WORKERS' COMPENSATION APPEALS BOARD
STATE OF CALIFORNIA

DEMETRIO MENDOZA, ***Applicant***

vs.

CITY OF LOS ANGELES;
administered by INTERCARE LAPD GLENDALE, ***Defendants***

Adjudication Number: ADJ21635072
Los Angeles District Office

OPINION AND ORDER DENYING PETITION FOR RECONSIDERATION

Defendant seeks reconsideration of the Findings, Order and Award (F&A) issued by the workers' compensation arbitrator (WCA) on August 26, 2025 which found in relevant part that applicant is entitled to a permanent disability award of 45% with no apportionment.

Defendant contends the WCA erred in disallowing apportionment.

We have received an Answer from applicant. The WCA prepared a Report on Reconsideration (Report), recommending that the Petition be denied.

We have considered the allegations of the Petition for Reconsideration, the Answer and the contents of the Report of the WCA with respect thereto. Based on our review of the record, and for the reasons stated in the WCA's Report, which we adopt and incorporate, we will deny reconsideration.

Former Labor Code[1] 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, 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.

[1] All further references are to the Labor Code unless otherwise noted.

(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 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 November 5, 2025 and 60 days from the date of transmission is Sunday, January 4, 2026, a weekend. (See Cal. Code Regs., tit. 8 § 10600(b).)[2] The next business day that is 60 days from the date of transmission is Monday, January 5, 2026. (See Cal. Code Regs., tit. 8, § 10600(b).) This decision was issued by or on Monday, January 5, 2026, so that we have timely acted on the petition as required by section 5909(a).

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 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. 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 by the WCJ, the Report was served on October 3, 2025, and the case was transmitted to the Appeals Board on November 5, 2025. Service of the Report and transmission of the case to the Appeals Board did not occur on the same

[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.

day. Thus, we conclude that service of the Report may not have provided accurate notice of transmission under section 5909(b)(2) because service of the Report did not provide actual notice to the parties as to the commencement of the 60-day period on November 5, 2025.

Thus, we conclude that the parties were not provided with accurate notice of transmission as required by section 5909(b)(1). While this failure to provide notice does not alter the time for the Appeals Board to act on the petition, we note that as a result the parties did not have notice of the commencement of the 60-day period on November 5, 2025.

Accordingly, we deny the Petition for Reconsideration.

For the foregoing reasons,

IT IS ORDERED that the Petition for Reconsideration is **DENIED**.

WORKERS' COMPENSATION APPEALS BOARD

/s/ KATHERINE A. ZALEWSKI, CHAIR

I CONCUR,

/s/ CRAIG L. SNELLINGS, COMMISSIONER

/s/ LISA A. SUSSMAN, DEPUTY COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

January 5, 2026

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

DEMETRIO MENDOZA
LEWIS, MARENSTEIN, WICKE, SHERWIN & LEE
OFFICE OF CITY ATTORNEY-LOS ANGELES
MARIOTTO RESOLUTIONS, INC.
MARK L. KAHN, ARBITRATOR

SL/abs

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

REPORT AND RECOMMENDATION
ON PETITION FOR RECONSIDERTATION

TRANSMITTAL DATE TO WCAB
November 5, 2025

I.

INTRODUCTION

The above-captioned matter was set for Arbitration on July 24, 2025, before Mark L. Kahn, Arbitrator, the parties reached Stipulations, Issues and admitted Exhibits into evidence and agreed to submit the matter on the present record.

On August 26, 2025, the Arbitrator issued Findings, Orders and Awards finding that Demetrio Mendoza, born […], while employed during the period June 4,1996 through June 15, 2020, by the City of Los Angeles Police Department, as Police Officer, Group Number 490, at Los Angeles California sustained an injury arising out of and occurring in the course of employment to his back resulting in permanent disability of 45% with no basis for apportionment to a prior Award.

The Arbitrator further found that defendant's Exhibit D, the Medical Report of Hamid Mir, M.D., dated May 12, 2025, and defendants' Exhibit M the interrogatory to Hamid Mir M.D., dated March 19 2025, were not admissible into evidence, and if they were admissible in evidence they were not substantial evidence on the issue of overlap.

The defendant now files this Petition for Reconsideration from Arbitrator's Finding and Award of August 26, 2025, on the following grounds:

1. That the Arbitrator erred in following the WCAB decision in the cases of Bates v. County of San Mateo, PSI, California Highway Patrol v. WCAB (Santiago), and Zapatka v. City of Los Angeles Police Department in awarding permanent disability for the lumbar spine without apportionment pursuant to Labor Code §4664 (b) to the prior Award to the same body part.

2. That precluding defendant from receiving credit for the prior lumbar Award would reflect double recovery and be unjust enrichment for the applicant.

3. The plain language and legislative history of Labor Code §4663 (e) indicates that the anti-attribution exceptions of subdivision (e) are not intended to apply to Section 4664.

4. The evidence demonstrates that there is overlap between the two lumbar injuries.

5. Defendant's Exhibit D, the Medical Report of Hamid Mir, M.D. dated May 12, 2025, and defendants' Exhibit M the interrogatory to Hamid Mir M.D., dated March 19, 2025, are admissible should have been admitted into evidence and are substantial medical evidence of overlap.

II.

FACTS

The applicant sustained an admitted injury to his low back on March 9, 2007, while employed by the City of Los Angeles as a Police Officer.

