

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

ROGELIO MALDONADO, *Applicant*

vs.

**AL LOWE CONSTRUCTION, INC.; EVEREST NATIONAL INSURANCE COMPANY,
administered by AMERICAN CLAIMS MANAGEMENT, INC., *Defendants***

**Adjudication Number: ADJ11198598
Oxnard District Office**

**OPINION AND DECISION
AFTER RECONSIDERATION**

We previously granted reconsideration in this matter to provide an opportunity to further study the legal and factual issues raised by the Petition for Reconsideration. Having completed our review, we now issue our Decision After Reconsideration.

Applicant seeks reconsideration of the April 25, 2025 Findings and Order (F&O), wherein the workers' compensation administrative law judge (WCJ) found that applicant, while employed as a laborer on February 20, 2017, sustained industrial injury to his left knee and low back. The parties resolved the claim by way of stipulated award on September 18, 2019, and applicant petitioned to reopen the award for new and further disability on October 7, 2021. Applicant also sustained a June 8, 2020 injury to the right knee, which the parties resolved by way of Compromise and Release on April 12, 2024. Relying on the apportionment analysis of the Agreed Medical Evaluator (AME) for the 2017 claim, the WCJ determined that applicant's net residual disability for the left knee and low back is not presently greater than it was at the time of the prior stipulated award. Accordingly, the WCJ denied applicant's Petition for New and Further Disability.

Applicant contends the AME impermissibly apportions the permanent disability that is conclusively presumed to exist following the issuance of the 2019 stipulated award.

We have not received an answer from any party. The WCJ prepared a Report and Recommendation on Petition for Reconsideration (Report), recommending that the Petition be denied.

We have considered the Petition for Reconsideration and the contents of the Report, and we have reviewed the record in this matter. For the reasons discussed below, we will rescind the F&A and return this matter to the trial level for further proceedings and decision by the WCJ.

FACTS

The relevant factual background is set forth in our September 2, 2025 Opinion and Order Granting Petition for Reconsideration, as follows:

The instant dispute involves a pending Petition to Reopen for New and Further Disability filed in Case No. ADJ11198598. Therein, applicant received a September 18, 2019 Award for 42 percent permanent partial disability arising out of a February 20, 2017 injury to the left knee and low back. (Minutes of Hearing and Summary of Evidence (Minutes), dated May 31, 2024, at p. 2:12.) Applicant filed a Petition to Reopen the claim for new and further disability on October 7, 2021.

Applicant has also filed Case No. ADJ15299369 involving a specific injury on June 8, 2020 to the right knee. The matter settled by Compromise and Release approved on April 12, 2024.

The parties to the present case have selected Peter Newton, M.D., as the Qualified Medical Evaluator (QME) in orthopedic medicine. Dr. Newton has evaluated applicant with respect to both the original injury as well as applicant's pending Petition to Reopen for New and Further Disability.

Dr. Newton's report of October 17, 2023 reflects a reevaluation of applicant including a clinical evaluation and record review. (Ex. B, Report of Peter Newton, M.D., dated October 17, 2023, at p. 1.) Dr. Newton finds increased whole person impairment as compared to applicant's prior evaluations, but also finds apportionment as follows:

To a reasonable degree of medical probability, 75% of this applicant's current lumbar spine and left knee condition/disability/impairment is apportioned to the 02/20/17 injury and 25% as a sequela of the 2020 injury which has caused a significantly abnormal gait aggravating both his low back and left knee.

To a reasonable degree of medical probability, 100% of this applicant's current right knee condition/disability/impairment is apportioned to the 2020 injury.

(*Id.* at p. 16.)

The WCJ's decision applied the apportionment described by QME Dr. Newton and based thereon, determined that "[a]pplicant's disability for the left knee and low back arising out of this injury is not greater than it was at the time of the stipulated award dated [September 18, 2019]." (Finding of Fact No. 5.)

