WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

ELIZABETH ALDI,

Applicant,

vs.

CARR, McCLELLAN, INGERSOLL, THOMPSON & HORN; and REPUBLIC INDEMNITY COMPANY OF AMERICA,

Defendants.

Case No. SFO 0485703

OPINION AND DECISION AFTER RECONSIDERATION (EN BANC)

On April 3, 2006, the Appeals Board granted reconsideration of the January 12, 2006 Conclusion of Law and Finding of Fact, wherein the workers' compensation administrative law judge ("WCJ") concluded that the revised permanent disability rating schedule adopted on January 1, 2005, pursuant to Labor Code section 4660,[1] is applicable only to injuries occurring on or after that date, and that the permanent disability rating schedule previously in effect applies to all injuries which occur prior to January 1, 2005.

Defendant, Republic Indemnity Company of America ("defendant"), filed a petition for reconsideration challenging the WCJ's interpretation of section 4660(d). Defendant contends the proper interpretation of this provision requires that the revised permanent disability rating schedule be applied to all claims pending after the effective date of the rating schedule unless one of the exceptions in section 4660(d) applies. Defendant argues that the WCJ's interpretation delays the implementation of the revised permanent disability rating schedule, and thus is in conflict with the legislative declaration of emergency intending to immediately implement the revised permanent disability rating schedule, and is in conflict with the clear and ambiguous statutory language. Alternatively, defendant seeks the removal of this matter to the Appeals Board

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[1] All further statutory references are to the Labor Code, unless otherwise specified.

under section 5310, asserting that it will suffer significant prejudice and irreparable harm if it is required to litigate basic issues of liability for compensation under what it contends is an erroneous interpretation of the law.

The Appeals Board granted reconsideration in this matter to allow time to study the record and applicable law.[2] Because of the important legal issue presented as to the meaning and application of Senate Bill (SB) 899 (Stats. 2004, ch. 34) enacted April 19, 2004, with regard to the applicability of the revised permanent disability rating schedule, and in order to secure uniformity of decision in the future, the Chairman of the Appeals Board, upon a majority vote of its members, assigned this case to the Appeals Board as a whole for an en banc decision. (Lab. Code, §115.)[3]

Based on our review of the relevant statutory and case law, we hold that the revised permanent disability rating schedule, adopted by the Administrative Director of the Division of Worker's Compensation, effective January 1, 2005, applies to injuries occurring on or after that date, and that in cases of injury occurring prior to January 1, 2005, the revised permanent disability

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[2] A petition for reconsideration is properly taken only from a "final" order, decision, or award. (Lab. Code, §§ 5900(a), 5902, 5903.) Ordinarily, a "final" order is a non-interlocutory decision which determines a substantive right or liability. (*Maranian v. Workers' Comp. Appeals Bd.* (2000) 81 Cal.App.4th 1068, 1075 [65 Cal.Comp.Cases 650]; *Rymer v. Hagler* (1989) 211 Cal.App.3d 1171, 1180; *Safeway Stores, Inc. v. Workers' Comp. Appeals Bd.* (*Pointer*) (1980) 104 Cal.App.3d 528, 534-535 [45 Cal.Comp.Cases 410]; *Kaiser Foundation Hospitals v. Workers' Comp. Appeals Bd.* (*Kramer*) (1978) 82 Cal.App.3d 39, 45 [43 Cal.Comp.Cases 661].)

Under limited circumstances, however, an interim WCAB decision may be deemed a "final" order if it determines a "threshold" issue. (*Maranian*, *supra*, 81 Cal.App.4th 1068, 1073-1081; *Graham v. Workers' Comp. Appeals Bd.* (1989) 210 Cal.App.3d 499, 503 [54 Cal.Comp.Cases 160]; *Kosowski v. Workers' Comp. Appeals Bd.* (1985) 170 Cal.App.3d 632, 636 [50 Cal.Comp.Cases 427]; *Pointer*, *supra*, 104 Cal.App.3d at pp. 532-535.) A "threshold" issue has variously been described as "a substantial issue fundamental to the … claim for benefits," "an issue critical to the claim for benefits," or "an issue that is basic to the establishment of the ... right[] to benefits." (*Maranian*, *supra*, 81 Cal.App.4th at pp. 1070, 1075, 1078.) If a WCAB decision resolves a "threshold" issue, then it is a "final" decision, whether or not all issues are resolved or there is an ultimate decision on the right to benefits. (*Rea v. Workers' Comp. Appeals Bd*. (*Milbauer*) (2005) 127 Cal.App.4th 625, 642 [70 Cal.Comp.Cases 312]; *Wal-Mart Stores, Inc. v. Workers' Comp. Appeals Bd*. (*Garcia*) (2003) 112 Cal.App.4th 1435, 1438, fn. 2 [68 Cal.Comp.Cases 1575]; *Maranian*, *supra*, 81 Cal.App.4th at p. 1075.)

