

**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 and Award of December 19, 2025, 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 4% 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 32%, 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.¹

Applicant contends that the WCJ erred in finding compensable permanent disability of only 4%, 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.

¹ We issued a prior decision in this case on August 5, 2024. A different WCJ had issued a decision on May 20, 2024 finding permanent disability of 31% before apportionment and subtracting the prior 28% award, resulting in compensable permanent disability of 3%. Applicant sought reconsideration and we rescinded the WCJ's May 20, 2024 decision and returned the matter to the trial level to reanalyze the issues of permanent disability and apportionment.

As explained below, we will grant reconsideration, rescind the WCJ's decision, and return these matters to the trial level so that the record may be further developed on the issues of permanent disability and Labor Code section 4664 apportionment.

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 January 14, 2026 and 60 days from the date of transmission is Sunday, March 15, 2026. The next business day that is 60 days from the date of transmission is Monday, March 16, 2026. (See Cal. Code Regs., tit. 8, § 10600(b).)² This decision is issued by or on March 16, 2026, 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

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 January 14, 2026, and the case was transmitted to the Appeals Board on January 14, 2026. 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 January 14, 2026.

Turning to the merits, we repeat much of the factual history contained in our prior August 5, 2024 Opinion and Decision (see note 1, *ante*).

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.³ 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 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.

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

³ 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.)

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.

The matter went to trial with the above medical record. Despite the fact that Dr. Barber did not address section 4664 apportionment, a prior WCJ issued a May 20, 2024 decision applying section 4664 apportionment, finding 31% overall permanent disability based on the DRE cervical spine method, but subtracting the entire 28% prior award of permanent disability (also based on the DRE cervical spine method) to find 3% compensable permanent disability. Applicant sought reconsideration and on August 5, 2024, we granted reconsideration, rescinded the WCJ's decision and returned the matter to the trial level for further development of the record, analysis and decision with regard to permanent disability and apportionment. Among other things, we wrote that the reporting physicians 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" and discussed the fact that "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*.'"

After the issuance of our prior Opinion and Decision, Dr. Barber issued a supplemental report of July 10, 2025, in which she stated the following:

I have received a request for clarification and asked to address two specific points. The first involves the use of a DRE or Range of Motion Method. Typically, the Range of Motion Method is less accurate as it does not stand the test of time as range of motion for chronic injury may vary day to day or week to week.

However, per the legal guidelines as written, the Range of Motion Method is favored in situations in which multiple levels are involved. Therefore, I do think the most accurate and consistent rating is with the DRE Method in this case as Mr. Snow is status post C6-C7 discectomy and facetectomy with excellent improvement with the ability to return to full duty work and a lack of significant ADL loss of any type (and, with respect to the critique that my comment on his return to work relative to the shoulder ignored ADL consideration, I believe it was a lack of full explanation as opposed to failure to consider ADLs. I am well aware of the rather odd situation in which the AMA Guides are used for workers' compensation related disability tabulation when in fact the Guides specifically

exclude consideration of work in formulation of rating. However, the typical ADL review as given in Tables 1-2 and 1-3 of the Guides oftentimes themselves are limited in scope of review. I find that using both ADLs as determined from Table 1-2 in particular in conjunction with common sense review of activities at work provides the fullest basis upon which to compare deficits due to injury. In other words, work activities provide a secondary check of ADLs in an important sense of giving the full scope of a person's abilities). Specifically, it is my opinion that a DRE III or 15% whole person impairment was most accurate.

However, in reviewing the most recent diagnostic studies, it is noted that MRI of the cervical spine identified multilevel disc bulge greatest at C5-C6, C6-C7, C3-C4, and C4- C5. Therefore, given the multilevel involvement per the AMA Guides, 5th Edition, the Range of Motion Method is most appropriate.

Using the Range of Motion Method, the impairment rating for the cervical spine is as follows recalling first that there is four-level involvement. The reader is first directed to pages 418, Table 15-12. Cervical extension of 50 degrees equals a 1 % whole person impairment. Flexion of 60 degrees equals a 0% whole person impairment.

Turning to Table 15-13, right lateral bending of 30 degrees equals a 1% whole person impairment. Left lateral bending of 30 degrees also equals a 1% whole person impairment. With respect to rotation, the reader is directed to Table 15-14, 70 degrees of rotation is 0.5% whole person impairment for each direction.