The injury of March 9, 2007, resulted in a Stipulation with Request for Award (case ADJ3679303) for 18% permanent disability to the back. The 18% permanent disability was based a 10% Whole Person Impairment based on the report of Hormoz Zahiri, M.D. using DRE method. The stipulation indicates that the permanent disability in paragraph three is based on a 10% Whole Person Impairment found by the treating physician Dr. Zahiri. The Award was approved on April 9, 2009.

After the injury on March 9, 2007, and a period of temporary disability the applicant continued to work full duty as a Police Officer and continued to wear a full duty belt.

On January 5, 2023, the applicant filed an Application for Adjudication Claim for continuous trauma claim from June 1, 1996, through June 15, 2020, for an injury to his back because of his employment with the City of Los Angeles as a Police Officer.

The applicant underwent spinal fusion and disc-replacement on July 25, 2023.

Dr. Hamid was chosen by the parties to act as Agreed Medical Evaluator for the continuous trauma claim.

The matter was set for Arbitration on July 24, 2025, before Arbitrator, Mark L. Kahn, the parties reached Stipulations, Issues and admitted Exhibits into evidence and agreed to submit the matter on the present record.

The parties stipulated that Demetrio Mendoza, born […], while employed on during the period June 4, 1996, through June 15, 2020, by the City of Los Angeles Police Department, as Police Officer, Group number 490, at Los Angeles California sustained an injury arising out of and occurring in the course of employment to his back.

The issues raised were as follows: Permanent Disability; Apportionment; Need for future medical treatment; Attorney fees; Apportionment pursuant to Labor Code §4663 and 4664; Defendants assert that apportionment by subtraction is applicable for the lumbar spine Injury in case 9002-2006-001889. Admissibility of Exhibits D, E and F.

The industrial injury to the back was the result of wearing a full duty gun belt and other physical activities on the job.

The Labor Code §3213.2 presumption was applicable to the facts of this case.

On August 26, 2025, the Arbitrator issued the following Findings, Orders and Award set forth in relevant part as follows:

FINDINGS

1. The Arbitrator found that Demetrio Mendoza, born […], while employed during the period June 4, 1996, through June 15, 2020, by the City of Los Angeles Police Department, as Police Officer, Group Number 490, at Los Angeles California sustained an injury arising out of and occurring in the course of employment to his back.

2. The Arbitrator found permanent disability based on the reports of the Agreed Medical Evaluator, Hamid Mir, M.D. The Medical report of the Agreed Medical Evaluator rates according to the following formula: **15.03.01.00 – 23% – (1.4) 32 – 490I – 41 – 45%** permanent disability. The Arbitrator finds the applicant is entitled to a permanent disability Award of 45% permanent disability payable at $290.00 per week in the total sum of $68,440.00 payable beginning after the last payment of temporary disability.

3. The Arbitrator found that apportionment pursuant Labor Code §4664(b) to a prior permanent disability Award to the lumbar spine is precluded by the anti-attribution clause in Labor Code §4663(e), and therefore the applicant is entitled to an Award without apportionment.

4. The Arbitrator found that if apportionment is allowed pursuant to Labor Code §4664 and if the interrogatory and the medical report date May 12, 2025, of Dr. Mir are not admissible in evidence, the medical evidence prior to that report of Dr. Mir dated May 12, 2025, is not based on substantial medical evidence, substantial medical evidence is required on the issue of overlap, defendants have not met their burden of proof on the issue of overlap and has not met their burden of proof on apportionment, and therefore the applicant is entitled to an Award without apportionment.

5. The Arbitrator found that if apportionment is allowed pursuant to Labor Code §4664 and if the interrogatory and the medical report date May 12, 2025 of Dr. Mir are admissible in evidence the medical report is not based on substantial medical evidence, substantial medical evidence is required on the issue of overlap, the defendant has the burden of proof on the issues of apportionment and overlap and has not met their burden of proof on apportionment, and therefore applicant is entitled to an Award without apportionment.

6. The Arbitrator found that apportionment is not warranted in this case because defendant has failed to meet their burden of proof on the issue of overlapping disability and because apportionment is prohibited by the anti-attribution clause of Labor Code §4663 (e) is this is a presumptive injury.

7. The Arbitrator found that if apportionment is allowed pursuant to Labor Code §4664 in this case, the burden of proof is on the defendant is to prove a prior Award and to prove overlap between the present and prior Award. The Arbitrator finds that defendants have met their burden of proof of showing a prior Award, defendants have not met their burden of proof on showing overlap between the present and prior award, therefore, defendants have not met their burden of proof on apportionment pursuant to Labor Code §4664, the applicant is entitled to an Award without apportionment.

8. The Arbitrator found that the Arbitrator as the trier-of-fact must decide the issue of overlap based on substantial medical evidence. In the absence of substantial medical evidence, the Arbitrator cannot decide the issue regarding overlap based on the facts, both injuries were to the back, and both injuries used the DRE method for rating and finding overlapping disability between the two injuries without substantial medical evidence to support the finding of overlap.

9. The Arbitrator found that the interrogatory and medical report of the Agreed Medical Evaluator in May 2025 are not admissible based on the fact the defendant had from October 29, 2024 through the date of the mediation to send the interrogatory to the physician and defendant failed to object to the mediation (equivalent to an MSC), and pursuant to board rules and the ADR rules discovery is cut off at the time of the mediation, and therefore the medical report and interrogatory are not admissible.

