WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

VIRGINIA SANCHEZ, ***Applicant,*** **vs.** **COUNTY OF LOS ANGELES, Permissibly Self-Insured; and TRISTAR RISK MANAGEMENT (Adjusting Agent),** ***Defendant(s).***	**Case No. MON 0307506** **OPINION AND DECISION AFTER RECONSIDERATION (EN BANC)**

We granted reconsideration to further study the issue of apportionment under Labor Code section 4664,[1] as enacted by Senate Bill 899 (SB 899),[2] in situations where an employee suffers an industrial injury causing permanent disability, and where there has been a prior industrial injury resulting in an award of permanent disability relating to the same region of the body. Because of the important legal issue presented, and in order to secure uniformity of decision in the future, the Chairman of the Appeals Board, upon a majority vote of its members, assigned this case to the Appeals Board as a whole for an en banc decision. (Lab. Code, §115.)[3]

Based on our review of the relevant statutes and case law, we hold:

(1) Where an employee suffers an industrial injury causing permanent disability, and where there is a prior award of permanent disability

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[1] Unless otherwise indicated, all further statutory references are to the Labor Code.

[2] Stats. 2004, ch. 34, §35.

[3] The Appeals Board's en banc decisions are binding precedent on all Appeals Board panels and workers' compensation administrative law judges. (Cal. Code Regs., tit. 8, §10341; *City of Long Beach v. Workers' Comp. Appeals Bd. (Garcia)* (2005) 126 Cal.App.4th 298, 313, fn. 5 [70 Cal.Comp.Cases 109]; *Gee v. Workers' Comp. Appeals Bd.* (2002) 96 Cal.App.4th 1418, 1425, fn. 6 [67 Cal.Comp.Cases 236, 239, fn. 6]; see also Govt. Code, §11425.60(b).)

relating to the same region of the body, section 4664 requires the apportionment of overlapping permanent disabilities;

(2) The defendant has the burden of proving the existence of any prior permanent disability award(s) relating to the same region of the body;

(3) 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;

(4) When the defendant has established the existence of any prior permanent disability award(s) relating to the same region of the body, the percentage of permanent disability from the prior award(s) will be subtracted from the current overall percentage of permanent disability, unless the applicant *disproves* overlap, i.e., the applicant demonstrates that the prior permanent disability and the current permanent disability affect different abilities to compete and earn, either in whole or in part;

(5) The issue of whether the prior permanent disability for the same region of the body overlaps the current disability is determined using substantially the same principles that were applied prior to the enactment of section 4664; and

(6) The sum of the permanent disability awards for any one body region cannot exceed 100%, even where the permanent disability caused by the applicant's new injury does not overlap the permanent disability underlying the prior award(s), unless the employee's new industrial injury causes disability that is conclusively presumed to be total under section 4662.

I. BACKGROUND

Virginia Sanchez (applicant) sustained an industrial injury to her left foot on December 18, 2002, while employed as a deputy sheriff by the County of Los Angeles (defendant). At trial, the parties stipulated that her left foot injury resulted in permanent disability of 7%. This stipulation apparently was based on the February 18, 2004 report of Jon Greenfield, M.D., the agreed medical evaluator (AME) in orthopedics. Dr. Greenfield stated that applicant's left foot injury caused subjective disability of intermittent slight left foot pain, becoming moderate with cold weather and rain. Dr. Greenfield imposed no work restrictions based on the left foot injury.[4]

Previously, applicant had received a stipulated 22% permanent disability award for an October 10, 1997 bilateral knee injury, which she also sustained while employed as a deputy sheriff by defendant. When the parties stipulated to this award, they further stipulated that the 22% permanent disability rating was "based upon the applicant's loss of 35% pre-injury capacity for kneeling, squatting, climbing, heavy lifting, pushing and pulling as determined by Alexander Angerman, M.D., in his AME report dated 11/7/01."[5] They also stipulated to the following rating formula: "14.5-15%-490I-21-22."

On October 7, 2004, the workers' compensation administrative law judge (WCJ) issued a decision determining that applicant's December 18, 2002 left foot injury resulted in 7% permanent disability, without apportionment.

Thereafter, defendant filed a timely petition for reconsideration. Defendant contended, in substance, that apportionment is required and that no new permanent disability should have been awarded because: (1) the factors of disability resulting from applicant's left foot injury are completely overlapped by the factors of disability from her prior bilateral knee injury, for which

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[4] Dr. Greenfield also stated that applicant has ¼-inch atrophy of the left calf as compared to the right, which he apparently attributed to her December 18, 2002 left foot injury. A ¼-inch left calf atrophy, however, is not ratable. (See Schedule for Rating Permanent Disabilities (April 1997), Disability No. 14.631, note 49, and Table 8B, p. 7-10.)

[5] Dr. Angerman's November 7, 2001 report was not produced in these proceedings, and the WCAB's file for applicant's October 10, 1997 bilateral knee injury has been destroyed. (See Cal. Code Regs., tit. 8, §10758.)

she received a 22% permanent disability award; and (2) section 4664(b), as enacted by SB 899, provides that "[i]f 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."