The reader is then redirected to page 404. For the cervical spine, utilizing Range of Motion Method identified on pages 418 through 421 of the Guides to Evaluation of Permanent Impairment, 5th Edition. With respect to measured flexion of 60 degrees, a 0% whole person impairment is identified. With respect to extension of 50 degrees, a 1% whole person impairment is identified. As it relates to lateral bending, 30 degrees equals a 1% whole person impairment in each direction. With respect to the cervical spine rotation, 70 degrees equals a 0.5% whole person impairment for each direction. This equals a 4% whole person impairment.

Turning now to page 404, findings are consistent with IIF identified multilevel involvement with or without operations or with or without residual signs or symptoms. This equals a 9% for the cervical spine with an additional 3 % added for the additional three levels.

The third portion of the range of motion references the specific motor and sensory loss. This is not identified in this case. Therefore, the overall impairment rating for the cervical spine based on range of motion in February 2023 is 16% whole person impairment.

(July 10, 2025 report at pp. 2-3.)

Dr. Barber then sat for deposition on September 29, 2025, where she was first presented with the issue of Labor Code section 4664 apportionment. Dr. Barber suggested that she would be more comfortable analyzing the issue in a supplemental report, testifying “You want this to be done now in a deposition? I mean, that’s fine. But that’s not how I always think through something, but. You know, I usually have things around me that I think differently, but sure.” (September 29, 2025 deposition at p. 12.)

In response to questioning whether there was an “indication of overlap,” Dr. Barber responded, “well, the injuries involved the same level, so yes.” (September 29, 2025 deposition at p. 12.) Dr. Barber also testified that her DRE impairment rating overlapped with Dr. Moses’s prior DRE impairment rating. (September 29, 2025 deposition at p. 18.) However, asked to compare the pathology between the MRI’s underlying Dr. Moses’s impairment rating and the MRI underlying her own, Dr. Barber testified that there was not exact overlap and that “There’s actually more pathology on the 2021 [MRI] at different levels than the ... 2018 [MRI].” (September 29, 2025 deposition at p. 19.) Asked if these pathological differences could account for functional differences or differences in subjective complaints, Dr. Barber testified “I’m not able to say. Because both involve the right upper extremity, right arm. And ... every cervical nerve root involves a different part of the arm.” (September 29, 2025 deposition at p. 21.)

When cross-examined by applicant’s counsel about the existence of overlap, Dr. Barber testified, “I was asked at what level, whether the body part was overlapped, and it is, it’s both the cervical spine. But there’s a difference in what was injured in ... [the] 2018 MRI versus the 2021 MRI.” (September 29, 2025 deposition at p. 30.) Asked again, “So then do you think that these injuries don’t overlap then?” Dr. Barber answered, “Well, you’re asking me to be lawyer and doctor at the same time. So there’s two – legally, it involves the cervical spine.” (September 29, 2025 deposition at p. 31.)

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. “Overlap is not proven merely by showing that the second injury was to the same body part because the issue of overlap requires a consideration of the factors of disability ... resulting from the two injuries, not merely the body part injured. [Citations.]” (*Guedea v. Foley Family Wines, Inc.* (2024) 2024 Cal. Wrk. Comp. P.D. LEXIS 164, *20 [Appeals Bd. panel].)

As an Appeals Board panel discussed recently:

[O]verlap under the 2005 PDRS is shown on a legal basis when the second impairment is simply a progression of the first impairment utilizing the exact same chart or table within the AMA Guides.

In cases where the disability is not rated using a progression within the same chart or table, overlap is a factual issue requiring medical evidence establishing overlap between the two disabilities. In some cases, a doctor may deviate from using the same chart to rate the subsequent injury. For example, a doctor may rate an injury by analogy using other charts or tables in the AMA Guides. (*Milpitas Unified School Dist. v. Workers' Comp. Appeals Bd. (Almaraz-Guzman)* (2010) 187 Cal.App.4th 808, 822 [75 Cal.Comp.Cases 837].) Another example could occur where a low back injury is rated disparately using a Diagnosis Related Estimate in one case, and the Range of Motion method in another.

Where the disability is not rated using a progression within the same chart or table, overlap may be shown when the medical evidence demonstrates the following:

1. The impacts to the ADLs from the prior award of disability are to the same body region.
2. The impacts to the ADLs from the current award of disability overlap the impacts to the ADLs measured in the prior disability.

(*Canto Shadoan v. City of San Diego* (2025) 2025 Cal. Wrk. Comp. P.D. LEXIS 435, *16 [Appeals Bd. panel].)