10. The Arbitrator found, even if the report and interrogatory were admissible into evidence, that evidence does not change the outcome as the medical report is not substantial evidence on the issue of apportionment, and overlap, and the arbitrator as the trier-of-fact cannot become the medical expert and determine the issue of overlap based on the facts.

11. The Arbitrator found the legislative history is admissible in evidence as the Arbitrator can take judicial notice of the legislative history. The Arbitrator, after considering the legislative history, found because the issue of legislative history is dealt with in some of the cases cited above and based on those cases, the Arbitrator finds that the legislative history does not require apportionment pursuant Labor Code §4664(b) to a prior award of permanent disability Award in a presumptive injury case.

12. The Arbitrator found the review the legislative history does not change the result as the review of the legislative history was conducted in some of the cases cited above and the board rejected that the legislative history supported a finding that anti-attribution clause was inapplicable to Labor Code §4664 and not applying to presumptive injury cases.

AWARD

An Award was made was made in favor of Demetrio Mendoza against the City of Los Angeles awarding temporary disability, permanent disability without apportionment, and a need for future medical treatment.

Defendants now file their Petition for Reconsideration on the grounds set forth above basically arguing they are entitled to apportionment to the prior Award pursuant to Labor Code §4664.

III.

DISCUSSION

A.

SUMMARY OF MEDICAL REPORT O[F] AGREED MEDICAL EVALUATOR

Dr. Hamid Mir in his first medical report dated April 25, 2023, finds a diagnosis was disc degeneration with stenosis and partial laminectomy. The physician found an industrial continuous trauma injury while applicant was employed by the City of Los Angles as Police Officer, The physician found the applicant had not yet reached Maximal Medical Improvement and that lumbar surgery is medically indicated and should be authorized. He would like to re-evaluate the applicant following the surgery.

Hamid R. Mir M.D. in his Medical report dated April 30, 2024, diagnosed the applicant with status posts lumbar fusion July 25, 2023, status post lumbar disc replacement July 25, 2023, and residual low back pain.

The applicant returns for an AME re-evaluation on April 30, 2024, having previously been examined on April 25, 2023, at which time his industrial injured lumbar spine had not yet reached MMI improvement. In his opinion lumbar surgery was medically indicated and should be authorized.

The applicant now returns for re-evaluation on April 20, 2024. He states that on July 25, 2023, he underwent lumbar disc replacement fusion surgery followed by postoperative physical therapy.

The applicant has not yet fully recovered from the surgery and has not yet reached Maximal Medical Improvement.

Dr. Hamid Mir is his medical report dated October 29, 2024, finds a diagnosis of status post anterior disc replacement, anterior lumbar fusion, low back pain and left leg numbness.

The applicant returns for a re-evaluation.

The physician finds that peace officers have a presumption for developing injury to the lumbar spine while wearing a duty gun belt.

The physician opinion is that the applicant sustained an industrial continuous trauma injury from June 1, 1996, through June 15, 2020, during the course of his employment as a Police Officer.

The applicant has reached Maximal Medical Improvement and needs future medical treatment.

As to permanent disability the physician finds a 23% Whole Person Impairment.

As for apportionment, the physician finds that the current lumbar impairment of 23% Whole Person Impairment should be subtracted from the impairment for the prior industrial injury.

The issue of apportionment of the cumulative trauma injury can further be addressed in a supplemental report after the physician has had the opportunity to review the prior settlement documents which may include the stipulations for Award.

On April 24, 2025, defendant an interrogatory sent to Dr. Mir requesting he discuss overlap between applicant's prior Award in the current disability. While the letter is dated March 19, 2025, it was not sent to Dr. Mir until April 24, 2025. Attached to the interrogatory was the Stipulations with Request for Award for the injury of March 9, 2007, and the medical report of Hormoz Zahiri M.D. whose report was the basis for the Stipulations with Request for Award.

Dr. Hamid Mir is his medical report dated May 12, 2025, indicated the report was written in response to correspondence from the Deputy City Attorney dated March 19, 2025, referencing his reports of April 25, 2023, April 30, 2024, and October 29, 2024, requesting additional information.

The medical report references the enclosed prior Award for the lumbar spine, along with Dr. Zahiri's supporting report. It requests a review of both documents and asks for a supplemental report that addresses whether there is overlapping permanent disability between the prior injury and the current injury. Additionally, the report should provide a thorough explanation of the reasoning behind his findings on the presence or absence of overlap.

After reviewing the records, the physician indicated he found the applicant sustained a cumulative trauma injury to his lumbar spine from June 1, 1996, through June 15, 2020, during the course of his employment as a police officer.

The lumbar spine condition reached Maximal Medical Improvement at the time of his examination October 29, 2024.

Future medical treatment was found.

An appropriate period of temporary disability was found.

The physician found a 23 % Whole Person Impairment. Using the DRE method.

As to apportionment, Dr. Mir found degenerative changes on diagnostic imaging, however, it would be speculative state there would be significant degenerative changes absent long periods of cumulative trauma while performing the article his physical activities Police Officer.

According to history the applicant underwent decompression surgery in 2011. The records also mention prior history of lumbar spine laminectomy surgery in 2005.

In his prior report the physician requested the prior settlement documents which include the stipulations with request for Award following the initial surgery for a more accurate apportionment.

He has now reviewed the records including the prior stipulation and Award dated April 9, 20[0]9, indicating permanent disability for the injury of March 9, 2007, to the lumbar spine resulting in a 10% Whole Person Impairment.