We conclude that the issue of whether or not the revised permanent disability schedule applies here is a "threshold" issue that is "fundamental," "critical," and "basic" to Aldi's claim for permanent disability benefits. Therefore, we will treat the WCJ's decision as a "final" order (although, had we deemed it a "non-final" order, we could have considered the order on removal in any event). Accordingly, we will not address defendant's petition for removal.

[3] The Appeals Board's en banc decisions are binding precedent on all Appeals Board panels and WCJ's. (Cal. Code Regs., tit. 8, §10341; *Gee v. Workers' Comp. Appeals Board* (2002) 96 Cal.App.4th 1418, 1425, fn. 6 [67 Cal.Comp.Cases 236, 239, fn. 6]; see also Govt. Code, §11425.60(b).)

rating schedule applies, unless one of the exceptions delineated in the third sentence of section 4660(d) is present. We return this matter to the WCJ to consider in the first instance whether any exception to the application of the revised permanent disability rating schedule is present based upon the facts of this case.

Background

At a hearing on January 6, 2006, the parties stipulated that applicant, Elizabeth Aldi, while employed as a legal secretary by Carr, McClellan, Ingersoll, Thompson & Horn, during a cumulative period ending November 18, 2002, sustained an industrial cumulative trauma injury to her neck and upper extremities. The parties agreed to submit a single issue for decision at the hearing, which was framed as: "Whether the permanent disability rating schedule adopted by the Administrative Director of the Division of Worker's Compensation as of January 1, 2005 is applicable to the injury in this case or whether the rating schedule in effect prior to January 1, 2005 is applicable." The parties agreed to defer all other issues. In its verified petition for reconsideration, defendant asserts that none of the exceptions to the application of the revised permanent disability rating schedule are present. (See Petition, p. 3, ll. 2-9.) Applicant, in her answer to the defendant's petition, however, contends that even if we reject the WCJ's conclusion of law, she is still entitled to have her permanent disability rated according to the old schedule because the initial payment of temporary disability in 2003 triggered the requirement that defendant give notice under section 4061, which is one of the exceptions in section 4660(d).

The WCJ issued his determination on January 12, 2006, and cogently set forth his analysis of the issues and the justification for his decision in his Opinion on Decision, from which we quote at length.

> **"The Statutory Scheme for Determining the Extent of Permanent Disabilities**
> "The statutory scheme for determining the extent of injured workers' permanent disability is set forth in Labor Code sections 4658 and 4660. The latter statute, as amended by SB 899 effective April 19, 2004 (Stats. 2004, ch 34.), provides as follows:

‘a) In determining the percentages of permanent disability, account shall be taken of the nature of the physical injury or disfigurement, the occupation of the injured employee, and his or her age at the time of the injury, consideration being given to an employee's diminished future earning capacity.

‘(b)(1) For purposes of this section, the ‘nature of the physical injury or disfigurement’ shall incorporate the descriptions and measurements of physical impairments and the corresponding percentages of impairments published in the American Medical Association (AMA) Guides to the Evaluation of Permanent Impairment (5th Edition).

‘(2) For purposes of this section, an employee's diminished future earning capacity shall be a numeric formula based on empirical data and findings that aggregate the average percentage of long-term loss of income resulting from each type of injury for similarly situated employees. The administrative director shall formulate the adjusted rating schedule based on empirical data and findings from the Evaluation of California's Permanent Disability Rating Schedule, Interim Report (December 2003), prepared by the RAND Institute for Civil Justice, and upon data from additional empirical studies.

‘(c) The administrative director shall amend the schedule for the determination of the percentage of permanent disability in accordance with this section at least once every five years. This schedule shall be available for public inspection and, without formal introduction in evidence, shall be prima facie evidence of the percentage of permanent disability to be attributed to each injury covered by the schedule.