Here, because the 2013 and 2021 injuries were rated under different methods, the first disability could only be subtracted from the first to the extent that there was substantial medical evidence based on medical probability that the first disability completely overlapped the ADL restrictions reflected in the second disability. Although the deposition contained some testimony regarding differences in functional limitations between the first and second MRI's and overlap

between applicant's complaints regarding activities of daily living, we believe that this issue must be more carefully and fully analyzed in a supplemental report. We note that to the extent that it cannot be determined to the proper legal standard that there is complete overlap between restrictions in activities of daily living, prior cases have held that permanent disability rated under one method of rating permanent disability was properly apportioned to a prior award of permanent disability rated pursuant to a different method if the prior disability could be converted to an impairment utilizing the same method as the current disability. (*Minvielle v. Workers' Comp. Appeals Bd.* (2010) 75 Cal.Comp.Cases 896 [writ denied].) In *Minvielle*, the agreed medical evaluator opined that it was not possible to re-rate the prior disability utilizing the same method as the subsequent disability. (*Minvielle*, 75 Cal.Comp.Cases at p. 901.) An Appeals Board panel therefore held that defendant did not prove overlap. (*Id.* at p. 903.) However, other cases found that defendant was able to prove overlap where the prior award was recalculated using the same metric as the current award and constituted substantial medical evidence. (*Canto Shadoan, supra*, 2025 Cal. Wrk. Comp. P.D. LEXIS at *20; *Robinson v. Workers' Comp. Appeals Bd.* (2011) 76 Cal.Comp.Cases 847 [writ den.].) Thus, Dr. Barber should determine if Dr. Moses's report can be "translated" into a range of motion impairment.

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, rescind the WCJ's decision, and return this matter to the trial level 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 and Award of December 19, 2025 is **GRANTED**.

IT IS FURTHER ORDERED as the Decision After Reconsideration of the Workers' Compensation Appeals Board that the Findings of Fact and Award of December 19, 2025 is **RESCINDED** and that this matter is **RETURNED** to the trial level for further proceedings and decision consistent with the opinion herein.

WORKERS' COMPENSATION APPEALS BOARD

/s/ KATHERINE A. ZALEWSKI, CHAIR

I CONCUR,

/s/ JOSEPH V. CAPURRO, COMMISSIONER

I DISSENT,

/s/ JOSÉ H. RAZO, COMMISSIONER



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

March 16, 2026

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

**MICHAEL SNOW
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*

DISSENTING OPINION OF COMMISSIONER JOSÉ H. RAZO

I respectfully dissent. I would have denied the applicant's Petition for the reasons stated by the WCJ in his Report and Recommendation on Petition for Reconsideration, which I quote below. In this case, Dr. Barber sufficiently discussed overlap between restrictions in activities in daily living underlying the prior award of permanent disability and her own findings. (September 29, 2025 deposition at pp. 23-26.)

REPORT AND RECOMMENDATION ON PETITION FOR RECONSIDERATION

I INTRODUCTION

Applicant, by and through his attorney of record, has filed a timely Petition for Reconsideration challenging the Findings of Fact & Award, Opinion on Decision, filed December 19, 2025.

II FACTS

Applicant, 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. Applicant was evaluated by AME Victoria Barber who initially assigned the neck a cervical DRE III at 15%.

Prior to the present injury, Applicant sustained an August 19, 2013, injury to the same body parts of neck and right shoulder. This injury was assigned ADJ9994609 and ultimately settled by Stipulations with Request for Award and Award on August 29, 2016, with an overall permanent disability of 32%. The settlement documents state the settlement was based on the March 22, 2016, AME report of Max Moses who assigned the neck a cervical DRE III at 15%. The settlement documents included a string rating for the neck of 15.01 .01.00 - 15 -[X1.4)21 - 4901 - 28 - 28%.

After trial before WCJ Paul Saltzen it was found that Defendant had established apportionment pursuant to California Labor Code (LC) §4664 and 3% permanent disability after such apportionment was awarded. Applicant sought reconsideration of the LC §4664 apportionment. The WCAB granted reconsideration as to the issues of permanent disability and apportionment. AME Dr. Barber was ordered to more fully discuss the proper rating method for the instant injury, including discussion of whether DRE method or the ROM method is appropriate. Dr. Barber was also ordered to discuss whether any other method within the four corners of the AMA Guides more accurately reflects the

applicant's permanent impairment. As result, AME Dr. Barber issued a supplemental report dated July 10, 2025 (Joint Ex. YY) and provided deposition testimony September 29, 2025 (Joint Ex. ZZ).