After reviewing the additional records including the stipulations and Award and the prior report based on the current level of information, the 23% Whole Person Impairment for the lumbar spine should be subtracted from the 10% Whole Person Impairment for the lumbar spine resulting in a 13% impairment.

B.

Admissibility of Exhibits D, M, and F

Admissibility of Exhibits D, and M; the medical report from Dr. Hamid Mir dated May 12, 2025, and the interrogatory form defendant to Dr. Hamid Mir, dated March 19, 2025.

1.

NOTE REGARDING THIS ISSUE

There was an error in the Stipulations and Issues listed in the Opinion on Decision, however the discussion part of the Opinion on Decision and Findings and Award were correct.

Defendant's Exhibit D is listed as a Medical Report of Hormoz Zahiri M. D. dated May 12, 2025. (marked for identification only). In fact, it is the Medical Report of Dr. Hamid Mir dated May 12, 2025. (marked for identification only)

Defendants' Exhibit M is listed as interrogatory to Hormoz Zahiri M. D. (Marked for identification only). In fact, it is interrogatory to Hamid Mir M.D., dated March 18. 2025. (Marked for identification only)

2.

ADMISSIBILITY

Dr. Hamid Mir was chosen to evaluate the applicant as Agreed Medical Evaluator.

Dr. Mir first evaluated the applicant on May 25, 2023, finding the applicant and not yet reached Maximal Medical Improvement and needed surgery and he would like to re-evaluate the applicant following the surgery.

Dr. Mir re-evaluated the applicant on April 30, 2024, and found the applicant had not yet fully recovered from the surgery and had not reached Maximum Medical Improvement.

Dr. Mir evaluated the applicant on October 29, 2024, finding the applicant had reached Maximal Medical Improvement. The physician found a 23% Whole Person Impairment. As to apportionment, the physician finds the current lumbar impairment of 23% Whole Person Impairment should be subtracted from the impairment from the prior industrial injury.

The physician indicated that he would further address apportionment in a supplemental report after he had the opportunity to review the prior settlement documents.

The applicant requested a Mediation pursuant to the rules of the Alternative Dispute Resolution Program between the Los Angeles Police Protective League and the City of Los Angeles.

Defendant did not object to the request for Mediation submitted by the applicant.

The case proceeded to Mediation April 21, 2025, before Saul Allweis, as Mediator. Robert Sherwin appeared for the applicant and Edwin Rathbun appeared for the defendant.

The Mediation Statement and Orders indicate the parties had different interpretations regarding Labor Code §4664. Applicant requested the matter be set for Arbitration. Defendant objected to this matter been set for Arbitration, indicating that they believe additional discovery was needed. Specifically, defendant wants to obtain a supplemental report from Dr. Mir on the issue of overlap. Applicant advised that to date, they have never received any interrogatories.

The Mediator Ordered the matter to be scheduled for Arbitration, on notice, over defendant's objection. If defendants obtain a supplemental report from Dr. Mir prior to the Arbitration, it will be up to the arbitrator as to whether the report will be admitted into evidence.

On April 24, 2025, the defendant sent an interrogatory to the Agreed Medical Evaluator sending him the Findings and Award from the prior injury and the medical report from the primary treating physician that was the basis of that award.

In response to that letter on May 12, 2025, Dr. Mir prepared a supplemental report indicating he did receive the Findings and Award in the medical report of the Primary Treating Physician, Dr. Zahir, he then indicated after reviewing the records, that the 23% Whole Person Impairment from the prior Award should be subtracted from 10% Whole Person Impairment for the lumbar spine resulting in a 13% impairment. The report contained no explanation or discussion regarding the issue of overlap, just the conclusion set forth above.

Pursuant to the rules of the Alternative Dispute Resolution Program between the Los Angeles Police Protective League and the City of Los Angeles, Mediation is the equivalent to a Mandatory Settlement Conference in WCAB proceedings and the same rules and laws regarding discovery cut off are applied.

Rule 2.12 of the ADR agreement (attached to defendant's Petition for Reconsideration) states that discovery shall close on the date of the mediation and evidence obtained thereafter shall not be admissible unless it can be demonstrated that was not available or could not have been discovered by the exercise of due diligence prior to the settlement conference.

The Arbitrator finds there was no evidence introduced by defendants that they objected to the Mediation (which is the equivalent of an MSC in a WCAB proceeding) and the Mediation not

going forward as discovery was not complete prior to the mediation, when they received applicants request for Mediation, and when they received the mediation notice.

They first raised the issue at the Mediation on April 21, 2025, of needing a supplemental report from Dr. Mir.

Defendant received the report of Dr. Mir dated October 29, 2024, where he asked for additional information on apportionment and defendant did not send the interrogatory to the physician until after the Mediation.

The Arbitrator finds that the interrogatory and medical report of the Agreed Medical Evaluator in May 2025 are not admissible based on the fact the defendant had from October 29, 2024 through the date of the mediation on April 21, 2025 to send the interrogatory to the physician, and defendant failed to object to the mediation (equivalent to an MSC), and pursuant to board rules and the ADR rules of discovery, discovery is cut off at the time of the mediation, and therefore the medical report and interrogatory are not admissible.

The Arbitrator finds that the medical report and interrogatory are inadmissible because discovery closed the date of the Mediation and the defendants did not demonstrate that the evidence could not have been discovered by the exercise of due diligence prior to the settlement conference.

