

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

MICHAEL SNOW, *Applicant*

vs.

CITY OF MODESTO, *Permissibly Self-Insured, Defendants*

**Adjudication Number: ADJ14815013
(Lodi District Office)**

**OPINION AND ORDER GRANTING
PETITION FOR RECONSIDERATION AND
DECISION AFTER RECONSIDERATION**

Applicant seeks reconsideration of a workers' compensation administrative law judge's (WCJ) Findings of Fact & Award of May 20, 2024, wherein it was found that while employed on March 22, 2021 as a fire engineer, applicant sustained industrial injury to the neck and right shoulder causing permanent disability of 3% after apportionment. Previously, on August 26, 2016, applicant received a stipulated Award of 28% permanent disability for an August 19, 2013 industrial injury to the neck and right shoulder in case ADJ9994609. In the instant case, it was found that applicant's overall permanent disability was 31%, but the WCJ apportioned to the prior award of permanent disability in ADJ9994609 pursuant to Labor Code section 4664 to arrive at 3% compensable permanent disability.

Applicant contends that the WCJ erred in finding compensable permanent disability of only 3%, arguing that the WCJ erred in applying Labor Code section 4664 because defendant did not carry its burden of showing that the current award of permanent disability overlapped with the prior award. We have received an Answer from the defendant and the WCJ has filed a Report and Recommendation on Petition for Reconsideration.

As explained below, we will grant reconsideration and amend the WCJ's decision to defer the issues of permanent disability and apportionment so that the record may be further developed on the issues of permanent disability and Labor Code section 4663 and 4664 apportionment.

Applicant's stipulated Award in case ADJ9994609 was based on the March 22, 2016 report of orthopedist Max Moses, M.D., who served as agreed medical evaluator in that case. Dr. Moses

diagnosed the applicant with “cervical strain/sprain with C5-6 and C6-7 disc herniations with C6 radiculopathy.” (March 22, 2016 report at p. 9) Dr. Moses rated applicant’s cervical permanent impairment at 15% whole person impairment (WPI) explaining:

The Diagnosis-Related Estimates (DRE) method is used to rate the cervical spine impairment. He is placed in DRE Cervical Category III per Table 15-5 on page 392 based on the MRI evidence of a disc herniation at C5-6 corresponding with clinical signs of radiculopathy at that level. His activities of daily living are minimally impacted so he is assigned a specific rating of **15% WPI** of the cervical spine. The Range of Motion method can be considered on the basis of multilevel involvement but his range of motion measurements are essentially full, and specific spine disorders from Table 15-7 on page 404 and a grade 4 sensory deficits of C6 from Table 15-17 on page 424 are less than the rating using the DRE method.

(March 22, 2016 report a p. 10.)

Applicant sustained his injury in the instant case on March 22, 2021, when he experienced a pinch in his neck while carrying a monitor on his right shoulder. The qualified medical evaluator who evaluated applicant in the instant case, orthopedist Victoria L. Barber, found that applicant had 15% WPI, utilizing the same DRE method previously utilized by Dr. Moses.¹ Dr. Barber also found no residual impairment with regard to the right shoulder, although she did find a need for further medical care. (February 1, 2023 report at pp. 17-18.) Dr. Barber opined that the scheduled ratings accurately described applicant’s impairment. (February 1, 2023 report at pp. 17-18.) With regard to apportionment of the cervical impairment, Dr. Barber wrote:

I have considered apportionment. I have done so with the understanding that Labor Code Section 4663 requires apportionment of permanent disability shall be based on causation. I also have studied for this issue with my understanding of the Escobedo decision as it explains Labor Code Section 4663 borne in mind. Even if not directly stated, all my apportionment opinions are given to a reasonable degree of medical probability. In reaching those conclusions, I have not engaged in guessing, speculation or surmise.

With respect to apportionment, given the previous injury in 2013, apportionment is at issue. Comparing the MRIs performed prior to the 2021 injury with that performed after the injury, there was no significant disc pathology at the C6-C7 level which is the primary focus of injury at this juncture. However, findings were identified at multiple levels related to previous injury. It is my opinion that

¹ While the permanent impairment found by Dr. Barber was unchanged from the permanent impairment found by Dr. Moses, applicant’s permanent disability increased from 28% to 31% because of the difference in age adjustment. (2005 Schedule for Rating Permanent Disabilities at p. 6-3.)

the previous injury did result in both lowering his threshold for injury as well as slowing recovery. For that reason, I would apportion 20% of the current disability to the sequelae of prior industrial injury and 80% to the March 22, 2021 injury. Surgical intervention was only discussed in conjunction with the more recent injury.

In response to an inquiry regarding the right shoulder impairment, Dr. Barber wrote an August 29, 2023 report. Dr. Barber noted that applicant's right upper extremity weakness was residual of the cervical spine impairment and that "given the ability to return to work in a full duty capacity as a fire engineer, the impairment rating accurately reflects the level of disability in this case." (August 29, 2023 report at p. 2.)

Dr. Barber wrote a final report on March 27, 2024 where she repeated and clarified her opinions on Labor Code section 4663 apportionment as follows:

[I]t remains my opinion that apportionment is 80% due to the March 22, 2021 injury and 20% to the sequelae of the prior industrial injury. Upon further review, it is clear that the issue surrounding the cervical spine which was problematic from at least August 2018, when an MRI was performed of the cervical spine. Given the significant findings, apportionment is as indicated above of 80%/20% with 80% being the most recent 2021 injury remains appropriate.