Applicant filed an answer to the petition for reconsideration. The WCJ issued a Report and Recommendation on Petition for Reconsideration (Report), recommending that the petition be denied because there is no overlap between applicant's current left foot disability, which is based solely on subjective complaints, and her prior bilateral knee disability, which was based solely on work restrictions.[6]

II. DISCUSSION

A. The Determination Of Overlapping Disabilities Prior To SB 899

In order to evaluate whether new section 4664, as enacted by SB 899, requires the apportionment of overlapping disability when an employee suffers an industrial injury causing permanent disability to one region of the body, but there has been a prior industrial injury resulting in an award of permanent disability for the same region of the body, we will first trace some of the pre-SB 899 history of apportionment based on pre-existing permanent disability.

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, ///

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[6] The WCJ's Report also recommended that defendant's petition be dismissed for lack of verification. (See Lab. Code, §5902*; Lucena v. Diablo Auto Body* (2000) 65 Cal.Comp.Cases 1425 (Significant Panel Decision).) Defendant's petition, however, is verified. In any event, verification is not required when the defendant is the state, a county, a city or other specified public entity. (Code Civ. Proc., §446; *Wings West Airlines v. Workers' Comp. Appeals Bd.* (*Nebelon*) (1986) 187 Cal.App.3d 1047, 1055 [51 Cal.Comp.Cases 609].)

§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.
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> "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.)[7]

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. (*Mercier v. Workers' Comp. Appeals Bd*. (1976) 16

[7] The 1945 amendment merely added the phrase "from the employer" in the first sentence.

Cal.3d 711, 714 [41 Cal.Comp.Cases 205]; *Hegglin v. Workmen's Comp. Appeals Bd.* (1971) 4 Cal.3d 162, 173 [36 Cal.Comp.Cases 93]; *State Comp. Ins. Fund v. Industrial Acc. Com.* (*Hutchinson*) (1963) 59 Cal.2d 45, 49 [28 Cal.Comp.Cases 20].)[8] 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. (*E.g., State Comp. Ins. Fund v. Industrial Acc. Com.* (*Hutchinson*), *supra*, 59 Cal.2d at p. 48; *Smith v. Industrial Acc. Com*. (1955) 44 Cal.2d 364, 365 [20 Cal.Comp.Cases 82]; *Gardner v. Industrial Acc. Com.* (1938) 28 Cal.App.2d 682, 684 [3 Cal.Comp.Cases 143].)

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." (*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 pp. 47, 49, 52, 53-54.) 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

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[8] See also, *Wolski v. Industrial Acc. Com*. (1945) 70 Cal.App.2d 427, 432 [10 Cal.Comp.Cases 181] (the purpose of section 4750 was "to remove any reasonable ground for an employer to refuse to hire one-armed, one-legged, or one-eyed men. In short, it [was] intended for the long-range benefit of handicapped workmen.")

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 [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 17-½/50ths 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).)[9]

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. (*State Comp. Ins. Fund. v. Industrial Acc. Com*. (*Hutchinson*), *supra*, 59 Cal.2d at pp. 51-52.) 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. (*Mercier v. Workers' Comp. Appeals Bd*., *supra*, 16 Cal.3d at p. 716; *State Comp. Ins. Fund v. Workers'*

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[9] See also, e.g. *Sidders v. Workers' Comp. Appeals Bd.* (1988) 205 Cal.App.3d 613 [53 Cal.Comp.Cases 445] (back and back); *Johns-Manville v. Workers' Comp. Appeals Bd.* (*Carey*) (1978) 87 Cal.App.3d 740 [43 Cal.Comp.Cases 1372] (back and pulmonary); *Bookout v. Workers' Comp. Appeals Bd.* (1976) 62 Cal.App.3d 214 [41 Cal.Comp.Cases 595] (back and heart); *Argonaut Ins. Co. v. Workmen's Comp. Appeals Bd.* (*Lopez*) (1971) 15 Cal.App.3d 436 [36 Cal.Comp.Cases 89] (back and back – total overlap); *Truck Ins. Exchange v. Industrial Acc. Com.* (*Tarantino*) (1965) 235 Cal.App.2d 207 [30 Cal.Comp.Cases 194] (neck/back/hand and heart).

Comp. Appeals Bd. (*Gaba*) (1977) 72 Cal.App.3d 13 [42 Cal.Comp.Cases 598]; *Bookout v. Workers' Comp. Appeals Bd.*, *supra*, 62 Cal.App.3d at p. 222.)[10]

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. (*Mercier v. Workers' Comp. Appeals Bd*., *supra*, 16 Cal.3d at p. 716; *Sidders v. Workers' Comp. Appeals Bd*., *supra*, 205 Cal.App.3d at p. 629; *Bookout v. Workers' Comp. Appeals Bd.*, *supra*, 62 Cal.App.3d at p. 223.)

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 [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

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[10] See also, *Abril v. Workers' Comp. Appeals Bd*. (1976) 55 Cal.App.3d 480, 486 [40 Cal.Comp.Cases 804]: "[I]t is the nature of the disability and not the anatomical part of the body to which the injury was inflicted which must be considered in computing compensation." (quoting from *Luchini v. Workmen's Comp. Appeals Bd*. (1970) 7 Cal.App.3d 141, 144 [35 Cal.Comp.Cases 205].)

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 [49 Cal.Comp.Cases 126].)