However, as discussed below, even if the report and interrogatory admissible it does not change the outcome as the medical report is not substantial evidence on the issue of apportionment and overlap, and the arbitrator has the trier-of-fact cannot become the medical expert and determine the issue of overlap based on the facts.

As to the legislative history, the Arbitrator rules that legislative history is admissible in evidence as the Arbitrator can take judicial notice of the legislative history and because the legislative history is contained in some of the cases cited by the parties and the Arbitrator.

However, the Arbitrator finds the review of the legislative history does not change the result as the review of the history was done in the *Santiago* case, discussed below, and the board rejected that the legislative history supported a finding that anti-attribution clause was inapplicable to Labor Code §4664 and not applying to presumptive injury cases and the legislative history did not preclude non-attribution of other causes including a prior Award.

C.

Apportionment pursuant to Labor Code §§4663 and 4664.

Defendants assert that apportionment by subtraction is applicable for the lumbar spine Injury for applicant prior case. Issue of w[h]ether apportionment pursuant to Labor Code §4664 is precluded in a presumptive injury case because of the anti-attribution clause contained in Labor Code §4663(e).

Labor Code §3213.2 provides as follows:

(a) In the case of a member of a police department of a city, county, or city and county, or a member of the sheriff's office of a county, or a peace officer employed by the Department of the California Highway Patrol, or a peace officer employed by the University of California, who has been employed for at least five years as a peace officer on a regular, full-time salary and has been required to wear a duty belt as a condition of employment, the term "injury," as used in this

division, includes lower back impairments. The compensation that is awarded for lower back impairments shall include full hospital, surgical, medical treatment, disability indemnity, and death benefits as provided by the provisions of this division.

(b) The lower back impairment so developing or manifesting itself in the peace officer shall be presumed to arise out of in the course of employment. This presumption is disputable and may be controverted by other evidence, but unless so controverted, the appeals board is bound to find in accordance with it. This presumption shall be extended to a person following termination of service for a period of three calendar months for each full year of the requisite service, but not to exceed 60 months in any circumstance, commencing with the last date actually worked in the specified capacity.

(c) For purposes of this section, "duty belt" means a belt used for the purpose of holding a gun, handcuffs, baton, and other items related to law enforcement.

Labor Code Section 4663 provides as follows

(a) Apportionment of permanent disability shall be based on causation.

(b) A physician who prepares a report addressing the issue of permanent disability due to a claimed industrial injury shall address in that report the issue of causation of the permanent disability.

(c) In order for a physician's report to be considered complete on the issue of permanent disability, the report must include an apportionment determination. A physician shall make an apportionment determination by finding what approximate percentage of the permanent disability was caused by the direct result of injury arising out of and occurring in the course of employment and what approximate percentage of the permanent disability was caused by other factors both before and subsequent to the industrial injury, including prior industrial injuries. If the physician is unable to include an apportionment determination in his or her report, the physician shall state the specific reasons why the physician could not make a determination of the effect of that prior condition on the permanent disability arising from the injury. The physician shall then consult with other physicians or refer the employee to another physician from whom the employee is authorized to seek treatment or evaluation in accordance with this division in order to make the final determination.

(d) An employee who claims an industrial injury shall, upon request, disclose all previous permanent disabilities or physical impairments.

[(e)] Subdivisions (a), (b), and (c) do not apply to injuries or illnesses covered under Sections 3212, 3212.1, 3212.2, 3212.3, 3212.4, 3212.5, 3212.6, 3212.7, 3212.8, 3212.85, 3212.9, 3212.10, 3212.11, 3212.12, 3213, and 3213.2.

The facts clearly establish that the applicant had a prior Award to the back resulting in 18% permanent disability.

This injury is an admitted continuous trauma injury to the applicants back during the period June 4, 1996, through June 15, 2020, while applicant was employed by the City of Los Angeles Police Department, as Police Officer.

The applicant's current level of disability is 45% permanent disability.

The applicant's prior level of disability was 18% permanent disability.

The applicant argues that the applicant is entitled to an Award of 45% permanent with no apportionment to the prior Award because the case law supports the proposition that apportionment pursuant to Labor Code §4664 is precluded in a presumptive injury case because the anti-attribution clause under Labor Code §4663(e) which precludes application of Labor Code §4664(b) subtraction of Applicant's prior Award

The defendant argues the applicant is entitled to Award of 45% permanent disability less the prior Award of 18% equaling 27% permanent disability based upon apportionment pursuant to Labor Code §4664 which is applicable to presumptive injury cases because of the plain language of Labor Code §4663(e) and legislative history.

In addition, the applicant argues that even if Labor Code §4664 is found applicable to presumptive injury cases the defendant failed to meet their burden of proof on the issue of Labor Code §4664 apportionment. The defendant argues that if Labor Code §4664 is found applicable to presumptive injury cases the defendant did meet their burden of proof on the issue of Labor Code §4664 apportionment. That issue is discussed below.

There is no dispute in this case that the Applicant is entitled to the "duty belt" presumption under Section 3213.2.

Labor Code 4663(e) expressly precludes apportionment under only LC 4663.

Labor Code 4663(e) does not expressly preclude apportionment to a prior Award pursuant to Labor Code §4664.

Several panel decisions of the WCAB on this issue have held that the anti-attribution clause of the presumptive injury statutes precludes application of Labor Code §4664(b) subtraction of applicant's prior Award from the current level of disability because Labor Code §4663(e) precludes application of Labor Code §4664(b) subtraction in presumptive injury cases.