‘(d) The schedule shall promote consistency, uniformity, and objectivity. *The schedule and any amendment thereto or revision thereof shall apply prospectively and shall apply to and govern only those permanent disabilities that result from compensable injuries received or occurring on and after the effective date of the adoption of the schedule, amendment or revision, as the fact may be. 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.*

‘(e) *On or before January 1, 2005, the administrative director shall adopt regulations to implement the changes made to this section by the act that added this subdivision*.’ [Italics added.]

"The provisions in Labor Code section 4660 which govern which rating schedule is applicable to a particular case are the second and third sentences of subdivision (d) and subdivision (e).

"The second sentence of subdivision (d) sets forth the general principle that a revised rating schedule is only applicable to injuries that occur after the revision. The principle embodied in that sentence has long been part of Labor Code section 4660 and was essentially unmodified by SB 899 (Statutes 2004, ch. 34.)

"The third sentence in subdivision (d) provides that '*[f]or 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.'* [Italics added.]

"Three Interpretations of Subdivision (d) of Labor Code Section 4660

"There are three possible interpretations of the second and third sentences in subdivision (d). First, the third sentence can be interpreted as directly contradictory to the second sentence. That is, the second sentence provides that a revised rating schedule applies only to injuries occurring *after* the revision but the third sentence provides that if at least one of three criteria are not met, then the revised rating schedule is applicable to injuries occurring *before* the revised rating schedule was adopted on January 1, 2005. Thus, each sentence negates the other.

"A second interpretation of the second and third sentences of subdivision (d) is that the third sentence provides an implied exception to the general principle set forth in the second sentence. That is, a revision to the rating schedule applies only to injuries occurring after the revision, except that the revision to the rating schedule mandated by SB 899 permits the revised schedule to apply to injuries occurring prior to the adoption of the revised schedule on January 1, 2005, if none of the criteria stated in the third sentence are met. Thus, the second sentence, which sets forth a universal rule, is impliedly, but not expressly, subjected to an exception specified in the third sentence.

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> "A third interpretation of the second and third sentences of subdivision (d) requires consideration of subdivision (e) as well. Subdivision (e) provides as follows: "*On or before January 1, 2005, the administrative director shall adopt regulations to implement the changes made to this section by the act that added this subdivision*." [Italics added.] Subdivision (e) thus contemplates that the Administrative Director might have adopted a revised rating schedule at some time after the enactment of SB 899 on April 19, 2004, but prior to January 1, 2005, but could not adopt the revised schedule any later than January 1, 2005. If the Administrative Director had adopted the revised rating schedule earlier than January 1, 2005, then there would have been many injuries which occurred in 2004, after the effective date of the revised rating schedule. The third sentence could have been intended to provide a rule for determining which of those injuries occurring after the rating schedule was revised but before the end of 2004, would be ratable under the revised rating schedule. Under that interpretation, the third sentence would be entirely consistent with the second sentence, and not an implied exception, because the revised rating schedule would be in effect and would only apply to injuries occurring after it took effect. Since the revised rating schedule was not actually adopted by the Administrative Director until January 1, 2005, however, the third sentence would now be moot.
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> "Thus, under the third interpretation, the third sentence is in harmony with the second sentence, rather than being directly contradictory to the second sentence (i.e., the first interpretation) or an implied exception to the longstanding principle stated in the second sentence (i.e., the second interpretation.)"

The WCJ concluded that the third interpretation was correct and held "that as a matter of law, injuries occurring prior to January 1, 2005, are ratable only under the old rating schedule." He concluded that only this interpretation harmonizes the second and third sentences in section 4660, and gives effect to each word, while the first interpretation which finds these sentences in conflict violates the rule that an interpretation should harmonize the language of the statute. He also concluded that the second interpretation violated proper statutory construction "because the Legislature could easily have made the third sentence an express exception to the second sentence if it had intended to do so. The second sentence admits of no exceptions to the principle stated. Inferring that the third sentence is intended to be an exception to the second sentence negates the plain meaning of the second sentence."

> "Thus, I conclude that the Legislature intended that the third sentence of subdivision (d) would be controlling for injuries occurring before 2005 only if the Administrative Director had adopted the revised rating schedule before the end of 2004. Since the Administrative Director did not adopt the revised rating schedule until January 1, 2005, the third sentence is moot."

Discussion

I.

