WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

STEPHEN HOM, ***Applicant,*** **vs.** **CITY AND COUNTY OF SAN FRANCISCO,** ***Defendant.***	**Case No. ADJ10658104** **(San Francisco District Office)** **OPINION AND DECISION AFTER RECONSIDERATION**

In order to further study the factual and legal issues in this case, on September 4, 2018, we granted defendant's Petition for Reconsideration of a workers' compensation administrative law judge's (WCJ) Findings of Fact and Award of June 20, 2018, wherein it was found that, while employed on November 16, 2013 as a police officer, applicant sustained industrial injury to his lumbar spine, causing permanent disability of 30% and the need for further medical treatment. In finding permanent disability of 30%, the WCJ found that "apportionment under LC §4664(b) is not applicable in this case."

Defendant contends that the WCJ erred in finding permanent disability of 30%, arguing that pursuant to Labor Code section 4664(b), the WCJ should have apportioned to a prior 20% award of permanent disability issued on June 2, 2013 in case ADJ8809427 with regard to a July 29, 2012 lumbar spine injury. We have received an answer, and the WCJ has filed a Report and Recommendation on Petition for Reconsideration (Report).

For the reasons stated by the WCJ in the Report, which we hereby adopt and incorporate, we will affirm the Findings of Fact and Award of June 20, 2018. "The burden of proving apportionment falls on the [defendant]...." (*Kopping v. Workers' Comp. Appeals Bd.* (2006) 142 Cal.App.4th 1099, 1115 [71 Cal.Comp.Cases 1229].) In order to find apportionment under Labor Code section 4664, the defendant must prove that there is overlap between the current disability and the disability that was subject to the

prior award. (*Id.*) As noted by the WCJ, because the prior disability was rated by a different AMA Guides method, defendant did not prove overlap. Although the agreed medical evaluator (AME) opined that the prior award could be substracted from applicant's overall permanent disability pursuant to Labor Code section 4664, "a medical opinion is not substantial evidence if it is based on ... incorrect legal theories...." (*Escobedo v. Marshalls* (2005) 70 Cal.Comp.Cases 604, 620 [Appeals Bd. en banc].) We note that the AME did not make a Labor Code section 4663 apportionment determination. Defendant did not attempt to clarify the record regarding Labor Code section 4664 apportionment, or ask the AME to make a Labor Code section 4663 apportionment determination. Accordingly, because defendant did not sustain its burden of proof on apportionment, we will affirm the WCJ's decision.

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For the foregoing reasons,

IT IS ORDERED as the Decision After Reconsideration of the Workers' Compensation Appeals Board that the Findings of Fact and Award of June 20, 2018 is hereby **AFFIRMED**.

WORKERS' COMPENSATION APPEALS BOARD

MARGUERITE SWEENEY

I CONCUR,

CHAIR
KATHERINE ZALEWSKI

JOSÉ H. RAZO

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

SEP 12 2018

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

LAW OFFICES OF VINCENT J. SCOTTO, III
OFFICE OF THE CITY ATTORNEY, CITY AND COUNTY OF SAN FRANCISCO
STEPHEN HOM

DW:ara

STATE OF CALIFORNIA
Division of Workers' Compensation
Workers' Compensation Appeals Board

CASE NUMBER: ADJ10658104

STEPHEN HOM **-vs.-** **CITY AND COUNTY OF SAN FRANCISCO;**

WORKERS' COMPENSATION ADMINISTRATIVE LAW JUDGE: **Colleen Casey**

DATE: 7/12/2018

REPORT AND RECOMMENDATION ON PETITION FOR RECONSIDERATION

I. INTRODUCTION

1. **IDENTITY OF PETITIONER:** Defendant, City & County of San Francisco
2. **DOI and BODY PART:** 11/16/2013 – Lumbar Spine
3. **Applicant's occupation:** Police Officer
4. **DATE F&A/Opinion on Decision:** 6/21/2018
5. **TIMELINESS**: Petition was timely filed.
6. **VERIFICATION**: A verification is attached.
7. **PETITIONER'S CONTENTION**: The WCJ erred by not finding overlap between applicant's two lumbar spine injuries, the first one dated 7/29/2012 in case number **ADJ8809427** and the second one dated 11/16/2013 in case number **ADJ10658104.** The WCJ erred by not subtracting the 20% Permanent Disability (PD) from the first award, from the 30% PD in the second per the apportionment rule set forth in LC §4664(b).

