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California: An Ode to the Intellectual Honesty and Integrity of the WCAB: *Hom v. City and County of San Francisco*, 2020 Cal. Wrk. Comp. P.D. LEXIS 124

I recently reviewed the WCAB's panel decision in *Hom v. City and County of San Francisco*, [2020 Cal. Wrk. Comp. P.D. LEXIS 124](#) (*Hom II*). The case is substantively significant in terms of its interpretation and application of the Labor Code 4664(b) conclusive presumption related to prior awards of permanent disability. However, it was the procedural history in *Hom II* that caught my attention to the extent that I was actually inspired, which for me is not a state of mind and soul normally engendered by reading scores of apportionment cases!

First, a little history related to the two *Hom* cases is necessary to set the stage. Yes, there are actually two separate *Hom* panel decisions from the Board which I have labeled as *Hom I* and *Hom II* for easy reference. The WCAB's panel's decisions in *Hom I* issued on September 12, 2018, see *Hom v. City and County of San Francisco* [2018 Cal. Wrk. Comp. P.D. LEXIS 431](#). I included a lengthy summary and analysis of *Hom I* in my January 2020 Apportionment Case Law Supplement at pages 109-112.

The *Hom II* panel decision was recently selected by the LexisNexis Workers' Compensation Newsletter, Vol. 11, Issue 23, July 20, 2020, as one of their "[Top Noteworthy Panel Decisions \(January through June 2020\) \(Part Two\)](#)." From a substantive standpoint, the staff at LexisNexis did a great job of summarizing the WCAB's decision in *Hom II*. However, for me, the most provocative and inspirational aspect of the case is its procedural history, which evidenced a refreshing example of the WCAB's intellectual honesty and integrity.

Procedural Overview

Hom I: The WCAB issued their decision in *Hom I* on September 12, 2018, in which they adopted and incorporated the WCJ's Report on Reconsideration in denying defendant's Petition for Reconsideration and affirming the WCJ's unapportioned award of 30% lumbar spine permanent disability. Defendant then filed a Petition for Writ of Review with the Court of Appeal. Even before the Court of Appeal could act on defendant's writ, the Board on its own motion granted reconsideration on November 13, 2018. What caused the WCAB in somewhat of a rare procedural action to grant reconsideration on its own motion without any direction whatsoever from the Court of Appeal?

Hom II: As stated by the Board in *Hom II*, "[i] light of the defendant's arguments in the writ petition, we granted reconsideration on our own motion to further study and deliberate on this matter." Either one of the Commissioners or one of their crack legal staff, or both, took the time to read and consider defendant's writ that was served contemporaneously on the Board when it was filed with the Court of Appeal. Not only did they read the defendant's petition, they also found merit in defendant's arguments and quickly took the rather rare and extraordinary procedural action of granting reconsideration of their prior panel decision in *Hom I* on their own motion.

The WCAB engaged in further study and deliberation of the case, and issued a second panel decision (*Hom II*) in which they demonstrated an exemplary degree of intellectual honesty and integrity in admitting they were dead wrong with respect to their prior decision in *Hom I*, or in common law parlance they "confessed error." The wording of the Board's confession of error is refreshingly direct, honest, and unadorned.

As explained below, our prior decision was in error, as Labor Code 4664 apportionment is not always precluded when different methodologies are used to determine whole

person impairment. We therefore, rescind our Decision affirming the WCJ, rescind the WCJ's underlying decision, and issue a new decision reflecting that applicant has sustained compensable permanent disability of 10% after apportionment.

As if one confession of error was not enough, the Board panel took pains to restate it again later in the decision. "Having reconsidered the issue, we find that our previous decision was in error. Overlap between injuries is not precluded merely because different AMA Guides methodologies were utilized in formulating whole person impairment." In *Hom II*, when the Board refers to different AMA Guides methodologies, they were specifically referring to the AMA Guides, Fifth Edition, which applied to both of applicant's specific lumbar spine injuries of July 29, 2012 and November 16, 2013. It is important to note that the Board's analysis in *Hom II* does not apply to separate injuries that fall under two different rating schedules such as the 1997 and 2005 PDRS schedules.

Summary and Analysis of the WCAB's Decision in *Hom II*: The underlying facts in both *Hom I* and *Hom II* are exactly the same. The applicant, a San Francisco Police Officer, suffered a specific lumbar spine injury on July 29, 2012. On July 2, 2013, the case settled pursuant to Stipulations with Request for Award for 20% permanent total disability. The lumbar spine disability in that case was determined by a primary treating physician who used the DRE metric of the AMA Guides, Fifth Edition to determine applicant's lumbar spine whole person impairment. (WPI)

The applicant suffered a subsequent admitted injury to his lumbar spine on November 16, 2013. With respect to the November 16, 2013 injury, the reporting physician was an orthopedic AME. In evaluating the applicant's lumbar spine impairment related to the November 16, 2013 injury, the AME also used the AMA Guides, Fifth Edition, but used the ROM method or metric, instead of the DRE method to rate applicant's lumbar spine WPI. After adjustment for age and occupation the final rating for applicant's lumbar spine injury of November 16, 2013 was 30% before apportionment. The AME opined that there appeared to be a basis for apportionment under L.C. 4664(b).

