



New Case Brief
Prepared by San Jose
Marlin Holmoe, Esq.

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Sanchez v. County of Los Angeles
(2005) 70 Cal.Comp.Cases ___ [WCAB En Banc]

Strong v. City and County of San Francisco
(2005) 70 Cal.Comp.Cases ___ [WCAB En Banc]

In *Sanchez*, WCAB *En Banc* address the issue of apportionment of PD from the *same region of the body* when the prior Award was based on work restrictions and the subsequent injury is based on subjective factors only. In *Strong*, the WCAB *En Banc* addressed the issue of apportionment of PD and overlapping disabilities relating to *different regions of the body*.

In *Sanchez*, the applicant suffered a prior bilateral knee injury while employed as a deputy sheriff on 10/10/97. She received a stipulated 22% PD Award, based upon an AME report establishing her loss of 35% of pre-injury capacity for activities. The parties also stipulated to the rating formula "14.5-15%-490-21-22." The issue for this case was the percentage of PD to be awarded, for a subsequent injury to the left foot on 12/18/02. The parties stipulated to PD for the left foot of 7%, based on an AME report establishing subjective disability of intermittent slight pain becoming moderate with weather.

The WCJ issued a decision finding that applicant's 12/18/02 left foot injury resulted in 7% PD, without apportionment. Defendant filed a Petition for Reconsideration arguing that (1) the factors of disability from the subsequent left foot 12/18/02 injury were completely overlapped by the factors of disability from her prior 10/10/97 bilateral knee injury for which she received 22%, and (2) that new Labor Code §4664(b) provides that the prior 22% awarded is to be conclusively presumed to exist at the time of her subsequent injury.

After applicant filed her Answer, the WCJ issued a Report and Recommendation on Petition for Reconsideration recommending that defendant's petition be denied because there is no overlap between the current left foot disability, which was based solely on subjective complaints, and her prior bilateral knee disability based solely on work restrictions.

The WCAB discussed overlapping disabilities determined prior to SB 899 and new §4664. The WCAB noted the long standing cases interpreting former §4750, and the intended policy to encourage employment of persons with disabilities,

citing among other cases the most recent Supreme Court case of Mercier v. WCAB (1976) 16 Cal.3d 711 (41 Cal. Comp. Cases 205).

In determining overlapping disabilities after SB 899 and new §4664, the Commissioners held that defendant proved that the prior award of 22% PD conclusively presumed to exist by providing a copy of the Stipulated Findings and Award; Applicant was not entitled to assert that she had medically rehabilitated from her prior bilateral knee injury; but that she did disprove apportionment by demonstrating that the prior PD did not overlap with the subsequent PD, either in whole or in part. She demonstrated that the pre-existing disability resulted solely in diminished capacity to perform specified work activities, which does not overlap with the current disability of subjective pain – because the prior and current disabilities affect her abilities to compete and earn in separate and independent ways. The WCJ's finding of new PD of 7% was therefore affirmed, without apportionment.

The Opinion and Decision held:

1. Where an employee suffers an industrial injury causing permanent disability, and where there is a prior award of permanent disability relating to the same region of the body, section 4664 requires the apportionment of overlapping permanent disabilities:

(a) §4664(c)(1) implicitly contemplates that, the WCAB *must* consider whether the disability caused by a new injury overlaps the disability that was the subject of a prior award because if overlap or the absence of it is not considered, the percentage of PD caused by all prior injuries would simply be subtracted from the overall percentage of PD present to the same region. The result would be that the applicant with a prior award or awards of PD to the same region could *never* accumulate to a total of 100% for that region, absent a new injury that is conclusively presumed to be totally disabling or is so based on the evidence. This result would contravene the language allowing for successive PD awards for one region to accumulate to 100%.

However, if the *new* non-overlapping disability is caused by the new work injury, then the successive PD can reach a total of 100%, but *the employee will not be compensated twice for the same disability.*

(b) §4664(b) requires a determination regarding the *consequences* of the previously existing PD – If the pre-existing PD and the current PD overlap, there will be subtraction to the extent of that overlap, but, otherwise, there will be no subtraction.

2. The defendant has the burden of proving the existence of any prior permanent disability award(s) relating to the same region of the body;

(a) If, for some reason, a copy of the prior PD award cannot be produced, then the existence of any prior PD award may be shown by secondary evidence – If the secondary evidence is sufficiently reliable and sufficiently establishes the substance of the lost or destroyed award.

3. When the defendant has established the existence of any prior permanent disability award(s) relating to the same body region, the permanent disability underlying any such award(s) is conclusively presumed to still exist, i.e., ***the applicant is not permitted to show medical rehabilitation*** from the disabling effects of the earlier industrial injury or injuries;

(a) Because §4664(b) mandates that “it shall be conclusively presumed that the prior PD exists,” the WCAB concluded that the legislature intended to repeal the prior line of cases that allowed evidence to show medical rehabilitation from the effects of an earlier injury at the time of the subsequent injury.