II. DISCUSSION – RESPONSE TO DEFENDANT'S CONTENTION

The primary issue for trial deals with LC §4664(b) apportionment. Defendant recognizes that in order to comply with LC §4664(b) apportionment, defense must prove that there was a prior award, and **also** that there was "overlap" between the initial and subsequent injury. Although, not specifically proven in this case, defendant argues in his Petition for Reconsideration at page 2:20 – 2:23, that "the WCJ and the WCAB [should] reasonably infer the legal concept of overlap [since] the prior same recurrent lumbar spine injury was intentionally incorporated into Applicant's current level of disability."

Defendant argues that since both the evaluating physician, Dr. Campbell in **ADJ8809427** and the evaluating physician, Dr. Pang in the instant case, **ADJ10658104** rated applicant's impairment using the 2005 Permanent Disability Rating Schedule (PDRS,) then the LC §4664(b) apportionment rules apply. However, as discussed more fully below, the law requires that in order to prove apportionment under LC §4664(b), the defendant must **specifically** prove overlap between the initial and the subsequent injury. (It is not a concept that can be **inferred** by the WCJ and the WCAB.) In addition, the **metrics** used to rate the applicant's impairment must be the same for both the initial and subsequent injury, or there can be no overlap. In cases, such as this one, when the **metrics** used to rate PD are not the same, defendant has not sustained their burden of proof for apportionment under LC §4664 (b).

The reasoning behind my decision was addressed in my "Opinion on Decision" which I have tweaked a bit and set forth below:

"OPINION ON DECISION

A. INTRODUCTION – FACTS

Stephen Hom, a San Francisco police officer, suffered an initial admitted industrial injury to his lumbar spine on 7/29/2012 in **prior** case number **ADJ8809427**. The parties have stipulated that this **prior** case settled with Stipulations and Request for a permanent disability (PD) Award in the amount of **20%** permanent disability (PD) on 7/2/2013, based on the findings of Primary Treating Physician (PTP) Dr. William Campbell, who used using the **DRE Metric** of the AMA Guides to determine the rating. (See Dr. Campbell's report dated 12/6/2012 (Exhibit "C").)

On 11/16/2013, subsequent to his initial injury to his lumbar spine, Officer Hom suffered a **second** admitted industrial injury to his lumber spine, when he was struck by an oncoming vehicle, while on traffic duty. Applicant filed a claim for this injury, which is the subject of the instant case **ADJ10658104.**

Dr. David Pang served as the AME in the instant case **ADJ10658104**. Dr. Pang utilized the **ROM method** of the AMA Guides to rate applicant's **current** whole person impairment (WPI) at 14%, which rates out to 30% PD. (See Dr. Pang's report dated 9/20/2017, Exhibit "A" at bottom of page 6 and top of page 7.) The stipulated rating for Dr. Pang's finding is:

15.03.00.0 – 14% [1.4] - 20 – 490I – 27 – **30%**

B. ISSUE

The primary issue for trial is whether defendant has sustained their burden of proof under LC §4664(b) to allow subtraction of applicant's prior **20%** PD award (calculated using **the DRE method**) regarding his 7/29/2012 injury to his lumbar spine in **ADJ8809427**, from his current PD level of **30%** (calculated using **the ROM method**) regarding his 11/16/2013 injury to his lumbar spine in **ADJ10658104**.

C. APPORTIONMENT OF PRIOR AWARD UNDER LC §4664(b)

Labor Code §4664(b) provides, "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."

In this case, the parties stipulated that the applicant, Officer Hom received a prior award of 20% PD for the initial injury of 7/29/2012 in case number **ADJ8809427**. Defendant has met this portion of its burden of proof on the issue. However, case law has interpreted defendant's burden of proof on apportionment under LC §4664, to be a two-prong analysis as discussed below.