B. The Determination Of Overlapping Disabilities After SB 899

1. Where An Employee Suffers An Industrial Injury Causing Permanent Disability, And Where There Is A Prior Award Of Permanent Disability Relating To The Same Region Of The Body, Section 4664 Requires The Apportionment Of Overlapping Permanent Disabilities

SB 899 repealed former section 4750 (Stats. 2004, ch. 34, §37) and, as relevant here, added current section 4664. (Stats. 2004, ch. 34, §35.) New section 4664 provides:

> "(a) The employer shall only be liable for the percentage of permanent disability directly caused by the injury arising out of and occurring in the course of employment.
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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.
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> "(c)(1) The accumulation of all permanent disability awards issued with respect to any one region of the body in favor of one individual employee shall not exceed 100 percent over the employee's lifetime unless the employee's injury or illness is conclusively presumed to be total in character pursuant to Section 4662. As used in this section, the regions of the body are the following:
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> (A) Hearing.
> (B) Vision.
> (C) Mental and behavioral disorders.
> (D) The spine.
> (E) The upper extremities, including the shoulders.
> (F) The lower extremities, including the hip joints.
> (G) The head, face, cardiovascular system, respiratory system, and all other systems or regions of the body not listed in subparagraphs (A) to (F), inclusive.
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> "(2) Nothing in this section shall be construed to permit the permanent disability rating for each individual injury sustained by

> an employee arising from the same industrial accident, when added together, from exceeding 100 percent."

For the reasons that follow, we hold that new section 4664 still requires the apportionment of overlapping permanent disabilities where an employee suffers an industrial injury causing permanent disability, and where there is a prior award of permanent disability relating to the same region of the body.

There is no doubt that, in repealing former section 4750 and in enacting new section 4664, the Legislature intended to change the law relating to apportionment of permanent disability. (See *People v. Mendoza* (2000) 23 Cal.4th 896, 916 (presumption that the Legislature intends to change the meaning of a law when it alters the statutory language, as for example when it deletes express provisions of the prior version); *In re Lance W*. (1985) 37 Cal.3d 873, 887 (general rule is that a new enactment reflects a legislative purpose to change existing law); *Mosk v. Superior Court* (1979) 25 Cal.3d 474, 493 (a substantial change in the language of a statute by an amendment indicates an intention to change its meaning).)

Nevertheless, when the Legislature enacts a statute, it is presumed the Legislature has in mind existing laws and judicial decisions. (*Viking Pools, Inc. v. Maloney* (1989) 48 Cal.3d 602, 609; *Bailey v. Superior Court* (1977) 19 Cal.3d 970, 977, fn. 10; *Estate of McDill* (1975) 14 Cal.3d 831, 837, 839.) It also is presumed the Legislature did not intend to overthrow long-established principles of law unless such an intention is clearly expressed or necessarily implied. (*People v. Superior Court* (*Zamudio*) (2000) 23 Cal.4th 183, 199; *Torres v. Automobile Club of So. Cal.* (1997) 15 Cal.4th 771, 779; *Fuentes v. Workers' Comp. Appeals Bd.* (1976) 16 Cal.3d 1, 7 [41 Cal.Comp.Cases 42]; *Theodor v. Superior Court* (1972) 8 Cal.3d 77, 92.)

Here, there is nothing in new section 4664 that evinces a clear expression of legislative intent to abandon the longstanding policy of encouraging employers to hire workers with disabilities by assuring that such employers are not made liable for pre-existing disabilities if those workers subsequently sustain an industrial injury. To the contrary, the express language of new section 4664 suggests the Legislature intended this policy to have continuing force and effect.

Specifically, section 4664(a) states, "[t]he 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." (Emphasis added; see, also, Lab. Code, §4663 (the employer is liable only for "the permanent disability … caused by the direct result of [the] injury" and it is not liable for "the permanent disability … caused by other factors both before and subsequent to the industrial injury, including prior industrial injuries").)

Thus, we conclude that, as was true before the repeal of former section 4750 and continuing with the enactment of new section 4664, an employee is not entitled to be compensated for permanent disability resulting from a new industrial injury to the extent that this permanent disability is overlapped by prior permanent disability involving the same region of the body. (See *State Comp. Ins. Fund v. Industrial Acc. Com.* (*Hutchinson*), *supra*, 59 Cal.2d 45 (prior neck disability overlapping subsequent low back disability); *Edson v. Industrial Acc. Com.*, *supra*, 206 Cal. (prior eye disability overlapping subsequent eye disability); *Sidders v. Workers' Comp. Appeals Bd.*, *supra*, 205 Cal.App.3d 613 (prior back disability overlapping subsequent back disability); *Argonaut Ins. Co. v. Workmen's Comp. Appeals Bd.* (*Lopez*), *supra*, 15 Cal.App.3d 436 (prior back disability overlapping subsequent back disability); *Gardner v. Industrial Acc. Com.*, *supra*, 28 Cal.App.2d 582 (prior left ankle disability overlapping subsequent left leg disability).) In this way, the employer in a subsequent injury case is held liable only for the permanent disability directly caused by that injury. On the other hand, the employee is entitled to be compensated for any *new* permanent disability directly caused by the new industrial injury.

