

**WORKERS' COMPENSATION APPEALS BOARD
STATE OF CALIFORNIA**

JEREMY IVEY, *Applicant*

vs.

**UNITED NATURAL FOODS, INC.; CONSTITUTION STATE SERVICES For
INDEMNITY INSURANCE COMPANY OF THE NORTH, *Defendants***

**Adjudication Number: ADJ16996210
Van Nuys District Office**

**OPINION AND ORDER DENYING
PETITION FOR RECONSIDERATION**

Defendant seeks reconsideration of a workers' compensation administrative law judge's (WCJ) Findings and Award of August 13, 2024, wherein it was found that while employed as a truck driver during a cumulative period ending November 9, 2022, applicant sustained industrial injury to his knees, thoracic spine and lumbar spine causing permanent disability of 29% after Labor Code section 4664 apportionment to a prior award of permanent disability. It appears uncontested that applicant sustained a previous industrial injury to the thoracic spine and knees during a cumulative period ending June 16, 2015 which resulted in a stipulated Award of 24% permanent disability in case ADJ10089577. In finding compensable permanent disability of 29% in the instant case, the WCJ found that the award of thoracic spine permanent disability in the previous case completely overlapped the permanent disability in the current case, and thus no new thoracic permanent disability was awarded. It was found that applicant's prior award of right knee permanent disability partially overlapped the disability caused in the current case, and the WCJ thus subtracted 3% right knee permanent disability from applicant's overall permanent disability pursuant to Labor Code section 4664.

Defendant contends that the WCJ erred in finding 29% permanent disability, arguing that more apportionment should have been found pursuant to Labor Code section 4664. Defendant argues that applicant was previously found to have 4% whole person impairment to both the right and left knee, and the entirety of these impairments should have been adjusted and subtracted from

the overall permanent disability rating. We have received an Answer, and the WCJ has filed a Report and Recommendation on Petition for Reconsideration.

As explained below, we will deny the defendants' Petition.

Preliminarily, we note that former Labor Code section 5909 provided that a petition for reconsideration was deemed denied unless the Appeals Board acted on the petition within 60 days from the date of filing. (Lab. Code, § 5909.) Effective July 2, 2024, Labor Code section 5909 was amended to state in relevant part that:

(a) A petition for reconsideration is deemed to have been denied by the appeals board unless it is acted upon within 60 days from the date a trial judge transmits a case to the appeals board.

(b)

(1) When a trial judge transmits a case to the appeals board, the trial judge shall provide notice to the parties of the case and the appeals board.

(2) For purposes of paragraph (1), service of the accompanying report, pursuant to subdivision (b) of Section 5900, shall constitute providing notice.

Under Labor Code section 5909(a), the Appeals Board must act on a petition for reconsideration within 60 days of transmission of the case to the Appeals Board. Transmission is reflected in Events in the Electronic Adjudication Management System (EAMS). Specifically, in Case Events, under Event Description is the phrase "Sent to Recon" and under Additional Information is the phrase "The case is sent to the Recon board."

Here, according to Events, the case was transmitted to the Appeals Board on September 10, 2024, and 60 days from the date of transmission is Saturday, November 9, 2024. The next business day that is 60 days from the date of transmission is Tuesday, November 12, 2024.¹ (See Cal. Code Regs., tit. 8, § 10600(b).)² This decision is issued by or on Tuesday, November 12, 2024, so we have timely acted on the petition as required by Labor Code section 5909(a).

Labor Code section 5909(b)(1) requires that the parties and the Appeals Board be provided with notice of transmission of the case. Transmission of the case to the Appeals Board in EAMS

¹ Monday, November 11, 2024 was the Veterans Day holiday.

² WCAB Rule 10600(b) (Cal. Code Regs., tit. 8, § 10600(b)) states that:

Unless otherwise provided by law, if the last day for exercising or performing any right or duty to act or respond falls on a weekend, or on a holiday for which the offices of the Workers' Compensation Appeals Board are closed, the act or response may be performed or exercised upon the next business day.

provides notice to the Appeals Board. Thus, the requirement in subdivision (1) ensures that the parties are notified of the accurate date for the commencement of the 60-day period for the Appeals Board to act on a petition. Labor Code section 5909(b)(2) provides that service of the Report and Recommendation shall be notice of transmission.