In construing a statute, the Appeals Board's fundamental purpose is to determine and effectuate the Legislature's intent. (*DuBois* v. *Workers' Comp. Appeals Bd*. (1993) 5 Cal.4th 382, 387 [58 Cal.Comp.Cases 286, 289]; *Nickelsberg* v. *Workers' Comp. Appeals Bd*. (1991) 54 Cal.3d 288, 294 [56 Cal.Comp.Cases 476, 480]; *Moyer* v. *Workmen's Comp. Appeals Bd*. (1973) 10 Cal.3d 222, 230 [38 Cal.Comp.Cases 652, 657].) Thus, the WCAB's first task is to look to the language of the statute itself. (Ibid.) The best indicator of legislative intent is the clear, unambiguous, and plain meaning of the statutory language. (*DuBois* v. *Workers' Comp. Appeals Bd*., *supra*, 5 Cal.4th at pp. 387-388 [58 Cal.Comp.Cases at p. 289]; *Gaytan* v. *Workers' Comp. Appeals Bd*. (2003) 109 Cal.App.4th 200, 214 [68 Cal.Comp.Cases 693, 702]; *Boehm & Associates* v. *Workers' Comp. Appeals Bd*. (*Lopez*) (1999) 76 Cal.App.4th 513, 516 [64 Cal.Comp.Cases 1350, 1351].) When the statutory language is clear and unambiguous, there is no room for interpretation and the WCAB must simply enforce the statute according to its plain terms. (*DuBois* v. *Workers' Comp. Appeals Bd*., *supra*, 5 Cal.4th at p. 387 [58 Cal.Comp.Cases at p. 289]; *Atlantic Richfield Co*. v. *Workers' Comp. Appeals Bd*. (*Arvizu*) (1982) 31 Cal.3d 715, 726 [47 Cal.Comp.Cases 500, 508].)

When construing any particular statutory provision, however, we may also consider it in light of the entire statutory scheme of which it is part and harmonize it with related statutes, to the extent possible. (*Chevron U.S.A., Inc*. v. *Workers' Comp. Appeals Bd*. (*Steele*) (1999) 19 Cal.4th 1182, 1194 [64 Cal.Comp.Cases 1]; *DuBois* v. *Workers' Comp. Appeals Bd*., *supra*, 5 Cal.4th at p. 388.) Further, meaning must be given to every word or phrase, if possible, so as not to render any portion of the statutory language mere surplusage. (*Hassan* v. *Mercy American River Hosp*. (2003)

31 Cal.4th 709, 716; *Moyer* v. *Workmen's Comp. Appeals Bd*., *supra,* 10 Cal.3d at p. 230.)

II.

We hold that section 4660(d) requires that the revised permanent disability rating schedule be applied to injuries arising on or after the January 1, 2005 effective date of the rating schedule, subject to the specified exceptions for "compensable claims arising before January 1, 2005 . . ." The prior rating schedule may only be used to rate permanent disabilities arising from compensable injuries that occurred prior to January 1, 2005, where one of the exceptions described in the third sentence of section 4660(d) has been established. If none of the specified exceptions is established, the revised permanent disability rating schedule applies to injuries occurring before its January 1, 2005 effective date.[4]

The second sentence of section 4660(d) expressly provides for the prospective application of the revised rating schedule to "compensable injuries received or occurring on and after the effective date of the adoption of the schedule, amendment or revision, as the fact may be." This is consistent with the long established principle that revised permanent disability rating schedules do not apply to injuries which occur prior to their adoption. A comparison of the prior version of this language in former section 4660(c) with the language in the second sentence, requiring that a revision of the rating schedule would apply prospectively, demonstrates that it was not an element added by the reform legislation for this revised rating schedule. The prospective application language in current section 4660(d) states:

> "The schedule and any amendment thereto or revision thereof shall apply prospectively and shall apply to and govern only those permanent disabilities that result from compensable injuries received or occurring on and after the effective date of the adoption of the schedule, amendment or revision, as the fact may be."

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[4] The right to workers' compensation benefits is wholly statutory and, therefore, a legislative amendment or repeal of a statutory right may be applied to matters that were pending prior to the amendment or repeal. (*McCarthy v. Workers' Comp. Appeals Bd*. (2006) 135 Cal.App.4th 1230, 1236-1237 [71 Cal.Comp.Cases 16]; *Rio Linda Union School Dist. v. Workers' Comp. Appeals Bd*. (*Scheftner*) (2005) 131 Cal.App.4th 517, 527-528 [70 Cal.Comp.Cases 999]; *Kleemann v. Workers' Comp. Appeals Bd.* (2005) 127 Cal.App.4th 274, 283 & fns. 17-21 [70 Cal.Comp.Cases 133]; *Abney v. Aera Energy* (2004) 69 Cal.Comp.Cases 1552, 1558-1559 (Appeals Board en banc).)