Our conclusion that the principle of overlap remains in full force is also supported by section 4664(c)(1). It provides that the accumulation of all permanent disability awards issued with respect to any one region of the body cannot exceed 100% over the employee's lifetime, except where the employee's disability is conclusively presumed to be total under section 4662. Section 4664(c)(1) implicitly contemplates that, in general, the WCAB *must* consider whether the disability caused by a new injury overlaps the disability that was the subject of a prior award. This is because if overlap – or, more accurately, the absence of overlap – were not considered, then the

percentage of permanent disability caused by all prior industrial injuries relating to a particular body region would simply be subtracted from the overall percentage of permanent disability present after the new industrial injury to that region. The result would be that an injured employee with a prior award or awards of permanent disability relating to the same body region could *never* accumulate to a total of 100% disability for that region – absent a new industrial injury that either is conclusively presumed to be totally disabling or is totally disabling based on the evidence. Such a result would largely contravene the language of section 4664(c)(1) expressly allowing successive permanent disability awards for one region to accumulate to 100%. On the other hand, if an employee is entitled to receive compensation for any *new* non-overlapping permanent disability caused by the new industrial injury, then it is possible that the sum of the employee's successive permanent disability can reach a total of 100%, but the employee will not be compensated twice for the *same* disability.

We further note that section 4664(b) states only that any prior permanent disability shall be conclusively presumed to "exist[]" at the time of the subsequent injury. It does not require that the prior permanent disability be subtracted, but also it does not preclude subtraction. Thus, the language of section 4664(b) also supports our conclusion that a determination must be made regarding the *consequences* of the previously "exist[ing]" permanent disability – i.e., if the pre-existing permanent disability and the current permanent disability overlap, there will be subtraction to the extent of that overlap, but, otherwise, there will be no subtraction.

Having concluded that the principles of overlap remain alive under new section 4664, we now address how these overlap principles are to be applied to apportionment determinations under new section 4664 in situations where an employee suffers an industrial injury causing permanent disability relating to one region of the body, and where there has been a prior industrial injury resulting in an award of permanent disability relating to the same region of the body.

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2. The Defendant Has The Burden Of Proving The Existence Of Any Prior Permanent Disability Award(s) Relating To The Same Region Of The Body.

Section 4664(b) applies only "[i]f the applicant has received a prior award of permanent disability." Thus, the provisions of section 4664(b) are not triggered unless a prior award of permanent disability exists.

We conclude it is defendant's burden to prove that applicant had a prior permanent disability award relating to the same region of the body. Placing this burden on defendant is consistent with the statutory provisions that the party holding the affirmative of an issue has the burden of proof by a preponderance of the evidence. (Lab. Code, §§3202.5, 5705.) Placing this burden on defendant is also consistent with the longstanding principle that, because it is the defendant that benefits from a finding of apportionment, it bears the burden of demonstrating that apportionment is appropriate. (*Pullman Kellogg v. Workers' Comp. Appeals Bd*. (*Normand*) (1980) 26 Cal.3d 450, 456 [45 Cal.Comp.Cases 170]; e.g., also, *Fresno Unified School Dist. v. Workers' Comp. Appeals Bd*. (*Humphrey*) (2000) 84 Cal.App.4th 1295, 1304 [65 Cal.Comp.Cases 1232]; *Ashley v. Workers' Comp. Appeals Bd*. (1995) 37 Cal.App.4th 320, 326 [60 Cal.Comp.Cases 683]; *Calhoun v. Workers' Comp. Appeals Bd*. (1981) 127 Cal.App.3d 1, 8 [46 Cal.Comp.Cases 1333].) *Robinson v. Workers' Comp. Appeals Bd*. (1981) 114 Cal.App.3d 593, 603 [46 Cal.Comp.Cases 78].)[11] Under section 4664, it is still the defendant that benefits from a finding of apportionment. Although – as discussed below – section 4664 has effected some shift in the parties' respective burdens on apportionment in the context of a prior permanent disability award, we discern no legislative intent to completely overthrow this long-established principle. (See *People v. Superior Court* (*Zamudio*), *supra*, 23 Cal.4th at p. 199; *Torres v. Automobile Club of So. Cal.*, *supra*, 15

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[11] The "presumption affecting the burden of proof" language of 4664(b) has nothing to do with triggering defendant's burden to prove the existence of a prior permanent disability award, because: (1) the "presumption affecting the burden of proof" language relates back to the conclusive presumption; yet, the conclusive presumption is not even triggered until the existence of a prior permanent disability award has been established (i.e., "[*i*]*f* the applicant has received a prior award of permanent disability, it shall be conclusively presumed … "); and (2) a presumption affecting the burden of proof requires the party against whom the presumption operates to establish the non-existence of the presumed fact and, in the context of section 4664(b), it would make little sense to require a defendant to *disprove* the existence of a prior permanent disability award.

Cal.4th at p. 779; *Fuentes v. Workers' Comp. Appeals Bd.*, *supra*, 16 Cal.3d at p. 7 [41 Cal.Comp.Cases 42]; *Theodor v. Superior Court*, *supra*, 8 Cal.3d at p. 92.) Thus, it is defendant's burden to show that applicant *had* a prior permanent disability award, rather than applicant's burden to show he or she did *not* have one.

