WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

RANDALL MINVIELLE, *Applicant,* vs. **COUNTY OF CONTRA COSTA / CONTRA COSTA FIRE, legally uninsured,** *Defendant(s).*	**Case No. ADJ277378 (OAK 0321116)** **OPINION AND ORDER DENYING RECONSIDERATION**

Defendant seeks reconsideration of the October 23, 2009 Findings and Award of the workers' compensation administrative law judge (WCJ) who found in this case (OAK 0321116) that applicant, while employed by defendant as a firefighter, sustained industrial injury to his back on November 22, 2004, causing 31% permanent disability without apportionment, and a need for future medical treatment.

It was earlier found on May 4, 1995 in a different case, WCK 022127, that applicant sustained an industrial injury to his back while working for the same employer as a firefighter on October 8, 1992, causing 27.5% permanent disability.

The WCJ addressed the issue of apportionment in this case in her findings as follows:

> "Although Labor Code section 4664 is a conclusive presumption of the existence of prior disability, and proof of medical rehabilitation does not rebut same, there remains a burden on Defendant to prove *overlap* and such has not been shown in the instant case, due to the dissimilarity on the one hand between the PDRS [Permanent Disability Rating Schedule] and the AMA guides [AMA Guides to the Evaluation of Permanent Impairment, Fifth Edition], and the ROM [Range of Motion] and DRE [Diagnosis-Related Estimate] methods within the AMA guides on the other. Further, no Labor Code section 4663 apportionment has been shown. I find that with no overlap in permanent disability and with due consideration of

> Labor Code section 4664 and 4663, that there is no apportionment as between the respective industrial injuries." (Emphasis in original, bracketed material added.)

Defendant contends that the WCJ should have subtracted the earlier award of 27.5% permanent disability in WCK 022127 from applicant's current permanent disability of 31% pursuant to Labor Code section 4664 because the earlier award was for an injury to the same body part.[1]

An answer was received and the WCJ provided a Report and Recommendation on Petition for Reconsideration (Report), which is incorporated by this reference.

We have carefully reviewed the record and considered the allegations of the petition for reconsideration, the answer and the WCJ's Report. For the reasons stated by the WCJ in her Report, and for the reasons below, we deny reconsideration and affirm the October 23, 2009 decision of the WCJ. The 27.5% permanent disability caused by the earlier 1992 injury was calculated using the PDRS and according to the parties AME Dr. Newton, the permanent disability caused by that earlier injury cannot at this point be re-calculated using the ROM method under AMA guides, which was the method used to calculate the 31% permanent disability caused by injury in this case. Because the permanent disability caused by the two injuries cannot be calculated using the same standard, defendant did not prove overlap and applicant is entitled to an unapportioned award.

This case was earlier before the Appeals Board on applicant's petition for reconsideration of a January 31, 2008 Findings and Award wherein the WCJ apportioned applicant's current 31% permanent disability pursuant to section 4664 by subtracting the entire earlier October 8, 1992 award of 27.5% permanent disability, and awarding applicant the rounded up difference of 4% permanent disability. In our June 25, 2008 Opinion and Decision After Reconsideration

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[1] Further statutory references are to the Labor Code. The WCJ concluded that there was no basis for apportionment under section 4663 because the parties' Agreed Medical Examiner (AME), Frederic H. Newton, M.D., opined that applicant rehabilitated from his earlier 1992 back injury. Defendant does not contend in its petition for reconsideration that the WCJ erred in not finding a basis for apportionment under section 4663, and that finding will not be further addressed. A petitioner, "shall be deemed to have finally waived all objections, irregularities, and illegalities concerning the matter upon which the reconsideration is sought other than those set forth in the petition for reconsideration." (Lab. Code, § 5904.)

(Decision), which is incorporated by this reference, we concluded that the record at that time did not establish overlap between the permanent disability caused by the two injuries because they were rated using different standards. The WCJ's January 31, 2008 decision was rescinded and the case returned to the trial level in order to allow Dr. Newton to determine if the two injuries could be rated using the same standard such that apportionment could be applied by subtraction pursuant to section 4664.[2]

We discussed the issue in our June 25, 2008 Decision as follows:

> "Turning to section 4664, we note that Dr. Newton questioned how apportionment would apply under section 4664 when the permanent disability caused by the prior injury is rated under a different standard than the permanent disability caused by the subsequent injury. The short answer is that section 4664 apportionment does *not* apply when the injuries are rated under different standards because overlap is not shown. In order to properly apportion pursuant to section 4664, the issue of overlap must be addressed by using the same standard to calculate the permanent disability caused by each of the injuries. This is an issue of proof based upon substantial medical evidence.
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> "In this case, it appears that the same standard was not used to rate the permanent disability caused by the 1992 injury and the permanent disability caused by the 2004 injury. Although the AME was able to provide a calculation of 10% permanent disability for the 1992 injury using the DRE category III from the AMA guides, it appears that the 31% permanent disability stipulated to be caused by the 2004 injury was calculated under the AMA guides using the ROM method. Because the permanent disability caused by each injury was determined under different standards there was no proof of overlap, and it was not proper to simply subtract the percentage of permanent disability awarded for the 1992 injury from the percentage of permanent disability stipulated to be caused by the 2004 injury." (Emphasis in original.)

Following return of the case to the trial level, Dr. Newton was provided with a copy of our

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[2] Section 4664(a) and (b) provide in full:

> "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.
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> "(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."