Panel decisions of the WCAB, while they are not binding authority, may be cited for their persuasive value and are an indication of contemporaneous interpretation and application of workers' compensation laws. (*Griffith v. WCAB, 54 CCC 145*).

The following panel decision deal with this issue:

In the case of *Bates v. County of San Mateo, PSI*, (2019 Cal. Wrk. Comp. P.D. LEXIS 72, 84 CCC 648), the WCAB affirmed the WCJ finding that applicant deputy sheriff was entitled to combined award of 80 percent permanent disability for injury to his heart and circulatory/cardiovascular system through 5/10/2010 and subsequent cumulative injury to same body parts through 4/18/2012, rather than apportioned award pursuant to Labor Code §4664(a) and Benson v. W.C.A.B. (2009) 170 Cal. App. 4th 1535, 89 Cal. Rptr. 3d 166, 74 Cal. Comp. Cases 113, when “heart trouble” presumption in Labor Code §3212 was applicable to both of applicant's cumulative injuries, and WCAB found that Labor Code §4663(e) precluded apportionment to causation for heart trouble injuries that were statutorily presumed to be compensable under Labor Code § 3212. The WCAB rejected defendant's contention that Labor Code § 4663(e) only precludes apportionment under Labor Code § 4663 but not under Labor Code §4664(a), and found that general apportionment to causation provisions of Labor Code §4664(a) do not trump the specific provisions of Labor Code §4663(e) that preclude apportionment to causation between two or more industrial injuries that are presumed compensable, and that it would be inconsistent with Legislature's unified scheme of apportionment based on causation to conclude

that Labor Code §4664(a) somehow overrides specific and later-enacted provisions of Labor Code 4663(e) precluding apportionment for presumptively compensable injuries.

In the case of *California Highway Patrol v. WCAB* (Santiago) (2022) 87 CCC 1011 (Writ Denied) the WCAB in denying reconsideration and affirming WCJ's decision, held that applicant highway patrol officer who suffered presumptively compensable heart injury during period 9/17/97 to 9/24/2018 was entitled to award of 55 percent permanent disability, and that defendant was not entitled to apportionment of applicant's permanent disability under Labor Code § 4664(b) based on prior permanent disability award, when WCAB found that although defendant established overlap between prior and current disabilities, which ordinarily would have entitled defendant to apportionment based on prior award, anti-attribution provision in Labor Code §4663(e), precluding apportionment in cases of presumptively compensable injuries under Labor Code § 3212 et seq., applies to apportionment under Labor Code §4664(a) and (b) and precluded apportionment in this case.

In the case of *California Highway Patrol v. WCAB* (Santiago) the WCAB reviewed the legislative history and the board rejected that the legislative history supported a finding that anti-attribution clause was inapplicable to Labor Code §4664 and not applying to presumptive injury cases and the legislative history did not preclude non-attribution of other causes including a prior award.

The WCJ adopted the Bates analysis in her report on reconsideration, specifically noting the WCAB's statement that Labor Code §§4663 and 4664 "have long been viewed as a single unified legislative approach to apportionment." The WCJ reviewed the legislative history of Labor Code § 4663(e) and opined that under the single unified approach described in *Bates*, Labor Code § 4663(e)'s bar on apportionment applies to Labor Code §4664(b), which conclusively presumes the continued existence of prior PD: Bates noted that AB 1368 added the language contained in section 4663(e) effective January 1, 2007. The court reviewed the legislative history of this bill which indicated that, Existing law further establishes a disputable presumption in this regard and prohibits these medical conditions from being attributed to any disease existing prior to the development or manifestation of that medical condition. (Legislative Counsel Digest)

In addition, the Senate Rule Committee Analyses indicated that, this bill clarifies the law relating to presumptive cause of certain medical conditions of specified public employees, nullifying the requirement with respect to these employees-that other potential causes be identified and apportioned. Senate Rules Committee AB 1368-Office of Senate Floor Analyses 8/23/06. Legislative History of the Assembly Floor Analysis noted.

This Bill requires the Commission on Health and Safety and Workers' Compensation (Commission) to study the impact of the apportionment requirement on permanent disability ratings for specified public safety workers' compensation claims for presumptive injuries.

Health and Safety and Workers' Compensation to prepare a report to the Legislature, by January 1, 2007, identifying public safety workers' compensation claims for presumptive injuries that have been rated for permanent disability pursuant to SB 899 (Chapter 34 of the Statutes of 2004) apportionment requirements, and identifying the extent to which these changes reduced permanent disability ratings. (Assembly Floor Analysis 6/1/05)

Applying this rationale, the applicant's current heart trouble would be precluded from being attributed to other potential causes, which in this case includes a prior existing award as a

potential cause. Especially since such apportionment would result in decreased permanent disability rating to these specified public employees, which was a concern, as noted in the legislative history of the bill.

The WCAB denied reconsideration and affirmed the WCJ's decision for the reasons stated by the WCJ as noted above. The WCAB agreed that the analysis in Bates was equally applicable in this case, observing that it would be illogical to find that the anti-attribution provision in Labor Code §4663(e) applies to apportionment under Labor Code §4664(a) but not to apportionment under Labor Code § 4664(b).

Defendant filed a Petition for Writ of Review, asserting in relevant respects that the WCAB erred in finding that Labor Code § 4663(e)'s bar on apportionment extended to prior awards under Labor Code §4664(b). Applicant filed an Answer, contending in substance that Labor Code §4663(e) applies to all apportionment, including Labor Code §4664(b).