D. DEFENDANT'S TWO-PRONG BURDEN OF PROOF UNDER LC §4664(b).

Case law has repeatedly held that defendant has a two-prong burden of proof regarding apportionment under LC §4664(b):

(1) Defendant must first prove that a prior award to the same body part exists,

AND

(2) Defendant must also prove that there is "overlap" of permanent disability (PD) between the initial and subsequent injury.

This legal standard was set forth in the 3rd DCA case of ***Kopping v. WCAB*** (2006) 71 Cal Comp Cases 1229. Ed Kopping was a California Highway Patrol (CHP) officer who had suffered two industrial injuries to his spine. The first injury occurred in 1996. The AME in that case found 29% PD, based on "factors of disability such as restrictions in spinal motion and subjective complaints of intermittent to frequent slight to moderate pain."

The second industrial injury to Officer Kopping's spine occurred in 2002. The AME in that case determined a 27% level of PD, based on a PD level "approximately halfway between a disability precluding repetitive motions of the back and a disability precluding heavy lifting."

The DCA provided an extensive analysis of the seemingly contradictory language of LC §4664(b) and came up with the only interpretation that made sense to them, which was that the defendant has a two-prong burden of proof under LC §4664(b) as follows:

> "First, the employer must prove the existence of the prior permanent disability award. Then, having established by this proof that the permanent disability on which that award was based still exists, the employer must prove the extent of the overlap, if any, between the prior disability and the current disability….
>
> "… The burden of proving overlap is part of the employer's overall burden of proving apportionment, which was not altered by section 4664(b), except to create the conclusive presumption that flows from proving the existence of a prior permanent disability award."

The DCA in the ***Kopping*** case concluded, "SCIF, the adjusting agency for Kopping's employer, has the burden of proving overlap between the current disability and the previous disability in order to establish its right to apportionment of Kopping's permanent disability." **Therefore, the DCA disallowed LC §4664 apportionment, because defendant failed to prove overlap between the prior award and the current industrial injury.**

E. *KOPPING'S* TWO PRONG ANALYSIS AFFIRMED IN SUBSEQUENT CASE LAW

The WCAB affirmed this two-prong analysis for defendant's burden of proof under LC §4664(b) in the panel decision of ***Laster v. City and County of San Francisco***, 2014 Cal. Wrk. Comp. PD LEXIS 201. Romero Laster was a San Francisco bus driver who suffered multiple industrial injuries to multiple body parts on multiple dates. Two of his prior injuries had settled with prior awards when the 1999 dates of injury were brought to trial. As in the instant case, the primary issue at trial was whether or not LC §4664(b) apportionment should be applied and thus whether the amount of PD on the prior awards should be subtracted from the current industrial PD level.

The WCAB noted that although the defendant sustained their burden of proof regarding the existence of prior stipulated awards for this applicant, defendant failed to prove overlap between the prior awards and the current industrial injury. The WCAB explained this analysis as follows:

> "Turning to defendant's contention that the WCJ did not properly address apportionment of applicant's earlier awards in accordance with section 4664, we note that before apportionment under section 4664(b) will apply, the **defendant must prove both the existence of a prior award and overlap of the permanent disability caused by the two injuries.** (***Kopping v. WCAB*** (2006) 71 Cal Comp Cases 1229 (3rd DCA); ***Minvielle v. County of Contra Costa*** (2010) 76 Cal Comp Cases 896 (writ denied). **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. (… ***Sanchez v. County of Los Angeles*** (2005) 70 Cal Comp Cases 1440 (WCAB en banc) This requirement was not changed by the legislature's adoption of section 4664. (***Kopping, supra.***)" (Emphasis added.)

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Therefore, it is defendant's burden to prove, not only that there was a prior award to the same body part, but **ALSO** that there is "overlap" between the prior industrial injury and the current industrial injury.

F. APPLYING THE TWO PRONG ANALYSIS OF LC §4664 IN THE INSTANT CASE

In the instant case, the defendant has met its burden of establishing that a prior award to applicant's lumbar spine exists. In fact, the parties stipulated at trial that an Award was approved on 7/2/2013, in the amount of 20% PD for applicant's industrial injury to his lumbar spine of 7/29/2012. This was applicant's initial award. Subsequently, applicant sustained an admitted industrial injury to his lumbar spine on 11/16/2013. Therefore, defendant has met the first prong of the mandated two-prong burden of proof under LC §4664.