The matter proceeded to trial once again before WCJ Basso on November 24, 2025. After additional consideration of both the supplemental report of July 10, 2025 as well as deposition testimony of AME Dr. Barber, Findings of Fact, Award & Opinion on Decision issued December 19, 2025 (EAMS #79877029). After reviewing the additional evidence provided by Dr. Barber, it was found that the AME had provided a 16 WPI to the cervical based on ROM, that apportionment had been established pursuant to LC §4664 and 4% permanent disability after apportionment was awarded.

Applicant once again seeks reconsideration of LC §4664 apportionment.

III **DISCUSSION**

FF&A, Opinion on Decision

The initial Finding of Fact & Award, Opinion on Decision authored by WCJ Saltzen (EAMS #77972858) at page 6 contains the following discussion regarding application of LC §4664 apportionment to this claim:

Labor Code §4664(b) provides “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 presumption affects the employer's burden of proving apportionment by conclusively establishing the continuing existing of the prior disability when the defendant proves the existence of a prior permanent disability award (an applicant may not defeat an employer's apportionment showing by proving medical rehabilitation from a prior permanent disability for which he or she received permanent disability benefits), however it does not completely carry it, because, to establish entitlement to apportionment, the employer must still prove overlap, if any, between the prior disability and the current disability. Kopping v WCAB (2006) 142 CA4th 1099, 1114, 71 CCC 1229. See Wynne v WCAB (2011) 76 CCC 865 (writ denied), “With regard to section 4664(b), it is important to note that before such apportionment can apply, a defendant must prove both the existence of a prior award and overlap of the permanent disability caused by the two injuries”.

The Appeals Board has stated that the preferred method for a defendant to establish the existence of a prior permanent disability award is to offer in

evidence a copy of the award or request the WCJ or Board to take judicial notice of it. Sanchez v WCAB, 70 CCC 1440, at 1451; Strong v WCAB, 70 CCC 1460, at 1471.

Overlap is not proven merely by showing that the second injury was to the same body part, because the issue of overlap requires a consideration of the factors of disability or work limitations resulting from the two injuries, not merely the body party injured. Contra Costa County Fire Protection Dist. v WCAB (Minvielle) (2010) 75 CCC 896 (writ denied). The existence and extent of overlap is a question of fact to be determined by the WCJ or Appeals Board based on substantial evidence. County of Los Angeles v WCAB (Seafus) (2014) 79 CCC 580 (writ denied).

In the present matter Defendant submitted Stipulations with Request for Award and Award for Applicant's prior neck and right shoulder injury resulting in 32% permanent disability. The stipulations provide the string rating for the neck as 15.01 .01.00 - 15 - [X1.4]21 - 4901 - 28 - 28%. (EXH B & C). Defendant has met the first requirement for apportionment under Labor Code §4664.

Although the current AME, Dr. Barber, states Applicant was able to significantly rehabilitate from the earlier injury and return to full duties (EXH XX pg. 2), such medical rehabilitation is excluded from consideration. (Kopping supra). Because AME Barber relies on impermissible medical rehabilitation in formulating apportionment opinions under Labor Code §4663, the AME's opinions on apportionment pursuant to Labor Code §4663 are based on an incorrect legal theory and may not be followed.

Both the prior and current neck disability is described with the same DRE. Applicant's prior neck permanent disability was based on a cervical DRE Category III and was assigned 15% WPI. (EXH A pg. 10). At that time “[t]he claimant is able to work full duty with no restrictions. He has been doing so and should continue to do.” (EXH A pg. 9). The current neck disability is also based on DRE Category III, 15% whole person impairment. (EXH VV pg. 17). “Mr. Snow may continue to perform his usual and customary duties. He is scheduled to return to work full duty on February 3, 2023.” (EXH W pg. 18).

Both DRE and work restrictions are the same.

On this record Applicant's neck permanent disability from his August 19, 2013, injury completely overlaps the permanent disability from his March 22, 20121, injury.

Defendant has established apportionment pursuant to LC §4664.

In considering Labor Code §§4663 and 4664, the percentage of disability attributable to the new injury is found by subtracting the old rating from the new rating, then consulting the table for the award due this difference (the approach dubbed Formula A). Brodie v. WCAB, 40 C4th 1313, 1321-1322, 72 CCC 565, (Citing Fuentes v. WCAB, 16 C3d 1, 41 CCC 42). This is because the formula approved in Fuentes still applies after the Legislature changed apportionment with SB 899. Brodie supra at 1325.