Defendant sought apportionment under L.C. 4664(b) by way of the conclusive presumption of pre-existing permanent disability based on the prior June 2, 2013 award of 20% lumbar spine PD to be subtracted from the overall 30% PD determined by the

AME related to the applicant's second "recurrent" lumbar spine specific injury of November 16, 2013.

The WCAB's Erroneous Panel Decision In *Hom I*: In *Hom I* the WCAB erroneously ruled that while the defendant was able to prove up the existence of the prior June 2, 2013 award of 20% permanent disability, they were unable to prove overlap of permanent disability between the initial lumbar spine injury of July 29, 2012 and the subsequent lumbar spine injury of November 16, 2013.

In *Hom I* the WCAB also erroneously reasoned that even when using the same rating schedule in order for a defendant to prove overlapping disabilities, the same metrics must also be used to measure impairment with respect to successive dates of injury. The applicant's lumbar spine disability of 20% related to the first specific lumbar spine injury of July 29, 2012, was calculated using the DRE method of the AMA Guides Fifth Edition. The subsequent 30% PD lumbar disability related to the second specific injury of November 16, 2013, was calculated using the ROM method. Since two different impairment metrics were used, the Board in *Hom I* erroneously reasoned there could not be a legal finding of "overlap" between the lumbar spine disabilities resulting from both separate injuries. As a consequence, the WCAB in *Hom I* erroneously concluded applicant was entitled to an unapportioned award of 30% permanent disability.

The WCAB's Revised Analysis and Holding in *Hom II*: The Board, in admitting their decision in *Hom I* was in error, completely revised their analysis and holding in *Hom II* and found the defendant satisfied the dual burden of proof under 4664(b) pursuant to the Court of Appeal's decision in *Kopping v. Workers' Comp. Appeals Bd.* (2006) 142 Cal. App. 4th 1099, 71 Cal. Comp. Cases 1229, in proving the existence of the prior PD award of 20% as well as proving the lumbar spine disability attributable to both of applicant's lumbar spine injuries overlapped.

Under Labor Code §4664(b) and the Court of Appeal's decision in *Kopping, supra*, the defendant's dual burden consists of initially proving that a prior award to the same body part exists, which they were able to do in this case. With respect to the second prong of defendant's burden of proof under Labor Code §4664(b) to establish the conclusive presumption related to a prior award of permanent disability, a defendant must also prove there is an "overlap" of permanent disability between both the initial and subsequent injury.

Citing Section 2.5h of the AMA Guides Fifth Edition, as well as the opinion of the AME, the Board stated their prior decision was in error since “[o]verlap between injuries is not precluded merely because different AMA Guides methodologies were utilized in formulating whole person impairment.” In this case the second injury to applicant’s lumbar spine on November 16, 2013, was a recurrent injury and in such situations the AMA Guides direct a different rating methodology for the subsequent injury. Since the AMA Guides, Fifth Edition was used to determine impairment for both dates of injury, there was no need to “convert” the ratings as is required when different editions of the AMA Guides apply to each date of injury.

The mere fact that different lumbar spine metrics or methodologies (DRE and ROM) under the same Edition of the AMA Guides were used to assess applicant’s lumbar spine impairment from applicant’s first and second lumbar spine injuries did not preclude proving overlap of the prior lumbar spine disability and the subsequent lumbar spine disability.

With respect to applicant obtaining credit for the prior 20% lumbar spine PD award under L.C. 4664(b) as reflected in the Court of Appeal’s decision in *Kopping, supra* the Board stated:

Here, the first prong is met as the parties stipulated to a prior Award of permanent disability of 20% to the lumbar spine. We find that defendant also proved overlap since the AMA Guides do not preclude a finding of overlap even though different ratings methodologies are used (AMA Guides, § 2.5h, *supra*) and, by stating that section 4664 apportionment was appropriate, AME Dr. Pang necessarily opined that overlap existed. Additionally, as argued in defendant’s Petition for Writ of Review, the finding of overlap is especially merited in this case, where the Guides direct a different ratings method for the subsequent injury by virtue of it being a recurrent injury.

The WCAB’s Decision in *Hom II*: The Board in *Hom II* rescinded both their own decision and the WCJ’s prior decision erroneously awarding the applicant 30% PD without apportionment. The WCAB then issued a new decision that applicant’s current lumbar spine injury caused compensable PD of 10% after subtraction under L.C. 4664(b) of 20% PD from the prior June 2, 2013 award from applicant’s overall current lumbar spine disability of 30%.

In my opinion the WCAB panel in *Hom II* should be recognized by the entire workers' compensation community for their exemplary intellectual honesty and integrity in granting reconsideration on their own motion and admitting and correcting their erroneous decision in *Hom I* without the necessity of any direction or a decision from the Court of Appeal.

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