However, under the case law cited above, establishing that the two industrial injuries at issue dealt with the same body part is not enough for defendant to sustain their burden of proof, to trigger application of LC §4664(b). Defendant must also prove "overlap" between the first and second industrial injury.

G. *Minvielle* Case - SAME METRIC MUST BE USED TO MEASURE PD IN BOTH CASES TO PROVE "OVERLAP"

Case law has interpreted the burden of proving "overlap" of disabilities to mean that the defendant must use the same **metric** to measure PD on both the initial and subsequent injuries.

In the writ denied case of ***Contra Costa County Fire Protection v. WCAB, (Minvielle),*** (2010), the WCAB struggled with a case where defendant had proved that applicant had received a prior PD award for the back, which was the same body part as the current industrial injury. A dispute arose, because the PD levels of both injuries were determined based on **metrics** set forth in **different** rating schedules.

Defense in the ***Minvielle*** case was not able to prove overlap of PD of the initial and subsequent injuries, since the metrics used to rate both injuries were different. The 27.5% PD level of the first back injury of 10/8/92 was determined using **metrics** from the 1997 PDRS, while the 31% PD level of the subsequent back injury of 11/22/2004 was determined using **metrics** from the 2005 PDRS.

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In the ***Minvielle*** case, Dr. Newton, had served as the AME on both industrial injuries. The WCJ asked Dr. Newton to convert the initial industrial injury to a PD level consistent with a **metric** from the AMA Guides, since the AMA Guides were the mandatory method to use to calculate PD on the subsequent industrial injury using the 2005 PDRS. Dr. Newton used the **DRE metric** of the AMA Guides to calculate a PD of **18%** for the **initial** back injury. Dr. Newton had previously used the **ROM metric** of the AMA Guides to calculate PD of **31%** on the **second** back injury.

The case went to trial, and the WCJ determined that defendant had not sustained their burden of proof regarding overlap, and LC §4664(b) apportionment did not apply, since the **metrics** (the **DRE metric** and the **ROM metric**) used for calculating PD were "dissimilar."

Defendant filed a Petition for Reconsideration and the WCAB sent the case back to the trial level to "consider overlap of disabilities."

The WCJ then asked the AME, Dr. Newton to calculate the PD of both the prior and current injury using the same **metric** or standard. Even though Dr. Newton made a good faith effort to re-calculate PD of the first injury using the **ROM method**, to be consistent with the ROM method used to calculate PD for the second injury, Dr. Newton ultimately concluded that "the PD caused by that earlier injury cannot be re-calculated using the **ROM method** under the AMA *Guides*."

Dr. Newton explained,

> "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."

Ultimately, the WCJ's finding of no overlap and no LC §4664(b) apportionment was affirmed by the WCAB because,

> "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 LC §4664."

H. *Robinson* Case - SAME METRIC MUST BE USED TO MEASURE PD IN BOTH CASES TO PROVE "OVERLAP"

The holding in the writ denied case of ***Robinson v. WCAB***, (2011) 76 Cal Comp Cases 847, was contrary to the holding in ***Minvielle.*** Tim Robinson was a correctional officer who sustained two injuries to his spine, one on 9/24/2004 and a second one on 10/29/2008.

The WCAB in ***Robinson*** explained why its holding was contrary to the holding ***Minvielle*** as follows:

> "Unlike in ***Minvielle***, in this ***[Robinson]*** case, the agreed medical evaluator was able to provide an AMA Guides rating using the same standard [**or metric, the DRE Method**] as the current injury. Accordingly, the defendant properly proved overlap."

I. METRICS USED IN EVALUATING PD FOR OFFICER STEPHEN HOM

As we have learned from the above cited case law, in order to sustain the burden of proof on the issue of "overlap" between an initial and subsequent injury, for purposes of implementing LC §4664(b), defendant must provide PD ratings for both injuries using the same **metric** or standard, as was done in the ***Robinson, supra*** case. Unfortunately, that was not done in this case.