June 25, 2008 Decision and asked to again look at the issue of apportionment to determine if the permanent disability caused by applicant's 1992 injury could be rated under the AMA guides by using the ROM method. In his April 20, 2009 supplemental report, Dr. Newton responded as follows:

> "I am asked if I can bring the 1992 injury into harmony with the 11/04 injury for purposes of apportionment. The simple response is that I cannot. The 2004 injury was already resolved using the ROM method. Even with a retroactive-type approach, for the 1992 injury the ROM method cannot be used for the simple fact that it would not be applicable under the circumstances.
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> "On further reflection, it is my best medical judgment that the retroactive application of the DRE rating I provided per the request of the parties is really not applicable either. Ultimately of course this is a legal issue to determine that different standards were in place at the time 1992 injury was resolved...
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> "I would like to respectfully suggest that the '*same standard*' cannot be found via retrospective application of the *AMA Guides* to an injury for which examination and evaluation were undertaken utilizing a different system and standard. In general, the physical examination requirements for an *AMA Guides* rating may be different than the requirements for a PDRS-type rating. The rating itself under the *AMA Guides* is based on loss of earning capacity, whereas the rating under the PDRS is based on loss of ability to compete in the open labor market. Given all of these differences, I do not see how a doctor can simply look backward and assign an *AMA Guides* rating to a PDRS-type case." (Emphasis in original.)

As discussed in our June 25, 2008 Decision, the defendant has the burden of proving overlap before apportionment under section 4664 will apply. (*Kopping v. Workers' Comp. Appeals Bd.* (2006) 142 Cal.App.4th 1099 [71 Cal.Comp.Cases 1229] (*Kopping*).) Under *Kopping*, a defendant must prove both the existence of a prior award *and* overlap of the permanent disability caused by the two injuries in order to obtain section 4664 apportionment. Overlap is not proven merely by showing that the second injury was to the same body part because the issue of overlap requires a consideration of the factors of disability or work limitations resulting from the two injuries, not merely the body part injured. (*State Compensation Ins. Fund v. Industrial Acc. Com. (Hutchinson)* (1963) 59 Cal.2d 45 [28 Cal.Comp.Cases 20]; *Gardener v. Industrial Acc. Com.* (1938) 28 Cal.App.2d 682 [3 Cal.Comp.Cases 143]; *Sanchez v. County of Los Angeles* (2005) 70

Cal.Comp.Cases 1440 (Appeals Board en banc).) The need to consider the same factors of disability in order to determine overlap was not changed by the legislature's adoption of section 4664. (*Kopping, supra.*)

Defendant argues that it does not matter how permanent disability is determined because section 4664 references only "permanent disability" and not how it is calculated. This argument fails to consider that the percentage of permanent disability found to be caused by an injury may differ depending upon how it is calculated, and how that difference relates to the entire process of apportionment. The new regimen of apportionment adopted by the Legislature as part of Senate Bill 899 (Appeals Board 899) necessitates that permanent disability caused by a prior injury be calculated under the same standard as an applicant's current permanent disability.

As the Supreme Court recognized in *Brodie v. Workers' Comp. Appeals Bd.* (2007) 40 Cal.4th 1313 [72 Cal.Comp.Cases 565] (*Brodie*), "[T]he new approach to apportionment is to look at the current disability and parcel out its causative sources – nonindustrial, prior industrial, current industrial – and decide the amount directly caused by the current industrial source." This approach will not work if the percentages attributable to the various causative sources of an applicant's current permanent disability are determined under different standards because the percentage calculated using the PDRS will likely be different than the percentage calculated using the AMA guides, as the parties stipulated would occur in this case. Indeed, if the process argued by defendant was followed the percentage of permanent disability attributable to prior industrial injuries as determined using the PDRS could exceed an injured worker's current level of permanent disability that is calculated using the AMA guides. Such a result would be contrary to the new approach to apportionment described by the Supreme Court in *Brodie* because it would not allow the various causative sources of an applicant's current permanent disability to be correctly parceled out.

Defendant urges that section 4664 apportionment can be applied in this case by determining applicant's current permanent disability using the PDRS. However, this approach would also be contrary to the apportionment scheme implemented by SB 899, which requires use of the AMA

guides to rate permanent disability in most pending cases, including this case. (*Aldi v. Carr, McClellan, Ingersoll, Thompson & Horn* (2006) 71 Cal.Comp.Cases 783 (Appeals Board en banc); *Pendergrass v. Duggan Plumbing* (2007) 72 Cal.Comp.Cases 456 (Appeals Board en banc); *Baglione v. Hertz Car Sales* (2007) 72 Cal.Comp.Cases 444 (Appeals Board en banc).)

Defendant did not prove overlap because there is no evidence herein that the permanent disability caused by applicant's earlier 1992 injury can be calculated under the same standard used to calculate the permanent disability caused by the injury in this case. For that reason, the WCJ correctly determined that apportionment could not lawfully be applied pursuant to section 4664.

The October 23, 2009 Findings and Award is affirmed.

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IT IS ORDERED that defendant's petition for reconsideration of the October 23, 2009 Findings and Award is **DENIED**.

WORKERS' COMPENSATION APPEALS BOARD

JAMES C. CUNEO

I CONCUR,

ALFONSO J. MORESI

FRANK M. BRASS

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

JAN 04 2010

SERVICE BY MAIL ON SAID DATE ON THE PERSONS LISTED BELOW AT THEIR ADDRESSES AS SHOWN ON THE CURRENT OFFICIAL ADDRESS RECORD:

Randall Minvielle
Davis, Cowell & Bowen
Thomas, Lyding, Cartier& Gaus

JFS/jp