The preferred procedure for establishing the existence of a prior permanent disability award is for the defendant to offer in evidence a copy of the award, or to request that the WCAB take judicial notice of a prior award. If, for some reason, a copy of the prior permanent disability award cannot be produced,[12] then the existence of any prior permanent disability award may be shown by secondary evidence – *if the secondary evidence is sufficiently reliable and sufficiently establishes the substance of the lost or destroyed award*. (See Evid. Code, §1521; *Dart Industries, Inc. v. Commercial Union Ins. Co*. (2002) 28 Cal.4th 1059; *Prato-Morrison v. Doe* (2002) 103 Cal.App.4th 222.)[13] This opinion does not address what type(s) of secondary evidence might be used to establish the existence of a prior permanent disability award, but we will observe that the WCAB may draw reasonable inferences from any secondary evidence presented, if it is sufficiently reliable. (See *Leonard Van Stelle, Inc. v. Industrial Acc. Com*. (*Hartman*) (1963) 59 Cal.2d 836, 839 [28 Cal.Comp.Cases 140]; *Phoenix Indemnity Co. v. Industrial Acc. Com*. (*Hamilton*) (1948) 31 Cal.2d 856, 859 [13 Cal.Comp.Cases 118]; *Coborn v. Industrial Acc. Com*. (1948) 31 Cal.2d 713, 717 [13 Cal.Comp.Cases 89]; *Cal. Shipbuilding Corp. v. Industrial Acc. Com*. (*Baker*) (1946) 27 Cal.2d 536, 541-542 [11 Cal.Comp.Cases 14].)

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[12] For example, the WCAB's record of the permanent disability award may be destroyed (Cal. Code Regs., tit. 8, §§10755, 10758), and no other copy of it can be located.

[13] We do not mean to suggest that all of the Evidence Code provisions regarding secondary evidence are applicable in workers' compensation proceedings, because the WCAB is not bound by the Evidence Code in this context. (Lab. Code, §§5708, 5709.) Nevertheless, the Evidence Code provisions do provide some guidance with respect to secondary evidence issues.

3. 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

Once a defendant establishes the existence of a prior award of permanent disability relating to the same region of the body, section 4664(b) provides, "it shall be conclusively presumed that the prior permanent disability exists at the time of any subsequent industrial injury."

Because section 4664(b) mandates "it shall be *conclusively* presumed that the prior permanent disability exists" (emphasis added), we conclude that, in the context of apportionment under section 4664(b), the Legislature intended to abrogate the line of cases that had allowed an injured employee to show he or she had medically rehabilitated from the effects of an earlier injury at the time of a subsequent injury. (See *Mercier v. Workers' Comp. Appeals Bd*., *supra*, 16 Cal.3d at p. 716, fn. 2; *Robinson v. Workers' Comp. Appeals Bd.* (1981), *supra*, 114 Cal.App.3d 593, at pp. 602-603 [46 Cal.Comp.Cases 78]; *Bookout v. Workmen's Comp. Appeals Bd.*, *supra*, 62 Cal.App.3d at pp. 223-224; *Amico v. Workmen's Comp. Appeals Bd.* (1974) 43 Cal.App.3d 592, 607-608 [39 Cal.Comp.Cases 845].)[14] Accordingly, an applicant cannot offer any medical or testimonial evidence to contradict the conclusively presumed "prior permanent disability," i.e., he or she cannot attempt to demonstrate medical rehabilitation.[15]

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[14] At this time, we need not and will not address the issue of whether an injured employee may still show that he or she has medically rehabilitated from a prior industrial or non-industrial condition to avoid apportionment under new section 4663.

[15] This conclusion is also consistent with Section 49 of SB 899, which states: "This act is an urgency statute necessary for the immediate preservation of the public peace, health, or safety within the meaning of Article IV of the Constitution and shall go into immediate effect. The facts constituting the necessity are: In order to provide relief to the state from the effects of the current workers' compensation crisis at the earliest possible time, it is necessary for this act to take effect immediately."

4. When The Defendant Has Established The Existence Of Any Prior Permanent Disability Award(s) Relating To The Same Region Of The Body, The Percentage Of Permanent Disability From The Prior Award(s) Will Be Subtracted From The Current Overall Percentage Of Permanent Disability, Unless The Applicant *Disproves* Overlap, i.e., The Applicant Demonstrates That The Prior Permanent Disability And The Current Permanent Disability Affect Different Abilities To Compete And Earn, Either In Whole Or In Part

Section 4664(b) provides, in relevant part:

> "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."

Thus, section 4664(b)'s first sentence creates a "conclusive" presumption that the prior permanent disability exists at the time of any subsequent industrial injury. The second sentence, however, states that this "conclusive" presumption is a "presumption affecting the burden of proof" – which is a rebuttable presumption. Hence, an inherent tension in section 4664(b) exists.

The Evidence Code establishes that there are only two types of presumptions: conclusive presumptions and rebuttable presumptions. (Evid. Code, §601 ("A presumption is either conclusive or rebuttable").)

The Evidence Code also establishes that a presumption affecting the burden of proof is a rebuttable presumption. (Evid. Code, §601 ("Every rebuttable presumption is either (a) a presumption affecting the burden of producing evidence or (b) a presumption affecting the burden of proof.").)