Applicant's Petition contends that Dr. Newton's apportionment opinion is conclusory and unsupported in the evidentiary record. (Petition, at p. 7:3.) Applicant further contends that the QME is proceeding from an incorrect legal premise because applicant has received a prior award of permanent disability that is conclusively presumed to exist at the time of any subsequent industrial injury. (Lab. Code, § 4664(b).)

(Opinion and Order Granting Petition for Reconsideration, dated September 2, 2025, at pp. 4-5.)

The WCJ's Report observes that the parties selected Dr. Newton as the AME with respect to the applicant's February 20, 2017 injury and resolved the claim based on his opinions. Following the filing of applicant's Petition for New and Further Disability, the parties returned to Dr. Newton, who issued an October 17, 2023 report in which applicant's disability levels for the low back and left knee were noted to have increased. However, the report identified applicant's interceding 2020 right knee injury as a partial cause of applicant's overall left knee and low back disability and apportioned 25 percent of the entirety of applicant's left knee and low back disability to the 2020 right knee injury. (Report, at pp. 2-3.) Following the application of 25 percent apportionment to applicant's present overall disability the WCJ determined that applicant's present disability was not greater than that identified in the existing stipulated award. Accordingly, the WCJ found no basis upon which to award new and further disability. (Report, at pp. 5-7.)

DISCUSSION

Applicant contends our decision in *Vargas v. Atascadero State Hosp.* (2006) 71 Cal.Comp.Cases 500 [2006 Cal. Wrk. Comp. LEXIS 116] (Appeals Bd. en banc) (*Vargas*) precludes the retroactive apportionment of a previously resolved award of permanent disability. We agree.

In *Vargas*, we addressed the extent to which the changes made under SB899 would apply to applicant's pending Petition to Reopen for New and Further Disability. We wrote:

In *Marsh v. Workers' Comp. Appeals Bd.* (2005) 130 Cal.App.4th 906 [30 Cal.Rptr.3d 598] [70 Cal.Comp.Cases 787], wherein a petition to reopen was pending on the date of SB 899's enactment, the Court held that the apportionment provisions of SB 899 must be applied to all cases not yet final at

the time of the legislative enactment on April 19, 2004, regardless of the earlier dates of injury and any interim decision. (See also, *Kleemann v. Workers' Comp. Appeals Bd.* (2005) 127 Cal.App.4th 274 [25 Cal. Rptr. 3d 448] [70 Cal.Comp.Cases 133] (in which the Court reached a similar conclusion wherein a petition to reopen was pending on the date of SB 899's enactment); cf., *Rio Linda Union School Dist. v. Workers' Comp. Appeals Bd. (Scheftner)* (2005) 131 Cal.App.4th 517 [31 Cal. Rptr. 3d 789] [70 Cal.Comp.Cases 999].)

Accordingly, and consistent with the principles stated in *Marsh*, we conclude that the new apportionment provisions of SB 899 apply to the issue of increased permanent disability alleged in any petition to reopen (see sections 5803, 5804, 5410) that was pending at the time of the legislative enactment on April 19, 2004, regardless of date of injury.

(*Id.* at p. 505-506.)

However, notwithstanding the applicability of the new apportionment standards described in the reform legislation of SB899, we nonetheless noted that, “in applying the new apportionment provisions to the issue of increased permanent disability, the issue must be determined without reference to how, or if, apportionment was determined in the original award.” (*Id.* at p. 507.) We acknowledged that “to the extent that applicant’s neck and upper extremity injury may have resulted in increased permanent disability, any such increased disability will be subject to apportionment under the new law, provided there is substantial medical evidence establishing that these other factors have caused increased permanent disability.” However, because the prior award was finalized, “the new apportionment statutes cannot be used to revisit or recalculate the level of permanent disability, or the presence or absence of apportionment, determined under a final order, decision, or award issued before April 19, 2004.” (*Id.* at p. 508.)

