

1 **WORKERS' COMPENSATION APPEALS BOARD**

2 **STATE OF CALIFORNIA**

3
4 **STEPHEN HOM,**

5 *Applicant,*

6 **vs.**

7 **CITY AND COUNTY OF SAN FRANCISCO,**

8 *Defendant.*

Case No. **ADJ10658104**
(San Francisco District Office)

**OPINION AND DECISION
AFTER RECONSIDERATION**

9
10 In order to further study the factual and legal issues in this case, and in light of arguments made
11 by defendant in its Petition for Writ of Review, on November 13, 2018, we granted reconsideration of
12 our Decision After Reconsideration of September 12, 2018 on our own motion (Lab. Code, §§ 5900,
13 subd. (b), 5911). In our Decision After Reconsideration of September 12, 2018, we affirmed a workers'
14 compensation administrative law judge's (WCJ) Findings of Fact and Award (F&A) of June 20, 2018,
15 wherein it was found that, while employed on November 16, 2013 as a police officer, applicant sustained
16 industrial injury to his lumbar spine, causing permanent disability of 30% and the need for further
17 medical treatment. In finding permanent disability of 30%, the WCJ found that "apportionment under LC
18 §4664(b) is not applicable in this case."

19 On July 6, 2018, defendant filed a Petition for Reconsideration of the WCJ's June 20, 2018 F&A,
20 in which it contended that the WCJ erred in finding permanent disability of 30%, arguing that pursuant to
21 Labor Code section 4664(b), the WCJ should have apportioned to a prior 20% award of permanent
22 disability issued on June 2, 2013 in case ADJ8809427 with regard to a July 29, 2012 lumbar spine injury.
23 Applicant filed an Answer, and the WCJ filed a Report and Recommendation on Petition for
24 Reconsideration, which, as discussed below, we incorporated into our Opinion of September 12, 2018
25 affirming the WCJ's decision. After we issued our Decision After Reconsideration affirming the WCJ's
26 finding of 30% permanent disability without apportionment, defendant filed a Petition for Writ of
27 Review with the California Court of Appeal. In light of the defendant's arguments in the writ petition,

1 we granted reconsideration on our own motion to further study and deliberate on this matter.

2 As explained below, our prior decision was in error, as Labor Code section 4664 apportionment is
3 not always precluded when different methodologies are used to determine whole person impairment
4 We, therefore, rescind our Decision affirming the WCJ, rescind the WCJ's underlying decision, and issue
5 a new decision reflecting that applicant has sustained compensable permanent disability of 10% after
6 apportionment.

7 Applicant had sustained an industrial injury to his lumbar spine on July 29, 2012 in case
8 ADJ8809427. Case ADJ8809427 was resolved on July 2, 2013 by way of a stipulated Award for 20%
9 permanent disability. The stipulated Award was based on the December 6, 2012 report of primary
10 treating physician orthopedist William R. Campbell, M.D., who opined that the July 29, 2012 injury had
11 caused 10% whole person impairment of the lumbar spine utilizing the Diagnosis Related Estimates
12 (DRE) Method. Dr. Campbell opined that applicant's impairment was properly categorized as DRE
13 Lumbar Category III pursuant to Table 15-3 of the AMA Guides. (December 6, 2012 report at p. 5;
14 AMA Guides, Table 15-3, Criteria for Rating Impairment Due to Lumbar Spine Injury, p. 384.)

15 Applicant then sustained a second injury to the lumbar spine on November 11, 2013 in the instant
16 case. Applicant was evaluated by agreed medical evaluator orthopedist David K. Pang, M.D. In a
17 September 29, 2017 report, Dr. Pang wrote:

18 Mr. Hom states that he sustained an on-the-job injury of his lower back
19 on July 29, 2012 the details of which were summarized earlier in this
20 report and eventually was declared to be MMI by Dr. Campbell who
21 issued a final report dated December 6, 2012 opining that is her palm
[sic] fell into DRE Lumbar Spine Category II [sic] and had a 10% WPI
and no basis for apportionment.

22 Referring to page 379 -380 section 15.2 item 4 and 398 section 15.8 at
23 the bottom-of the right hand column item #4 it indicates that a recurrent
24 injury in the same spinal segment as one of the criteria to use the ROM
25 method to derive spinal impairment and since Mr. Hom sustained a lower
back injury on July 29, 2012 and November 2013 that by definition is an
[sic] recurrent injury and/or recurrent radiculopathy in. the same spinal
segment; therefore, I will use the range of motion method to derive Mr.
Hom's lumbar spine impairment.

26 (September 29, 2017 report at p. 6.)

27 Indeed, as stated by Dr. Pang, the AMA Guides state that the Range of Motion Method, rather

1 than the DRE Method is to be utilized when there is “a recurrent injury in the same spinal region.”
2 (AMA Guides, § 15.2 Determining the Appropriate Method for Assessment, p. 379.)