Here, according to the proof of service for the Report and Recommendation by the workers' compensation administrative law judge, the Report was served on September 10, 2024, and the case was transmitted to the Appeals Board on September 10, 2024. Service of the Report and transmission of the case to the Appeals Board occurred on the same day. Thus, we conclude that the parties were provided with the notice of transmission required by Labor Code section 5909(b)(1) because service of the Report in compliance with Labor Code section 5909(b)(2) provided them with actual notice as to the commencement of the 60-day period on September 10, 2024.

Turning to the merits, 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. (*Kopping v. Workers' Comp. Appeals Bd.* (2006) 142 Cal.App.4th 1099 [71 Cal.Comp.Cases 1229].) According to the Court of Appeal in *Kopping*, in order to apportion under section 4664, "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. Under these circumstances, the employer is entitled to avoid liability for the claimant's current permanent disability only to the extent the employer carries its burden of proving that some or all of that disability overlaps with the prior disability and is therefore attributable to the prior industrial injury, for which the employer is not liable." (*Id.* at p. 1115.)

In *Sanchez v. County of Los Angeles* (2005) 70 Cal.Comp.Cases 1440, 1447 (Appeals Bd. en banc) (disapproved on other grounds in *Kopping, supra*), we held that disabilities overlap when they affect the "same abilities to compete and earn...." We further explained in *Sanchez* that, "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. [Citation.] 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. [Citation.]” (*Id.* at pp. 1446-1447.)

The AMA Guides which are now used to determine permanent impairment (Lab. Code, § 4660.1, subd. (b)) are designed to reflect how much an impairment affects a person’s activities of daily living. (*Vigil v. County of Kern* (2024) 89 Cal.Comp.Cases 686, 691 [Appeals Bd. en banc].) Thus, in determining overlap of AMA Guides disabilities for purposes of Labor Code section 4664, the focus is on whether the impairments overlap in how they affect activities of daily living.

In this case, the WCJ found that it was appropriate to subtract the thoracic spine and a portion of the right knee disabilities because the evaluating physicians in the prior and subsequent cases used the same AMA Guides methods to rate the disabilities. Thus, it was determined by the WCJ that these disabilities overlapped because they affected the same activities of daily living. However, the other disabilities in the instant case were rated utilizing different ratings methods than those used to determine applicant’s impairment in the prior case. Although the use of different ratings methods does not always preclude Labor Code section 4664 apportionment, in order to prove overlap, evidence needs to be introduced that the impairments overlapped. In this case, panel qualified medical evaluator (PQME) orthopedist Harvey Wieseltier, M.D. repeatedly asked for the documents in the underlying case in order to analyze the issue of apportionment (August 11, 2023 report at p. 45; November 22, 2023 report at pp. 25-27; June 20, 2024 report at p. 5.) It appears that discovery remained open after the mandatory settlement conference to allow the PQME to submit a supplemental report on this issue, but defendant never procured the report prior to submission of the case.

Accordingly, outside the apportionment already found by the WCJ which we express no opinion on because it was not challenged by either party, defendant did not carry its burden that any prior award of permanent disability overlapped with the permanent disability found in the instant case. We therefore deny the defendant’s Petition.

For the foregoing reasons,

IT IS ORDERED that Defendant's Petition for Reconsideration of the Findings and Award of August 13, 2024 is **DENIED**.

WORKERS' COMPENSATION APPEALS BOARD

/s/ KATHERINE A. ZALEWSKI, CHAIR

I CONCUR,

/s/ JOSÉ H. RAZO, COMMISSIONER

/s/ JOSEPH V. CAPURRO, COMMISSIONER



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

November 12, 2024

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

**JEREMY IVEY
GLAUBER BERENSON VEGO
LLARENA, MURDOCK, LOPEZ & AZIZAD
EDD**

DW/oo

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