Where the law establishes a conclusive presumption, no evidence can be offered to dispute it. (*People v. McCall* (2004) 32 Cal.4th 175, 185 ("conclusive presumptions … are irrebuttable by definition"); 1 Witkin, Cal. Evidence (4th ed. 2000) Burden of Proof and Presumptions, §160, p. 301 ("a conclusive or indisputable presumption is entirely different from the ordinary rebuttable presumption: It need not have a logical basis, and no evidence may be received to contradict it."); 2 Jefferson, Cal. Evidence Benchbook (Cont. Ed. Bar, 3d ed. 2004) Presumptions, §46.6, p. 1055 ("A 'conclusive presumption' requires the trier of fact to find the existence of the presumed fact

from the existence of the basic fact. An adverse party is not permitted to introduce evidence to contradict or rebut the existence of the presumed fact.").) Indeed, conclusive presumptions are not truly rules of evidence, but are substantive rules of law, which exist to further particular public policies and purposes. (*Estate of Cornelious* (1984) 35 Cal.3d 461, 464-465; *Kusior v. Silver* (1960) 54 Cal.2d 603, 619; *Federal Deposit Ins. Corp. v. Superior Court* (1997) 54 Cal.App.4th 337, 346.)

A presumption affecting the burden of proof is a rebuttable presumption. (Evid. Code, §601.) By law, "[t]he effect of a presumption affecting the burden of proof is to impose upon the party against whom it operates the burden of proof as to the nonexistence of the presumed fact." (Evid. Code, §606.) Like a conclusive presumption, a presumption affecting the burden of proof "implement[s] some public policy other than to facilitate the determination of the particular action in which the presumption is applied." (Evid. Code, §605; e.g., also, *City of Long Beach v. Workers' Comp. Appeals Bd*. (*Garcia*) (2005) 126 Cal. App. 4th 298, 314 [70 Cal.Comp.Cases 109]; *Gee v. Workers' Comp. Appeals Bd*. (2002) 96 Cal.App.4th 1418, 1425-1426 [67 Cal.Comp.Cases 236]; *Reeves v. Workers' Comp. Appeals Bd.* (2000) 80 Cal.App.4th 22, 30 [65 Cal.Comp.Cases 359]; *State Comp. Ins. Fund v. Workers' Comp. Appeals Bd*. (*Welcher*) (1995) 37 Cal.App.4th 675, 682-683 [60 Cal.Comp.Cases 717].) But, of course, a presumption affecting the burden of proof is rebuttable. (Evid. Code, §§601, 606.) The party against whom the presumption applies must produce evidence to *disprove* the presumed fact. (See *City of Long Beach v. Workers' Comp. Appeals Bd*. (*Garcia*), *supra*, 126 Cal. App. 4th at p. 314; *Gee v. Workers' Comp. Appeals Bd*., *supra*, 96 Cal.App.4th at pp.1425-1426; *Reeves v. Workers' Comp. Appeals Bd.*, *supra*, 80 Cal.App.4th at p. 30.)

Of course, it is a basic principle of construction that meaning must be given to every word or phrase of a statute, if possible, so as not to cause any word or phrase to be mere surplusage. (*Hassan v. Mercy American River Hosp*. (2003) 31 Cal.4th 709, 716; *Moyer v. Workmen's Comp. Appeals Bd*. (1973) 10 Cal.3d 222, 230 [38 Cal.Comp.Cases 652]; *Dept. of Corrections v. Workers' Comp. Appeals Bd*. (*Stentz*) (2003) 109 Cal.App.4th 1720, 1725-1726 [68

Cal.Comp.Cases 853]; *McGee Street Productions v. Workers' Comp. Appeals Bd*. (*Peterson*) (2003) 108 Cal.App.4th 717, 723 [68 Cal.Comp.Cases 708].) Moreover, statutory phrases are not to be read in isolation; rather, they must be harmonized, both internally and with the entire statutory scheme of which they are a part, to the extent possible. (*State Farm Mut. Auto. Ins. Co. v. Garamendi* (2004) 32 Cal.4th 1029, 1043; *Chevron U.S.A., Inc. v. Workers' Comp. Appeals Bd*. (*Steele*) (1999) 19 Cal.4th 1182, 1194 [64 Cal.Comp.Cases 1]; *DuBois v. Workers' Comp. Appeals Bd*. (1993) 5 Cal.4th 382, 388 [58 Cal.Comp.Cases 286]; *Moyer v. Workmen's Comp. Appeals Bd*. (1973) 10 Cal.3d 222, 23-231 [38 Cal.Comp.Cases 652].) Therefore, it is our duty to harmonize both the first and second sentences of section 4664(b), if possible, so as to give effect to them both and so as *not* to render either sentence meaningless.

In light of these principles, we conclude that, once a defendant has established the existence of a prior award of permanent disability relating to the same region of the body, then the percentage of permanent disability found under the prior award will be subtracted from the current overall percentage of disability, *unless* the applicant *disproves* overlap by establishing that the prior permanent disability does not overlap the current permanent disability, either in whole or in part.

This interpretation of section 4664(b) harmonizes its first sentence, which provides that "it shall be conclusively presumed that the prior permanent disability exists at the time of any subsequent industrial injury," with its second sentence, which provides that "[t]his presumption is a presumption affecting the burden of proof." That is, consistent with the first sentence, the prior permanent disability still will be conclusively presumed to "exist," and the applicant cannot show that he or she has medically rehabilitated from it. Nevertheless, consistent with the second sentence, the applicant will have the opportunity to disprove or negate apportionment, in whole or in part, by showing that his or her most recent injury caused some *new* permanent disability that did *not* previously "exist," i.e., that the new injury has produced separate and independent permanent disability that does not overlap the pre-existing permanent disability because the new disability affects *different* abilities to compete and earn. If, however, the applicant fails to

disprove overlap, then the applicant cannot avoid the application of the conclusive presumption that the prior permanent disability still "exists" and, therefore, the prior percentage permanent disability rating will be deducted from the current overall percentage permanent disability rating where the disabilities are in the same region as described in section 4664(c).