3 Dr. Pang opined that under the ROM Method, applicant’s lumbar permanent impairment was
4 14% WPI, which adjusted to 30% permanent disability. With regard to apportionment of permanent
5 disability, Dr. Pang wrote:

6 According to the information in the records as was discussed earlier in
7 this report Mr. Hom was sustained [sic] an on-the-job lower back injury
8 and the date of injury was July 29, 2012 and on December 6, 2012 Dr.
9 Campbell (orthopedist) opined that Mr. Hom had a 10% WPI (DRE
10 Lumbar Spine Category II [sic]) and since Mr. Hom’s lumbar spine
impairment flowing from the July 29, 2012 date of injury was derived
using the AMA Guides then Labor Code 4664 can be applied and other
than that I could not identify any other apportionable factors.

11 (September 29, 2017 report at p. 7.)

12 The matter went to trial on June 19, 2018. The parties stipulated that applicant’s overall
13 permanent disability was 30%. The main issue at trial was whether apportionment of the July 2, 2013
14 award of 20% permanent disability was appropriate pursuant to Labor Code section 4664. Applicant
15 argued, and the WCJ agreed, that Labor Code section 4664 apportionment was not appropriate because
16 the defendant had not proven that the permanent disability caused by the prior injury and the subsequent
17 injury overlapped, because the underlying impairments were measured utilizing different AMA Guides
18 impairment methods (i.e. the DRE method for the first injury, and the ROM method for the subsequent
19 injury.)

20 In our Opinion and Decision After Reconsideration of September 12, 2018, we affirmed the
21 WCJ’s decision. In addition to incorporating the WCJ’s analysis from her Report and Recommendation
22 on Petition for Reconsideration, we stated:

23 “The burden of proving apportionment falls on the [defendant]...”
24 (*Kopping v. Workers’ Comp. Appeals Bd.* (2006) 142 Cal.App.4th 1099,
25 1115 [71 Cal.Comp.Cases 1229].) In order to find apportionment under
26 Labor Code section 4664, the defendant must prove that there is overlap
27 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 subtracted from applicant’s overall permanent
disability pursuant to Labor Code section 4664, “a medical opinion is not

1 substantial evidence if it is based on ... incorrect legal theories....”
2 (*Escobedo v. Marshalls* (2005) 70 Cal.Comp.Cases 604, 620 [Appeals
3 Bd. en banc].) We note that the AME did not make a Labor Code section
4 4663 apportionment determination. Defendant did not attempt to clarify
5 the record regarding Labor Code section 4664 apportionment, or ask the
6 AME to make a Labor Code section 4663 apportionment determination.
7 Accordingly, because defendant did not sustain its burden of proof on
8 apportionment, we will affirm the WCJ’s decision.

9 The defendant then sought review of our decision by filing a Petition for Writ of Review with the
10 Court of Appeal. In light of the arguments in the Petition for Writ of Review, we timely granted
11 reconsideration of our decision on our own motion. (Lab. Code, §§ 5900, subd. (b), 5911.) Having
12 reconsidered the issue, we find that our previous decision was in error. Overlap between injuries is not
13 precluded merely because different AMA Guides methodologies were utilized in formulating whole
14 person impairment. Section 2.5h of the AMA Guides states:

15 If apportionment is needed, the analysis must consider the nature of the
16 impairment, and its relationship to each alleged causative factor,
17 providing an explanation of the medical basis for all conclusions and
18 opinions.... For example, in apportioning a spine impairment, first the
19 current spine impairment is calculated, and then an impairment rating
20 from any preexisting spine problem is calculated. The value of the
21 preexisting impairment rating can be subtracted from the present
22 impairment rating to account for the effects of the intervening injury or
23 disease. Using this approach to apportionment requires accurate
24 information and data to determine both impairment ratings. If different
25 editions of the *Guides* are used, the physician needs to assess their
26 similarity. If the basis of the ratings is similar, a subtraction is
27 appropriate. If they differ markedly, the physician needs to evaluate the
28 circumstances and determine if conversion to the earlier or latest version
29 of the *Guides* for both ratings is possible. The determination should
30 follow any state guidelines and should consider whichever edition best
31 describes the individual’s impairment.

(AMA Guides, § 2.5h, Changes in Impairment from Prior Ratings, p. 21.)

32 Thus, pursuant to the Guides, impairments to the same body part utilizing the same edition of the
33 Guides may overlap, and “conversion” is only necessary if different editions of the Guides were utilized.
34 In this case, the impairments for the prior injury and the subsequent injury were both calculated by
35 reference to the same edition of the AMA Guides, the Fifth Edition, mandated by Labor Code section
36 4660(b)(1) for injuries prior to January 1, 2013, such as the prior injury, and section 4660.1(b) for
37 injuries after January 1, 2013, such as the subsequent injury.

