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CONJUNCTION DYSFUNCTION: OLD VS. NEW PD SCHEDULE

Your PD exposure and the settlement value of your cases can be significantly affected by which PD schedule is used. The difference in applying the April 1997 Schedule for Rating Permanent Disability (old schedule) versus the January 2005 Schedule for Rating Permanent Disability (new schedule) can change case exposure significantly. For example, in an admitted back or knee injury case, the difference in value can be quite large, exceeding \$25,000, with the new schedule providing substantially less PD than the old. In a few internal cases, the new schedule may provide more PD than the old.

The halls of the local WCAB offices are ripe with lively debate over which schedule will apply to any given case. This issue is centered on the proper interpretation of Labor Code Section 4660 (d), governing which PD schedule should be used for injuries arising before January 1,

2005. The issue has been addressed by the Workers' Compensation Appeals Board and will soon be addressed by the Courts of Appeal.

Labor Code Section 4660 (d) provides in relevant part as follows:

“For compensable claims arising before January 1, 2005, the schedule as revised pursuant to changes made in legislation enacted during the 2003-04 Regular and Extraordinary Sessions shall apply to the determination of permanent disabilities when there has been either no comprehensive medical-legal report or no report by a treating physician indicating the existence of permanent disability, or when the employer is not required to provide the notice required by Section 4061 to the injured worker.”

The Workers' Compensation Appeals Board is split over the proper interpretation of

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this sentence. By looking at five recent Opinions on Reconsideration from WCAB panels, we can see why there will likely not soon be a unanimous opinion issuing from the WCAB regarding the 3 exceptions to the new schedule for injuries occurring before 1/1/05 and the appellate courts will need to weigh in as litigation continues

For compensable claims arising before 1/1/05, LC 4660 (d) lists the circumstances that need to be presented before the new rating schedule shall apply to the determination of PD. This section is the core of the controversy since it can be read in at least two different ways. Most of the disputes boil down to the absence of a comma and the use of a single conjunction, “or”. Applicant attorneys argue it should be read as follows: The section shall apply to the determination of PD where there has been either 1) no comprehensive medical-legal report or 2) no report by a treating physician indicating the existence of PD or 3) when the employer is not required to provide the notice required by Section 4061 to the injured worker. Defendants argue that the phrase “indicating the existence of PD” also applies to medical-legal reports, not just to the reports of treating physicians.

The only area of agreement with the interpretation is in reference to the third sentence regarding LC 4061. If, prior to 1/1/05, the Applicant was owed a notice pursuant to LC 4061, which is an ending TD/delay or denial of PD, then the old rating schedule will apply. WCJ Barry Goldman from the Van Nuys WCAB recently stated his opinion at an educational seminar that the following events should trigger a LC 4061 benefit notice: 1) the last payment of TD, 2) an admissible P&S report by a qualified QME, 3) release of the employee from treatment or 4) the return of the employee to work or modified work. Attorneys at the recent CAAA

convention argued that the first (rather than the last) payment of TD triggered the obligation to send an ending TD notice. They reasoned that once the TD starts, at *some* point down the road, TD must end and the requirements of LC 4061 must be fulfilled. Therefore, they argue, if the first payment of TD issued before 1/1/05, the exception is proven and the old schedule should apply. Still other applicant’s attorneys argue that, on denied cases, a notice of “no PD” should issue, triggering the exception. There is no statutory basis for these positions because, by the statute’s terms, notice obligations only arise with the *last* payment of TTD.

In reviewing the available reports of panel decisions prior to *Aldi* (discussed below) dealing with the issue of the old versus new PD schedule, it could be inferred that four Commissioners (Rabine, Murray, O’Brien and Caplane) interpret 4660 (d) to favor expanded exceptions to the new schedule, favoring use of the old schedule. Two others (Miller and Cuneo) appeared to interpret the exceptions narrowly and favor use of the new schedule. One commissioner, (Brass), wrote a dissenting opinion supporting use of the new schedule; however, he has signed a concurrence to an opinion which heavily favors use of the old schedule. So, depending upon the issue, the WCAB has previously appeared to split 4-3 or 5-2 in favor of using the old schedule.

The newly released unanimous *en banc* decision from the WCAB regarding the case of *Elizabeth Aldi v. Carr, McClellan, Ingersoll, Thompson & Horn and Republic Indemnity Co. of America* (SFO 0485703) was expected to end the old versus new PD schedule debate by clarifying precisely when each schedule is to be used. It comes up well short of resolving most issues. In *Aldi*, the Trial Judge found that there are three possible interpretations to LC 4660 (d).