Further, the phrase "prior permanent disability" in section 4664(b) does *not* mean the *factors of disability* upon which the prior permanent disability award was based.[16] To so interpret section 4664(b) would mean that, before the conclusive presumption could attach, the defendant would have both the burden of proving the existence of a prior permanent disability award *and* the burden of proving the nature of the permanent disability upon which that award was based. As noted earlier, the trigger for the conclusive presumption is the existence of a prior award of permanent disability, not the factors of permanent disability underline such an award.

Additionally, if a defendant were required to establish the prior factors of permanent disability as well as the existence of the prior permanent disability award, this effectively would cause the *second* sentence of section 4664(b) to be read out of the statute, in violation of the principles of construction discussed above. Once more, the second sentence of section 4664(b) provides, in essence, that the conclusive presumption that the prior permanent disability exists "is a presumption affecting the burden of proof." As discussed above, a "presumption affecting the burden of proof" requires the party *against* whom the presumption operates to establish the *nonexistence* of the presumed fact. (Evid. Code, §606.) Reading the first and second sentences of section 4664(b) together, as we must, the conclusive presumption of the existence of prior permanent disability in the first sentence of section 4664(b) operates *in favor* of defendant.

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[16] See *Hegglin v. Workmen's Comp. Appeals Bd*., *supra*, 4 Cal.3d at pp. 171, 174 ("The individual physical and mental abnormalities resulting from [the] injury are referred to as 'factors' of permanent disability" and it is "[*t*]*he individual factors taken together* [*that*] *constitute the entire permanent disability*;" i.e., the employee's prior "*permanent disability is a composite of all the factors of disability arising from* [*that injury*]." (emphasis added); *Franklin v. Workers' Comp. Appeals Bd*. (1978) 79 Cal.App.3d 224, 248 [43 Cal.Comp.Cases 310] ("All the factors of disability … must be determined in order to ascertain the entire permanent disability"); 1 Cal. Workers' Compensation Practice (Cont. Ed. Bar, 4th ed. (June 2005 update)), Permanent Disability, §5.40, p. 326 [and, generally, §§5.41-5.45, pp. 326-331].

Therefore, any interpretation of the second sentence must require applicant to *disprove* something, while at the same time not nullifying whatever has been conclusively established.

Both of these aspects of section 4664(b) are fulfilled by requiring the applicant to *disprove* the existence of overlap by establishing the nature of the permanent disability upon which the prior permanent disability award was based, rather than by requiring the defendant to *prove* the existence of overlap by establishing the nature of that permanent disability. This is because, once the character of the permanent disability underlying the prior permanent disability award is established, the determination of apportionment is essentially a mechanical process – not a burden of proof issue – i.e., as will be discussed below, it is determined using substantially the same overlap principles that have been historically applied in the cases discussed in Section II-A, above. Thus, if a defendant had to prove not only the existence of a prior permanent disability award, but also the character of the permanent disability upon which the prior award was predicated, there would be nothing left for the applicant to *disprove*, in contravention to the second sentence of section 4664(b).

Moreover, as discussed above, a conclusive presumption is a substantive rule of law adopted to further some particular public policy or purpose. (*Estate of Cornelious*, *supra*, 35 Cal.3d at p. 464; *Kusior v. Silver*, *supra*, 54 Cal.2d at p. 619; *Federal Deposit Ins. Corp. v. Superior Court*, *supra*, 54 Cal.App.4th at p. 346.) Similarly, a presumption affecting the burden of proof is intended to "implement some public policy other than to facilitate the determination of the particular action in which the presumption is applied." (Evid. Code, §605.) It appears that the public policies behind the twofold conclusive and rebuttable presumptions of section 4664(b) are that apportionment of pre-existing disability will occur (i.e., the pre-existing disability will be deducted), unless some showing is made (other than medical rehabilitation) why apportionment should not occur. To interpret section 4664(b) to mean that, once a prior permanent disability award has been established, the prior permanent disability percentage will be deducted

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unless applicant shows that the present and pre-existing disabilities do *not* overlap, in whole or in part, is consistent with these policies.

We will not now address what documentary evidence and/or testimony might suffice to establish the nature of the prior permanent disability; however, we reiterate that the WCAB will have the power to draw reasonable inferences from the record before it. (*Leonard Van Stelle, Inc. v. Industrial Acc. Com*. (*Hartman*), *supra*, 59 Cal.2d at p. 839; *Phoenix Indemnity Co. v. Industrial Acc. Com*. (*Hamilton*), *supra*, 31 Cal.2d at p. 859; *Coborn v. Industrial Acc. Com*., *supra*, 31 Cal.2d at p. 717; *Cal. Shipbuilding Corp. v. Industrial Acc. Com*. (*Baker*), *supra*, 27 Cal.2d at pp. 541-542.)[17] Of course, if an applicant introduces evidence to show that his or her present and pre-existing disabilities do *not* overlap, the defendant is entitled to introduce rebuttal evidence to show why overlap should be found.