Accordingly, any increased permanent disability alleged in a petition to reopen for new and further disability must be determined without reference to how or if apportionment was determined in the original award. (*Vargas, supra*, at p. 502; see also *Wilson-Marshall v. Workers' Comp. Appeals Bd.* (2007) 72 Cal.Comp.Cases 1431 [2007 Cal. Wrk. Comp. LEXIS 304] (writ den.); *Loyola v. Storyteller Children's Center* (April 20, 2026, ADJ11832412) [2026 Cal. Wrk. Comp. P.D. LEXIS 122]; *Knapp v. Dept. of Social Services, In-Home Supportive Services* (March 21, 2019, ADJ700838 (SRO 0096054), ADJ414827 (SRO 0096056), ADJ178893 (SRO 0096055)) [2019 Cal. Wrk. Comp. P.D. LEXIS 102]; *Ortiz v. Travelodge Motel* (September 23, 2013, ADJ1907210 (VNO 0398521), ADJ171619 (VNO 0398522), ADJ3636036 (VNO 0438006)) [2013 Cal. Wrk. Comp. P.D. LEXIS 570]; *Myers v. Pomona Unified School Dist.* (June

18, 2013, ADJ4053395 (MON 0246454)) [2013 Cal. Wrk. Comp. P.D. LEXIS 324]; *Ortiz v. Orange County Transp. Auth.* (August 16, 2012, ADJ2033351 (ANA 0389567)) [2012 Cal. Wrk. Comp. P.D. LEXIS 429]; *Balderas v. GTE Corp.* (July 1, 2010, ADJ2405891 (GRO 0022758)) [2010 Cal. Wrk. Comp. P.D. LEXIS 270]; *Hartfield v. Los Angeles Unif. School Dist.* (September 24, 2009, ADJ1687053 (MON 0281584)) [2009 Cal. Wrk. Comp. P.D. LEXIS 453].)

Here, AME Dr. Newton has attributed 25 percent of applicant's *overall* residual permanent disability to the sequelae of the 2020 injury. We observe that insofar as the AME applies apportionment to previously awarded permanent disability, the apportionment is inconsistent with our holding in *Vargas, supra*, 72 Cal.Comp.Cases 1431, and is legally incorrect.

We also observe that the net effect of such purported apportionment would be to apportion the permanent disability arising out of applicant's February 20, 2017 injury *to a causal factor that had not yet occurred*, i.e., the June 8, 2020 right knee injury. Pursuant to section 4664(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." Here, applicant's June 8, 2020 injury could not have been a contributing factor to permanent disability that existed prior to that injury date.

While later identified apportionment as part of new and further disability proceedings may not be retroactively applied to an underlying permanent disability that was the subject of a finalized award, it nonetheless may be applicable to *new and further* permanent disability beyond that which was previously awarded. Accordingly, we will rescind the F&O and return this matter to the trial level to allow the WCJ to determine whether defendant has met its burden of establishing apportionment of the alleged new and further disability, and if so, to issue an award reflecting such apportionment insofar as it is valid and legally permissible.

In summary, we find that while apportionment may be applicable to any new and further permanent disability that has developed after the September 18, 2019 Award, such apportionment would not apply to the underlying 42 percent permanent disability previously awarded. We will rescind the F&O and return this matter to the WCJ for such further proceedings and decisions by the WCJ as may be required, consistent with this opinion.

For the foregoing reasons,

IT IS ORDERED, as the Decision After Reconsideration of the Workers' Compensation Appeals Board, that the April 25, 2025 Findings and Orders is **RESCINDED** and that this matter is **RETURNED** to the trial level for such further proceedings and decisions by the WCJ as may be required, consistent with this opinion.

WORKERS' COMPENSATION APPEALS BOARD

/s/ JOSEPH V. CAPURRO, COMMISSIONER

I CONCUR,

/s/ JOSÉ H. RAZO, COMMISSIONER

KATHERINE WILLIAMS DODD, COMMISSIONER
CONCURRING NOT SIGNING



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

July 30, 2026

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

**ROGELIO MALDONADO
LAW OFFICE OF JOHN SUGDEN
COLANTONI, COLLINS, MARREN, PHILLIPS & TULK**

SAR/abs

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