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He delved into an analysis of the various sentences in the statute and concluded that the language was internally inconsistent and self-contradictory. He then adopted an interpretation that he felt harmonized the otherwise contradictory interpretations. He ruled that the old rating schedule shall apply to *all* injuries occurring prior to 1/1/05, and the new schedule to injuries occurring after 1/1/05 .

The WCAB in their *en banc* decision overruled the Trial Court's interpretation of LC 4660 (d) by holding that the revised PD rating schedule not only applies to injuries that occur on or after 1/1/05, but to injuries that occur prior to that date as well, if one of the exceptions in the third sentence applies. The WCAB places the burden of proving one of the exceptions on the party advocating use of the old schedule (in most cases, this will be applicant's counsel). In listing the 3 exceptions, the WCAB appears to resolve the "or" issue in favor of the pro-Old Schedule majority, allowing a comprehensive medical legal report that does not find permanent disability to serve as an exception to use of the New Schedule.

The WCAB position that a pre-2005 medical-legal report does not have to address PD to invoke the old rating schedule has been reinforced by a panel decision issued July 24th, 2006 in *Raquel Torres v. SDM Precision Products* LAO 832511. Commissioner Rabine wrote the opinion, joined by Commissioners Brass and Caplane, which noted: "The grammar of the third sentence of section 4660(d) does not require a 'comprehensive medical-legal report that also indicates the existence of permanent disability, in order for the prior rating schedule to apply.'" The holding states that it is sufficient that there was a comprehensive report for any reason (which in the Torres case was an AOE/COE exam pursuant to LC 4060).

As noted at the onset of this article, in many (if not most) cases where this issue arises, you will want your counsel to argue for application of the new rating schedule. Applicant's counsel will try to argue that any opportune report prior to 1/1/05 should be deemed a "comprehensive" medical-legal report and therefore, based on *Aldi*, the old schedule should apply.

We think the better argument is that a medical-legal report cannot be "comprehensive" unless it complies with LC Section 4628 and Rule 10606 and discusses the issue of permanent disability and apportionment. This appears a viable construction of the rules and statute. When an applicant's attorney, recently arguing before a presiding WCALJ asserted that there was a comprehensive medical-legal evaluation prior to 1/1/06, the judge responded, "A 10606 evaluation? I don't see one, so you're still new schedule." The same attorney argued that denial letters issued before 1/1/05 triggered use of the old schedule as they were "essentially no P.D. letters (mandated by LC 4061.)" Said the same Judge: "I'm still not buying it. Not on legal denials."

In the *Aldi* case, counsel for applicant argued that beginning TD payments in 2004 triggered a duty to issue a stop PD notice, sometime in the future, thereby fulfilling one of the exceptions. The WCAB did not address this issue as it was first raised in response to the Petition for Reconsideration.

As a WCAB *en banc* decision, *Aldi* is citable persuasive authority. However, as you can see, it leaves much to be answered as to the details. And, as they say, the Devil is in the details. Litigation caused by poor legislative draftsmanship and widely divergent permanent disability rating schedules will continue. On all injuries prior to 1/1/05, it remains very important

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for defendants and those representing them to understand the two different rating schedules, the exposure, the schedule that yields the lowest disability, and the arguments that support use of the schedule that will provide the lowest liability.

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FOCUS ON



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Rob joined the firm in June 2001, and in 2002 he was asked to open an office in the San Fernando Valley where he remains managing attorney. He has spent the past 14 years defending employers and workers' compensation carriers. Rob is a Certified Specialist in Workers' Compensation by the State Bar of California, Board of Legal Specialization.

Rob is the product of Southern California Jesuit education, having graduated from 3 Loyolas. After graduating from the high school in Los Angeles, he obtained a

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In addition to lecturing on a number of workers' compensation issues for attorneys, employers, and insurance claims professionals, Rob has successfully litigated cases at over 16 WCAB locations, from San Diego to Grover Beach. He has also successfully argued cases on behalf of workers' compensation insurance companies before the 2nd (Los Angeles) and 4th (San Bernardino) Appellate Districts.

Rob lives in Thousand Oaks, where he enjoys spending time with his wife and 3 children, and by participating in a number of activities including sailing, hiking, and singing in a choir. He remains active in community service as a member of the Santa Barbara Regional Pastoral Council.

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