My reference to the surgical intervention as being mentioned only in relationship to the March 22, 2021 injury was meant to affirm the importance of that event in the hierarchy of apportionment. While Mr. Snow clearly had a significant injury years earlier as demonstrated in findings throughout 2013-2015, he was able to significantly rehabilitate from that earlier injury and return to full duties. My opinion, however, is that the already known to exist cervical spine pathology (i.e., in advance of the 2021 injury) functioned as a block of sorts on fuller recovery from that event and in that way contributes to causation of disability. That the lion's share of disability still relates to the later injury is confirmed by the medical choices and course subsequent to that event.

Section 4664(a) states that, "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." Section 4664(b) states that, "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." However, in *Kopping v. Workers' Comp. Appeals Bd.* (2006) 142 Cal.App.4th 1099 [71 Cal.Comp.Cases 1229], the Court of Appeal held that in order to apportion permanent disability pursuant to Labor Code section 4664, a defendant must

show that (1) there was a prior award of permanent disability, and that (2) there is overlap between the prior disability and the subsequent disability.

Here, Dr. Barber did not discuss the issue of Labor Code section 4664 apportionment or overlap in any of her reports, but the WCJ apportioned to the prior award of permanent disability as a matter of law because the same ratings method and category was utilized for both injuries. We believe that evidence in this case should be further developed in order for this matter to be decided on a more complete record. First, Dr. Barber should more fully discuss the proper rating method for the instant injury, including discussion of whether the DRE method or the ROM method is appropriate. Then, Dr. Barber should discuss whether any other method within the four corners of AMA Guides more accurately reflects the applicant's permanent impairment. We note that Dr. Barber opined that an alternative rating was not appropriate for the right shoulder because applicant was able to return to work without limitations, but AMA Guides impairment ratings "are consensus-derived estimates that reflect the severity of the medical conditions and the degree to which the impairment decreases an individual's ability to perform common **activities of daily living (ADL)**, *excluding work*. Impairment ratings were designed to reflect functional limitations and not disability. The **whole person impairment percentages** listed in the Guides estimate the impact of the impairment on the individual's overall ability to perform activities of daily living, *excluding work*..." (Emphasis in original.) The activities listed are "self-care, personal-hygiene," "communication," "physical activity," "sensory function," nonspecialized hand activities," "travel," "sexual function," and "sleep." (AMA Guides, § 1.2 Impairment, Disability and Handicap, p. 4.) Thus, the fact that applicant was able to return to his prior work without modifications is not strictly relevant to whether a non-scheduled rating is appropriate. After an expanded analysis and determination of the proper impairment rating, Dr. Barber should discuss in depth any factors contributing to applicant's impairment pursuant to Labor Code section 4663 and overlap between applicant's prior award of permanent disability and the disability found caused by the instant injury pursuant to Labor Code section 4664.

The WCAB has a duty to further develop the record when there is a complete absence of (*Tyler v. Workers' Comp. Appeals Bd.* (1997) 56 Cal.App.4th 389, 393-395 [62 Cal.Comp.Cases 924]) or even insufficient (*McClune v. Workers' Comp. Appeals Bd.* (1998) 62 Cal.App.4th 1117, 1121-1122 [63 Cal.Comp.Cases 261]) medical evidence on an issue. The WCAB has a constitutional mandate to ensure "substantial justice in all cases." (*Kuykendall v. Workers' Comp.*

Appeals Bd. (2000) 79 Cal.App.4th 396, 403 [65 Cal.Comp.Cases 264].) In accordance with that mandate, we will grant reconsideration and amend the WCJ's decision to defer the issues of permanent disability and apportionment so that the record may be further developed, and the issues reanalyzed. We express no opinion on the ultimate resolution of any of these issues.

For the foregoing reasons,

IT IS ORDERED that Applicant's Petition for Reconsideration of the Findings of Fact & Award of May 20, 2024 is **GRANTED**.

IT IS FURTHER ORDERED as the Decision After Reconsideration of the Workers' Compensation Appeals Board that the Findings of Fact & Award of May 20, 2024 is **AMENDED** as follows:

FINDINGS OF FACT

1. Michael Snow, age 49, while employed on March 22, 2021, as a fire engineer, Occupational Group No. 490, at Modesto, California, by the City of Modesto Fire Department, sustained injury arising out of and in the course of employment to the neck and the right shoulder.
2. At the time of injury, the employer was permissibly self-insured.
3. At the time of injury, the employee's earnings were \$3,993.90 per week, warranting indemnity rates of per code for temporary disability, and \$290.00 for permanent disability.
4. The employer has paid compensation consistent with Labor Code 4850 benefits at the weekly rate of \$3,993.90 for the period October 6, 2022, through January 31, 2023. The employee has been adequately compensated for all periods of TD claimed through November 14, 2023.
5. Applicant is in need of further medical treatment to cure or relieve from the effects of the industrial injury herein.
6. No attorneys' fees have been paid, and no attorney fee arrangements have been made.
7. The issues of permanent disability, apportionment, and attorneys' fees are deferred, with jurisdiction reserved.

AWARD

AWARD IS MADE in favor of Michael Snow against City of Modesto Fire Department, as follows:

- a) Further medical treatment as provided in Finding Number 5.

WORKERS' COMPENSATION APPEALS BOARD

/s/ JOSÉ H. RAZO, COMMISSIONER

I CONCUR,

/s/ KATHERINE A. ZALEWSKI, CHAIR

/s/ JOSEPH V. CAPURRO, COMMISSIONER



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

August 5, 2024

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

**MICHAEL SNOW
KELLY, DUARTE, URSOEGER & RUBLE
LENAHAN, SLATER, PEARSE & MAJERNIK**

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