1 In *Kopping v. Workers' Comp. Appeals Bd.* (2006) 142 Cal.App.4th 1099 [71 Cal.Comp.Cases
2 1229], the Court of Appeal held that in order to apportion permanent disability pursuant to Labor Code
3 section 4664, a defendant must show that (1) there was a prior award of permanent disability, and that (2)
4 there is overlap between the prior disability and the subsequent disability. Here, the first prong is met as
5 the parties stipulated to a prior Award of permanent disability of 20% to the lumbar spine. (Minutes of
6 Hearing and Summary of Evidence of June 19, 2018 trial at p. 5.) We find that defendant also proved
7 overlap since the AMA Guides do not preclude a finding of overlap even though different ratings
8 methodologies are used (AMA Guides, § 2.5h, *supra*) and, by stating that section 4664 apportionment
9 was appropriate, AME Dr. Pang necessarily opined that overlap existed. (September 29, 2017 report at
10 p. 7.) Additionally, as argued in defendant's Petition for Writ of Review, the finding of overlap is
11 especially merited in this case, where the Guides direct a different ratings method for the subsequent
12 injury by virtue of it being a recurrent injury.

13 Therefore, we will rescind both our Decision After Reconsideration of September 12, 2018
14 affirming the WCJ's decision and the WCJ's F&A of June 20, 2018, and we will issue a new decision
15 reflecting that applicant's November 16, 2013 injury caused compensable permanent disability of 10%
16 after subtraction of 20% permanent disability from the stipulated overall disability of 30% pursuant to
17 Labor Code section 4664. (See generally *Brodie v. Workers' Comp. Appeals Bd.* (2007) 40 Cal.4th 1313
18 [72 Cal.Comp.Cases 565].)

19 For the foregoing reasons,

20 **IT IS ORDERED** as the Decision After Reconsideration of the Workers' Compensation Appeals
21 Board that our Opinion and Decision After Reconsideration of September 12, 2018 is **RESCINDED**.

22 **IT IS FURTHER ORDERED** as the Decision After Reconsideration of the Workers'
23 Compensation Appeals Board that the Findings of Fact and Award of June 20, 2018 is **RESCINDED**
24 and that the following is **SUBSTITUTED** therefor:

25 **FINDINGS OF FACT**

26 1. Stephen Hom, while employed on November 16, 2013 as
27 a police officer, Occupational Group 490, at San Francisco, California,
by the City and County of San Francisco, sustained injury arising out of
and in the course of employment to his lumbar spine.

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2. The employee has been adequately compensated for all periods of temporary disability.

3. The employer has furnished all medical treatment. The primary treating physician is Dr. Wayne Anderson.

4. In Case Number ADJ8809427, applicant received an award of 20 percent permanent disability for an industrial injury to his lumbar spine. The award is dated July 2, 2013.

5. Applicant's injury caused the need for further medical treatment.

6. Applicant's injury caused compensable permanent disability of 10% after Labor Code section 4664 apportionment to the July 2, 2013 Award of permanent disability in case ADJ8809427.

7. Applicant's law firm has performed services entitling it to a reasonable attorney's fee of \$1,043.63.

AWARD

AWARD IS MADE in favor of Applicant, Stephen Hom and against Defendant, City and County of San Francisco, as follows:

A. Permanent partial disability indemnity in the accrued amount of \$6,957.50, less attorneys' fees in the amount of \$1,043.63, payable to the Law Offices of Vincent J. Scotto, III, whose lien is allowed.

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1 B. All further medical treatment as is reasonable and
2 necessary to cure or relieve from the effects of said injury.

3 **WORKERS' COMPENSATION APPEALS BOARD**

4 **MARGUERITE SWEENEY**

5 /s/

6
7 **I CONCUR,**

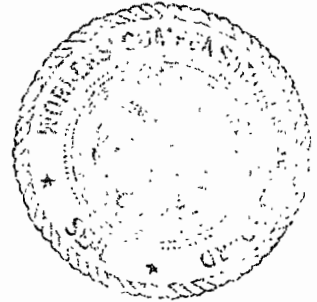
8 **JOSÉ H. RAZO**

9 /s/

10 **CHAIR**

11 **KATHERINE ZALEWSKI**

12 /s/



13
14 **DATED AND FILED AT SAN FRANCISCO, CALIFORNIA**

15 **APR 15 2020**

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

18 **CITY AND COUNTY OF SAN FRANCISCO**
19 **OFFICE OF THE CITY ATTORNEY**
20 **STEPHEN HOM**
21 **LAW OFFICES OF VINCENT J. SCOTTO, III**

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24 **DW:oo**