The writ was denied September 19, 2022.

In the case of *Zapatka v. City of Los Angeles Police Department* (2024 Cal. Wrk. Comp. P.D. LEXIS 286) the WCAB, denying reconsideration, affirmed arbitrator's decision that applicant who suffered presumptively compensable injuries to his left shoulder and lumbar spine while employed as police officer from 7/6/98 through 4/8/2019, was entitled to award of 33 percent permanent disability, and that apportionment under Labor Code § 4664(b) to prior permanent disability award for lumbar spine injury did not apply because it was precluded by the anti-attribution clause in Labor Code §4663(e), citing [B]ates and Santiago cases above.

The Arbitrator found based on the cases cited above that apportionment pursuant Labor Code §4664(b) to prior permanent disability award for lumbar spine injury did not apply because it was precluded by the anti-attribution clause in Labor Code §4663(e).

The defendant argues that Labor Code §4664 is applicable to presumptive injury cases based on legislative history and the plain meaning of the statue. The cases above discussed and rejected these arguments.

Therefore, The Arbitrator found based on the cases cited above that apportionment pursuant Labor Code §4664(b) to the prior permanent disability award for lumbar spine injury did not apply because it was precluded by the anti-attribution clause in Labor Code §4663(e).

The defendants are now requesting the Board reject all these prior cases and come to a new conclusion. The Arbitrator in analyzing the case law and Labor Code sections and legislative intent believes these prior board decisions are correct and persuasive and therefore follows these decisions in concluding that apportionment is not allowed in this case to the prior Award based on the anti-attribution clauses of presumptive injury cases. (Full duty gun belt presumption)

D

If Labor Code §4664 is found applicable to presumptive injury cases, did the defendant meet their burden of proof on the issue of Labor Code §4664 apportionment.

Defendant argues that if apportionment is warranted in his case if Labor Code §4664 is applicable to presumptive injury cases.

The applicant argues that even if Labor Code §4664 is found applicable to presumptive injury cases the defendant failed to meet their burden of proof on the issue of Labor Code §4664 apportionment.

As found above, the Arbitrator found that apportionment pursuant Labor Code §4664(b) to prior permanent disability award for lumbar spine injury did not apply because it was precluded by the anti-attribution clause in Labor Code §4663(e).

If the WCAB should disagree with above decision regarding that Labor Code §4664 is not appliable to presumptive injury cases, the Arbitrator finds regarding apportionment pursuant to Labor Code §4664 without the anti-attribution clause that the defendant failed to meet their burden of proof on the issue of Labor Code §4664 apportionment.

Labor Code §4664 provides in part as follows:

(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.

(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.

The defendant has the burden of proof on the issue of apportionment. (*Pullman Kellogg v. WCAB* (Normand) (1980) (45 CCC 170) and (Escobedo v. Marshall 70 CCC 604) (Appeals Board, en banc).

Apportionment of permanent disability must address causation a disability and must constitute substantial evidence. (*Escobedo v. Marshall 70 CCC 604*) (Appeals Board, en banc).

To constitute substantial evidence of medical opinion must be framed in terms of reasonable medical probability, it must not be speculative, it must be based on facts and in adequate examination and history, and it must set forth reasoning in support of its conclusions. (emphasis added) (*Escobedo v. Marshall 70 CCC 604*) (Appeals Board, en banc)

To prove apportionment pursuant to Labor Code §4664, defendant must prove that a prior Award of disability exists. This requires the production of the prior Stipulation with request for Award, or a prior Compromise and Release Agreement where the parties include applicant's level of permanent disability and the settlement. (*Pasquotto v. Hayward lumbar* (71 CCC 223) (Appeals Board, en banc)

Second the defendant must prove the prior Award of disability overlaps with the current Award of disability. (*Kopping v. WCAB, 142 Cal. App. 4th 1099*)

The presence of overlap requires medical reporting. The requirement for expert medical exam evidence exists throughout the Workers' Compensation proceedings including determination of temporary disability, permanent disability apportionment, and causation of injury. (Escobedo above)

The medical cause of an ailment is usually a scientific question, requiring a judgment based upon scientific knowledge and inaccessible to the unguided rudimentary capacities of lay arbiters. (*Peter Kiewit Sons v. IAC, 234 Cal App. 2d 831*)

The Board in the case of *Maria Del Pilar Cazares Meza* (ADJ16082204) found no reason to deviate from the requirement of the need for requiring a judgment based upon scientific

knowledge and because it is inaccessible to the unguided rudimentary capacities of lay arbiters. (*Peter Kiewit Sons V. IAC, 234 Cal App. 2d 831*) when analyzing application of section 4664 (b) and the existence of overlap.

In this case the defendant met their burden of proof of a prior Award by introducing the prior Stipulated Findings and Award.

The disputed issue in this case is whether defendants met their burden regarding the issue of overlap, between the present injury and the prior injury.

Dr. Mir is his medical report dated October 29, 2024, finds as to apportionment as follows:

As for apportionment, the physician finds that the current lumbar impairment of 23% Whole Person Impairment should be subtracted from the impairment for the prior industrial injury.

The issue of apportionment of the cumulative trauma injury can further be addressed in a supplemental report after the physician has had the opportunity to review the prior settlement documents which may include the stipulations for Award.

It is undisputed this report is admitted into evidence.