Petition for Reconsideration

It appears the most succinct statement of Applicant's position occurs at page 5 of the Petition for Reconsideration (EAMS #61930157), line 27, through page 6, line 9, as follows:

Here, Dr. Victoria Barber, the AME, specifically compared the prior industrial injury to the present industrial injury. She reviewed significant medical records including AME reports and diagnostic studies from a prior claim. The AME found that when she compared the MRIs prior to the 2021 injury with those performed after the injury, there was no significant pathology at the C6-C7 level, which is the primary focus of the present injury. In other words, the present injury is to a different spinal segment. She notes that surgery was only considered in conjunction with the 3/22/21 date of injury, and the applicant did in fact, undergo surgery. Dr. Barber does utilize §4663 apportionment because the previous injury had injuries at multiple levels, it would have lowered his threshold for injury and because of that she apportioned 20% of the current disability to the prior injury. (Joint Exhibit W, YY, ZZ).

In essence, Applicant continues to argue LC §4664 apportionment does not apply because applicant sustained injury to a new level of the neck, C6-7, which resulted in the need for surgery.

Analysis

It is undisputed Applicant sustained a new injury in the present matter resulting in the need for neck surgery. As noted above, the question is not what specific body part or segment was injured, nor even the severity of the treatment required, but rather do the disabilities and work restrictions overlap. Minvielle supra.

Here both disabilities from the injuries are described as resulting in at least Cervical DRE III at 15%. The work restrictions from the injuries are both

described as return to work without limitations. There is no difference. There is complete overlap.

Apportionment pursuant to LC §4664 is legally required.

To allow LC §4664 apportionment to be defeated by showing that Applicant's pre-injury pathology was altered by an industrial injury (even if that alteration leads to surgery) as argued by Applicant, would leave LC §4664 a dead letter. Such a position would defeat LC §4664 apportionment most cases before the WCAB where it would otherwise apply.

As to the previous development of the record as instructed by the Worker's Compensation Appeals Board, Dr. Barber was ordered to fully discuss the proper rating method for the instant injury, including discussion of whether DRE method or the ROM method is appropriate. Dr. Barber was also ordered to discuss whether any other method within the four corners of the AMA Guides more accurately reflects the applicant's permanent impairment.

At the time of Dr. Barber's deposition, she analyzed factors of overlap. The AME discussed Dr. Moses noting the prior involvement of C5-C6 & C6-C7 as being involved in the prior and present injury; diagnostics being performed previously at the prior, similarly-involved levels of the cervical spine; that if DRE is applied, the applicant rates a DRE-III as to both the present and prior injury; the general overlap of subject complaints between the present and prior injury; the similarity of abnormal findings found by Dr. Moses as to the 2013 date of injury compared to the present injury in that both involved a right upper extremity radiculopathy; the similarities between complaints associated with ADL's between the prior and present injury. (Ex. ZZ at 15-25).

Dr. Barber's deposition testimony, when viewed in connection with her prior reporting, is persuasive to establish overlap to justify apportionment based upon LC §4664.

As overlap exists, the board has previously found it permissible to apply LC §4664 where the prior disability was determined using DRE, while the subsequent disability was determined using ROM, for purposes of apportionment. Hom v. City & County of San Francisco, 2020 Cal. Wrk Comp. P.D. LEXIS 124. In the present Petition, Applicant has acknowledged as correct LC §4664 can be used to support apportionment when two different rating methods are used.

Applicant attempts to distinguish Smith v. City of Berkeley, 2020 Cal. Wrk. Comp. P.D. LEXIS 245 as more applicable, noting in Smith the WCJ found no overlap when the injury at issue was rated utilizing a different chapter than the prior injury. Applicant acknowledges in the present case the AME initially utilized the same chapter of the AMA Guides, prior to being ordered to develop

the record. The AME continued to indicate the same chapter of the AMA Guides should apply at the time of her deposition (Joint Exhibit ZZ, pg. 9). The court is unpersuaded Smith is dispositive considering AME Dr. Barber's analysis of overlapping factors (Ex. ZZ at 15-25).

For the foregoing reasons Applicant's Petition for Reconsideration should be denied.

IV
RECOMMENDATION

It is recommended that the Petition for Reconsideration be denied.

Accordingly, I would have denied the applicant's Petition. I therefore respectfully dissent.



WORKERS' COMPENSATION APPEALS BOARD

/s/ JOSÉ H. RAZO, COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

March 16, 2026

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

**MICHAEL SNOW
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