level of permanent disability. Thus, the finding of apportionment pursuant to section 4664(b) was properly based upon a prior award.

For these reasons, I concur with the judgment.

WORKERS' COMPENSATION APPEALS BOARD

/s/ JOSEPH V. CAPURRO, COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

January 20, 2026

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

LUIS CARRILLO
RHO LAW GROUP
GROSSMAN LAW
HANNA, BROPHY, MACLEAN, MCALEER & JENSEN

EDL/mt

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