5. Under Section 4664, The Issue Of Whether The Prior Permanent Disability For The Same Region Of The Body Overlaps The Current Disability Is Determined Using Substantially The Same Principles That Were Applied Prior To The Enactment Of SB 899

If the defendant meets its burden of proving the existence of a prior permanent disability award relating to the same region of the body, and if the applicant meets his or her burden of establishing the character of the permanent disability that was the basis of the prior award (from which he or she cannot assert medical rehabilitation), then apportionment shall be determined substantially in accordance with the same overlap principles that were historically applied in cases decided before the enactment of SB 899. (See Section II-A, *supra*.)

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

[17] We recognize that, often, the applicant may satisfy this burden by establishing the *factors of disability* underlying the prior permanent disability award. Nevertheless, future cases may illustrate how overlap may be negated even without the specific factors of disability being shown.

Disabilities may present novel overlap questions. None of these questions are presented here, however, and we will not speculate on them.

6. The Sum Of The Permanent Disability Awards For Any One Body Region Cannot Exceed 100%, Even Where The Permanent Disability Caused By The Applicant's New Injury Does Not Overlap The Permanent Disability Underlying The Prior Award(s), Unless The Employee's New Industrial Injury Causes Disability That Is Conclusively Presumed To Be Total Under Section 4662

Section 4664(c)(1) provides that the accumulation of all permanent disability awards issued with respect to any one region of the body cannot exceed 100% over the employee's lifetime, except where the employee's disability is conclusively presumed to be total under section 4662. Thus, absent conclusively presumed total disability, the sum of the permanent disability awards for one body region cannot exceed 100%, even where the permanent disability caused by the applicant's current injury does not overlap the permanent disability underlying his or her prior permanent disability award(s).

C. Application Of These Principles To The Present Case

The WCJ correctly determined that applicant's December 18, 2002 left foot injury caused 7% permanent disability, with no apportionment.

The parties stipulated applicant's December 18, 2002 left foot injury caused 7% permanent disability. The record establishes that this stipulation was based on the February 18, 2004 report of Dr. Greenfield, the AME, who found that applicant's left foot injury caused subjective disability of intermittent slight left foot pain, becoming moderate with cold weather and rain. Dr. Greenfield neither imposed any work restrictions nor found any ratable objective factors of disability based on the left foot injury.

To claim apportionment under section 4664(b), defendant had the burden of proving the existence of any prior permanent disability award(s). Defendant satisfied this burden by presenting a copy of the May 6, 2002 stipulated Findings and Award, which established that applicant's October 10, 1997 bilateral knee injury caused 22% permanent disability.

Under section 4664(b), applicant was not entitled to assert that she had medically rehabilitated from her bilateral knee disability. She was, however, entitled to disprove apportionment by demonstrating that her conclusively existing bilateral knee disability does not overlap the permanent disability caused by her December 18, 2002 left foot injury, either in whole or in part.

On this record, applicant succeeded in carrying her burden of proof. The May 6, 2002 stipulated Findings and Award shows that applicant's bilateral knee disability consisted of a 35% loss of her pre-injury capacity for kneeling, squatting, climbing, heavy lifting, pushing and pulling. Thus, applicant's pre-existing knee disability resulted solely in a diminished capacity to perform specified work activities. This partial loss of work capacity with respect to applicant's knees does not overlap her current disability of intermittent slight left foot pain – becoming moderate with cold weather and rain – because the prior and current disabilities affect her abilities to compete and earn in separate and independent ways. Therefore, applicant has demonstrated that there is no overlap between her prior permanent disability, which conclusively still exists, and her current permanent disability.

Finally, although both applicant's current and prior injuries involved the same region of the body, i.e., the lower extremities under section 4664(c)(1)(F), the sum of her current 7% permanent disability award and her prior 22% permanent disability award does not exceed 100%. Therefore, the additional award of 7% permanent disability does not violate section 4664(c)(1), which provides that "[t]he accumulation of all permanent disability awards issued with respect to any one region of the body in favor of one individual employee shall not exceed 100 percent over the employee's lifetime unless the employee's injury or illness is conclusively presumed to be total in character pursuant to Section 4662." We emphasize, however, that for purposes of section 4664(c)(1), applicant now has a total of 29% permanent disability (i.e., 22% plus 7%) for the lower extremities region.

Accordingly, we affirm the WCJ's October 7, 2004 decision finding that applicant's December 18, 2002 left foot injury resulted in 7% permanent disability, without apportionment.

For the foregoing reasons,

IT IS ORDERED, as the Decision After Reconsideration of the Board (En Banc), that the Findings and Award issued by the workers' compensation administrative law judge on October 7, 2004, be, and it is hereby, **AFFIRMED** [18]

WORKERS' COMPENSATION APPEALS BOARD (EN BANC)

/s/
JOSEPH M. MILLER, Chairman

/s/
MERLE C. RABINE, Commissioner

/s/
WILLIAM K. O'BRIEN, Commissioner

/s/
JAMES C. CUNEO, Commissioner

/s/
FRANK M. BRASS, Commissioner

/s/
RONNIE G. CAPLANE, Commissioner

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

October 26, 2005

SERVICE BY MAIL ON SAID DATE TO ALL PARTIES AS SHOWN ON THE OFFICIAL ADDRESS RECORD.

NPS/tab

[18] Commissioner Janice J. Murray is on leave and did not participate in this decision.