4. When the defendant has established the existence of any prior permanent disability award(s) relating to the same region of the body, the percentage of permanent disability from the prior award(s) will be subtracted from the current overall percentage of permanent disability, ***unless the applicant disproves overlap***, i.e., the applicant demonstrates that the prior permanent disability and the current permanent disability affect different abilities to compete and earn, either in whole or in part;

(a) Reading the first and second sentences of §4664(b) together, the WCAB found that the conclusive presumption in the first operates in favor of defendant, and thus, the second must be interpreted to require applicant to disprove something, while at the same time not nullifying whatever has been conclusively established. Thus *applicant must disprove the existence of overlap by establishing the nature of the PD upon which the prior PD award was based, rather than requiring the defendant to prove the existence of overlap by establishing the nature of the PD.*

This is because, once the *character* of the PD underlying the prior PD award is established, the determination of apportionment is essentially a mechanical process – not a burden of proof issue.

Once applicant introduces evidence to show the present and prior disabilities do not overlap, then defendant is entitled to introduce rebuttal evidence to show why overlap should be found.

5. The issue of whether the prior permanent disability for the same region of the body overlaps the current disability is determined using substantially the same principles that were applied prior to the enactment of section 4664;

6. The sum of the permanent disability awards for any one body region cannot exceed 100%, even where the permanent disability caused by the applicant's new injury does not overlap the permanent disability underlying the prior award(s), unless the employee's new industrial injury causes disability that is conclusively presumed to be total under section 4662.

In *Strong*, applicant sustained injury to his left knee on 11/27/95 while employed as an engineer. He received a stipulated award of 34-1/2% PD based on the report from the treater indicating a disability precluding heavy lifting, and a summary rating determination (SRD) admitted at trial. Applicant sustained a second injury on 2/12/99 to his left shoulder, left knee, left ankle and right wrist. He received a stipulated award of 42% PD, based on a summary rating determination (SRD) from the report of the same treating physician indicating a limitation to light work, after apportionment to the prior preclusion fro heavy lifting. Applicant also sustained a third injury to his back on 5/8/02. The same treating physician reported that applicant's present *overall* disability is a limitation to semi-sedentary work and that the *increase* in disability from the limitation to light work is as a result of the 5/8/02 injury to his back.

At trial, the reports of the treating physician, the prior stipulated awards, and the SRDs were all admitted into evidence. The parties also stipulated that the *overall* PD is 70%, after adjustment. Thereafter, the DEU issued a recommended PD rating indicating that: 1) applicant's pre-existing light work limitation rated 60% after adjustment, and 2) the 5/8/02 injury caused 10% PD after apportionment (ie. the stipulated 70% overall minus the 60% pre-existing disability).

The WCJ issued a Findings and Award determining that the 5/8/02 back injury caused 10% PD.

Applicant filed a petition for reconsideration contending that: 1) under §4664(a), the employer is liable for the percentage of PD directly caused by the injury – that the 5/8/02 back injury caused 70% PD; 2) because the 70% PD caused by the 5/8/02 injury is all in the region of the back, then under §4664(c)(1), there cannot be apportionment to pre-existing disability in other regions of the body; and 3: if apportionment is to apply it is limited to subtracting the monetary equivalent of the pre-existing from the current overall disability.

Defendant filed an Answer asserting 1) the repeal of former §4750 did not eliminate the principle of overlapping disability; and 2) under Nabors, the amount of indemnity due is calculated after subtracting the other factors from the overall percentages of disability.

Based on the principles as held in Sanchez reported above, the WCAB held that the WCJ correctly determined that the 5/8/02 back injury caused 10% PD, after apportionment, and affirmed the WCJ's decision. The WCAB found that defendant met its burden to establish the existence of the pre-existing disability by submitting the prior awards. The WCAB also found that the applicant succeeded in disproving total overlap when he established there is only partial overlap. The pre-existing light work limitation only partially overlaps the current overall semi-sedentary limitation, based upon review of the April 1997 Scheduled for Rating PD. Therefore, applicant is entitled to be compensated for the difference (and is therefore precluded from being paid twice for the same disability).

Practice Pointer: The WCAB has provided substantial guidance on the subject of apportionment and overlap, as seen in the length of the summary above. However, these cases still leave us with unresolved issues of how to apportion disability determined from different schedules (under the April 1997 Schedule and under the January 2005 Schedule); whether specific factors of disability underlying a prior award must be shown to disprove overlap; and, whether applicant may still show medical rehabilitation to avoid apportionment under new §4663 in future cases. On the other hand, this reviewer believes that these cases will assist to advance clarity of argument in reaching fair and balanced settlements as well as to frame the issue of PD and apportionment for trial.