In the initial lumbar spine injury case, **ADJ8809427**, the primary treating physician, Dr. Campbell used the Diagnosis Related Estimate (**DRE method)** from the AMA Guides to provide a WPI rating of 20%. (See Exhibit "C.") Dr. Campbell used Table 15-3 at page 384 of the AMA Guides and placed applicant in Category III of that **metric**, which provides a 10% - 13% WPI range. According to the AMA Guides instructions for use of Table 15-3, once the physician locates the correct Category, the physician must determine where in that Category's range of WPI the applicant's injury should be placed. This determination should be based on the impact of the industrial injury on applicant's activities of daily living (ADLs). Dr. Campbell did not provide an analysis of ADLs or any other analysis for selection of the WPI in the Category III range. He merely placed applicant at the bottom of the 10% - 14% range at 10%. (See page 4 of Exhibit "A" and Exhibit "C".) In case **ADJ8809427** the 10% WPI rates out to PD of 20%.

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The AME, Dr. Pang, in the instant lumbar spine case **ADJ10658104**, used the Range of Motion (**ROM method**), the **metrics** for which can be found on pages 405 to 411 of the AMA Guides. Using the **ROM method**, Dr. Pang determined that applicant's current WPI is 14% (See page 7 of Exhibit "A"). In case **ADJ10658104** the 14% WPI rates out to PD of 30%.

As illustrated by the cases discussed above, ***Minvielle, surpa*** and ***Robinson, supra,*** in order for the defendant to prove "overlap," the evaluating physician must somehow translate the rating **metrics** for both the initial and subsequent injuries so that the **metrics** used in both cases are the same. In other words, in the instant case, each injury must be rated using the **ROM method**, or each injury must be rated using the **DRE method,** the latter of which was done in ***Robinson,*** in order for the overlap burden of proof to be sustained.

In ***Minvielle, surpa,*** the WCAB explained how calculating PD for the initial 1992 injury under the **DRE Method** and calculating PD for the subsequent 2004 injury under the **ROM Method** results in calculation of PD under two different standards or **metrics**. Therefore the calculation is not eligible to support overlap, and the defendant did not meet its burden of proving overlap/apportionment under LC §4664(b) as follows:

> "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 added.)

Accordingly, in the case of Stephen Hom, his initial lumbar injury of 20% PD was calculated using the **DRE Method** of the AMA Guides and his subsequent lumbar injury of 30% PD was calculated using the **ROM Method** of the AMA Guides. Therefore, since calculation of PD was under two different methods or **metrics**, there cannot be a finding of "overlap" between the two levels of PD. Applicant is entitled to an award of 30% PD without apportionment.

J. DEFENDANT'S ARGUMENT

Defendant argues that the overlap burden has been met since Dr. Pang, the AME in this case, has stated that "Labor Code §4664 can be applied" and that the initial PD of 20% can be subtracted from the current PD of 30%. (See middle of page 7 of Exhibit "A")

Unfortunately, Dr. Pang, has not accurately understood the correct legal theory to apply in this case. As stated above, defense has to prove not only that there is a prior PD award, but also there is overlap using the same **metrics** or standards to measure the PD level of both the initial and subsequent injuries. If Dr. Pang had retroactively calculated the PD in the 2012 case based on the **ROM Method,** then it might be possible to consider subtracting that amount from the amount of PD he allocated to the lumbar injury of 11/16/2013, wherein he also used the **ROM Method.** But this was not done, and pursuant to case law cited above, the overlap burden of proof cannot be sustained."

III. RECOMMENDATION

IT IS RESPECTFULLY RECOMMENDED that the petition for reconsideration filed by defendant herein be **DENIED** on the merits.

DATE: 7/12/2018

Colleen Casey
WORKERS' COMPENSATION
ADMINISTRATIVE LAW JUDGE

FILED AND SERVED ON ALL PARTIES
AS LISTED ON THE OFFICE ADDRESS RECORD
ON: July 12, 2018
BY: Amy Tang

SERVICE ON:
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