

Which Permanent Disability Rating Schedule to Use???

As we all know by now, SB 899 helped to create a new permanent disability rating schedule (2005 PDRS) which is to be used on all cases with dates of injury on or after January 1, 2005. But, the Labor Code also provides occasions when the 2005 PDRS can be used for injuries with dates prior to January 1, 2005. Specifically, Labor Code § 4660(d) reads in pertinent part:

“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 disability 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.”

One would think that this was clear—but, as with almost all of the changes created by SB 899, there has been and continues to be a debate as to whether the schedule should apply to those cases with injuries before January 1, 2005. And, unfortunately, the cases that are coming out on this issue are far from clear as they often present a dispute as to only one of the three prongs mentioned.

The dispute began with *Aldi v. Carr, McClellan, Ingersoll, Thompson & Horn (2006) 71 CCC 783 (en banc)*. In that case, the trial judge ruled the 2005 PDRS only applied to injuries on or after January 1, 2005. The WCAB, in an en banc decision, disagreed and held the 2005 PDRS can apply to injuries prior to January 1, 2005 and sent the case back to the trial judge to determine if any of the three exceptions applied. It did not, however, at that time give guidance as to when the exceptions would apply. Now cases are being decided that interpret the three exceptions and when they will or won't apply.

Treating Physician Report Indicating the Existence of Permanent Disability:

One of the issues is whether there is a treating physician's report which indicates the existence of permanent disability prior to January 1, 2005. Several cases have been decided on this issue, however, they are conflicting.

In *City of Vacaville v. WCAB (Lee) (2006) 71 CCC 1853 (writ denied)*, the WCAB held that the 1997 schedule applied because there was a report dated 12/30/2004 which stated that applicant “will indeed have permanent disability from his injury but that will not be determined until he is permanent and stationary which would be anywhere from 2-4 months from now.” That report was determined to be one by a treating physician indicating the existence of permanent disability for purposes of Labor Code § 4660(d).

In a similar case, *Volt Services Group v. WCAB (Sanchez) (2006) 71 CCC 1890 (writ denied)*, the WCAB held that a report by applicant's treating physician, stating that physician “anticipate[d] that the patient will have permanent residuals,” constituted report by treating

physician indicating existence of PD under Labor Code § 4660(d) for purposes of applying 1997 rating schedule.

By contrast, there are two recent decisions that provide contrary results. In *SCIF v. WCAB (Echeveria) (2007) 72 CCC 33*, the Court of Appeal annulled a WCAB decision which applied the 1997 PDRS, holding that the decision was not supported by substantial evidence, when the Court of Appeal found that 12/15/2004 single-sentence report by treating physician stated physician's belief that permanent disability was within reasonable medical probability as result of applicant's 7/21/2004 industrial injury, that WCAB held that this statement, read in light of treating physician's other reports, constituted report by treating physician indicating existence of permanent disability within meaning of Labor Code § 4660(d), that none of treating physician's other reports provided any reasoning to support physician's 12/15/2004 conclusion, and that medical opinion is not substantial evidence if it does not indicate reasoning behind physician's opinion.

In addition, in *Trader Joe's v. WCAB (Evets) (2007) 72 CCC 204*, the Court of Appeal granted defendant's petition and vacated the portion of the WCAB's award that applied the 1997 PDRS and held that the 2005 PDRS applied, when Court of Appeal found that there had been no treating physician's report prior to 1/1/2005 indicating existence of permanent disability, that WCJ's observation that applicant's injuries were of type described in *AME Guides* did not indicate that applicant's injuries were necessarily permanent, that there was nothing in record that established that applicant's nerve damage and reduced range of motion were necessarily permanent as of 12/31/2004, and that no pre-1/1/2005 report gave sign of, directed attention to, or pointed out any facts or conclusions indicating that applicant's disability would be permanent.

Obviously, this issue is far from resolved, but good arguments have been given to support that a one-line report from a treating physician is not enough to constitute the existence of permanent disability.

Comprehensive Medical Legal Report:

One of the questions here is what kind of comprehensive medical legal report is required to establish use of the 1997 PDRS. Arguments were being raised that the comprehensive medical legal report must indicate the existence of permanent disability. A recent en banc decision, however, holds differently.

In *Baglione v. Hertz Car Sales (2007) 72 CCC 86 (en banc)*, the WCAB, en banc, reversing WCJ, held that, because comprehensive medical-legal report issued in case prior to 1/1/2005, 1997 permanent disability rating schedule applied pursuant to Labor Code § 4660(d), whether or not comprehensive medical-legal report indicated existence of permanent disability, when WCAB en banc found that "last antecedent rule" of statutory construction applied, which holds that qualifying words phrases, and clauses are to be applied to words or phrases immediately preceding and are not to be construed as extending to or including others more remote, so that phrase "indicating the existence of permanent disability" in Labor Code § 4660(d) applied only to report by treating physician, not to comprehensive medical -legal report.

In other words, the WCAB relied upon a grammar lesson to reach its conclusion. It should be pointed out, however, that this was a 4-3 decision, with the dissenting opinion holding that the comprehensive medical legal report should indicate the existence of permanent disability in order for the 1997 PDRS to apply, and could easily be reversed.

Duty to Send Notice to the Injured Worker under Labor Code § 4061:

This is the one exception that should be easy to determine. Either you were required to send out the notice required under Labor Code § 4061 prior to January 1, 2005, or you weren't. But the WCAB, in an en banc decision, has indicated that the duty required under Labor Code § 4061 actually arises with the first payment of temporary disability, not with the last payment as cited in the code. Instead, the code sets forth when the duty must be *executed*.

In *Pendergrass v. Duggan Plumbing (2007) 72 CCC 95 (en banc)* the WCAB en banc, amended the WCJ's findings, and held that, for purposes of determining applicable permanent disability rating schedule pursuant to Labor Code § 4660, employer's duty to provide notice required by Labor Code § 4061 arose with first payment of temporary disability indemnity, so that, if first date of compensable temporary disability occurred prior to 1/1/2005, 1997 permanent disability rating schedule applied, when WCAB en banc distinguished between when duty to give notice required by Labor Code § 4061 arose and when that duty was required to be executed, and WCAB en banc found that duty, once it arose, was absolute and could not be avoided by employer, that execution of duty occurred when last payment of temporary disability indemnity was made, and that in present case employer's duty arose on 6/30/2004, when first payment of temporary disability indemnity was made.

Again, this was a 4-3 decision with the dissenting opinion holding that the duty to provide notice under Labor Code § 4061 arose with the last payment of temporary disability and not the first.

Conclusion

While we would like to say that it is easy to determine which schedule will apply to a given injury, the answer is not that simple. While an *en banc* decision is binding on all WCJ's, it does not mean that it will be the final word. There are cases currently up on appeal on these issues. In addition, both the *Pendergrass* and *Baglione* cases have been appealed. As with most issues presented by SB 899, the answer is still, we have to wait and see.