The Arbitrator finds this medical report on apportionment is not substantial evidence because the physician had to review additional documents including the prior Award and the prior medical report from the prior [A]ward to determine overlap, and therefore the medical report is not substantial evidence on the issue of apportionment. In addition, the report is a mere conclusion without explaining how and why and therefore is not based on substantial evidence.

On April 24, 2025, defendant sent Dr. Mir an interrogatory requesting he discuss overlap between applicant's prior Award in the current disability. While the letter is dated March 19, 2025, it was not sent to Dr. Mir until April 24, 2025. The interrogatory had attached to it the prior Stipulations with Repressed for Award and the medical report upon which the Award was based upon.

The admissibility of this interrogatory and the report in response the interrogatory is in dispute as to admissibility is discussed above. The discussion below will be based on if the report and interrogatory are admissible into evidence.

Dr. Hamid Mir is his medical report of May 12, 2025, in response to the interrogatory and on the issue of apportionment on overlap reported as follows:

As to apportionment there are findings of degenerative changes on diagnostic imaging, however, it would be speculative state there would be significant degenerative changes absent long periods of cumulative trauma while performing the article his physical activities Police Officer.

According to history the applicant underwent decompression surgery in 2011. The records also mention prior history of lumbar spine laminectomy surgery in 2005.

In his prior report the physician requested the prior settlement documents which include the stipulations with request for Award following the initial surgery for a more accurate apportionment.

He has now reviewed the records including the prior stipulation and Award dated April 9, 2019, indicating permanent disability for the injury of March 9, 2007, to the lumbar spine resulting in a 10% Whole Person Impairment.

After reviewing the additional records including the stipulations and Award and the prior report based on the current level of information, the 23% Whole Person Impairment for the lumbar spine should be subtracted from the 10% Whole Person Impairment for the lumbar spine resulting in a 13% impairment.

The Arbitrator finds that the medical report of Dr. Mir on the issues of apportionment and overlap is not substantial evidence because it is a mere conclusion and not supported by reasoning and does not contain an explanation of how and why there is overlap between the two injuries.

As set forth above the arbitrator finds that medical evidence is required on the issue of overlap and that medical evidence must be substantial medical evidence.

The Arbitrator finds that even if the report and interrogatory are admissible, the medical report of the Agreed Medical Evaluator is not based upon substantial evidence on the issue of Labor Code §4664 apportionment and overlap.

The defendants argue that even if the medical reports are not based upon substantial medical evidence, the Arbitrator and Board should find overlap based on the facts of the case.

Defendants argue that the trier-of-fact as a layman should consider that both injuries were to the back, that both injuries were rated based on the DRE method, and based on the facts surrounding the injuries no medical evidence is required, and the arbitrator should find overlap.

In the opinion of the Arbitrator as the trier-of-fact, the Arbitrator cannot take the place of substantial medical evidence and make a decision regarding overlap without medical evidence which supports that finding, and cannot conclude based on the fact both injuries were to the back, and both injuries used the DRE method for rating that there is overlapping disability between the two injuries without substantial medical evidence.

The Arbitrator found even if the interrogatory and medical report are admissible the medical report of the Agreed Medical Evaluator is not based on substantial medical evidence, substantial medical evidence is required on the issue of overlap, the defendant has the burden of proof on the issues of apportionment and overlap and defendant has not met their burden of proof on apportionment, and therefore applicant is entitled to an Award without apportionment.

The Arbitrator finds that the reports of the Agreed Medical Evaluator, while concluding that there is overlap and that the prior award should be subtracted, are not based on substantial evidence. The conclusion is unsupported by any reasoning and fails to explain how and why both injuries overlap.

The Arbitrator finds that apportionment is not warranted in this case because defendant has failed to meet their burden of proof on the issue of overlapping disability, based on the fact that apportionment is prohibited by the anti-attribution clause of Labor Code §4663 (e) is this is a presumptive injury.

E.

The defendants argue to allow an award without apportionment would be unjust enrichment to the applicant and therefore the apportionment should be applied.

The Arbitrator responds that Unjust Enrichment is not applicable to this case.

If the legislature decided by legislation that Labor Code §4664 apportionment should not apply to presumptive injuries case, this is in the prerogative of the legislature and would not result in unjust enrichment to the applicant.

If the defendant failed to meet their burden of proof on apportionment, this failure was a result of their actions in not cross-examining the physician and/or making sure the report was substantial evidence or by timely obtaining a proper supplemental report that is based on substantial medical evidence and therefore their failure to meet their burden of proof does not result in unjust judgment as it resulted from defendants failure.

F.

In addition, defendant argue they be awarded apportionment as a monetary credit.

This issue is not raised by defendant at the mediation or Arbitration and is brought for the first time on this Petition for Reconsideration is waived.

The defendant site debates case for this proposition, however, a review of the Bates decision discussed above, shows that both parties agreed the monetary credit would be appropriate.

In the Opinion of the Arbitrator, arguing that monetary credit should be allowed does not change the result either because the issue is not raised at the Mediation or at the Arbitration, and there is no case law or legal precedent support such a conclusion.

In addition, monetary credit does not change the result, as it does not change the fact that the anti-attribution precludes apportionment and defendants did not meet their burden of proof as to overlap. Therefore, allowing monetary credit would change both those results.

IV.

RECOMMENDATION

For the foregoing reasons it is recommended that defendants' Petition for Reconsideration be denied.

Dated: October 3, 2025

Respectfully submitted,

By:
MARK L. KAHN,
ARBITRATOR