This language was essentially carried forward verbatim from former section 4660(c), which provided:

> "Any such schedule and any amendment thereto or revision thereof shall apply prospectively and shall apply to and govern only those permanent disabilities which result from compensable injuries received or occurring on and after the effective date of the adoption of such schedule, amendment or revision as the fact may be."

This prospective application language has been part of section 4660 since 1951. (Stats. 1951, ch. 1683, § 1, p. 3880; Stats. 1965, ch. 1513, § 91, p. 3579; Stats. 1993, ch. 121, § 53.) As discussed below, it is the third sentence of section 4660(d) that is new and was specifically crafted for the revised rating schedule.

The language contained in the second sentence, without separately considering the qualifying language in the third sentence, would require that the revised schedule be applied prospectively only to cases where there are "permanent disabilities that result from compensable injuries received or occurring on and after the effective date of the adoption of the [revised] schedule . . ." Nevertheless, the addition of the third sentence of section 4660(d) provides a clear and specific exception to the general rule of prospective application as stated in the second sentence, and mandates the application of the revised rating schedule to injuries occurring before January 1, 2005, in specified instances. That is, the third sentence unambiguously states "for compensable claims arising before January 1, 2005 the schedule as revised . . . shall apply to the determination of permanent disabilities" if none of the specified exceptions have been met. (Emphasis added.) Thus, for all pending cases involving injuries occurring prior to January 1, 2005, the revised schedule must be applied unless one of the listed exceptions has been established. Only in those cases where it can be established that at least one of the listed exceptions exists would the prior rating schedule still apply.[5]

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[5] We do not address at this time when and how the exceptions in the third sentence of section 4660(d) apply.

III.

We are not persuaded by the WCJ's conclusion that the Legislature intended that the revised rating schedule would not apply retroactively to injuries occurring prior to the effective date of the revised schedule. The WCJ's interpretation does not follow the requirement of statutory interpretation that meaning be given to every word or phrase and to not "render any portion of the statutory language mere surplusage." The conclusion that the Legislature intended the third sentence, and the exceptions to the retroactive application set forth therein, to be moot because the Administrative Director did not adopt a revised rating schedule before January 1, 2005, does not harmonize the statutory language. Rather, it nullifies a central condition for the application of the revised rating schedule as mandated by the statute. In the absence of clear language to indicate the legislative intent to condition the applicability of the retroactive exceptions upon the adoption of a revised schedule prior to January 1, 2005, we cannot adopt such an interpretation.

Contrary to the WCJ's interpretation, there is no inconsistency between the second and third sentence. The second sentence carries forward the prospective application language that has been present for many years. The third sentence delineates which injuries occurring before January 1, 2005 are subject to the revised rating schedule, and which are to be rated according to the prior rating schedule. These sentences may be harmonized whether the revised rating schedule became effective on January 1, 2005 or became effective at some earlier date in 2004.

Relying solely upon the presence of section 4660(e), which instructs the Administrative Director to adopt regulations to implement the revised rating schedule no later than January 1, 2005, is not an adequate basis to nullify the statutory language that applies the revised rating schedule retroactively to certain specified cases. Had the revised schedule become effective prior to January 1, 2005, as permitted under section 4660(e), it would have been possible to determine whether the revised schedule applied to the rating of permanent disabilities for any injury prior to January 1, 2005. For example, had the revised schedule been adopted on October 1, 2004, and the injury occurred on October 4, 2004 (i.e. a compensable claim prior to January 1, 2005), the exceptions in the third sentence would have been reviewed to determine whether the old schedule

or the revised schedule would apply. Similarly, if the effective date of the schedule had been October 1, 2004, and the date of injury was August 15, 2004 (i.e. a compensable claim prior to January 1, 2005), the exceptions for the class of cases prior to January 1, 2005, again would have been looked at to determine which schedule would apply. Therefore, the effective date of the revised schedule is irrelevant in determining the class of cases to which the exceptions may apply.

Furthermore, this interpretation of the application of the revised permanent disability rating schedule is most consistent with the urgency clause in section 49[6] of SB 899, which provides that the reform Act shall go into effect immediately. This interpretation is also consistent with the construction of section 4660 arrived at by the Administrative Director. In Rule 9805 (Cal. Code Regs., tit. 8, §9805), the Administrative Director indicates that the prospective application language is circumscribed by the limited retroactivity provided in the third sentence. Rule 9805 provides:

> "The method for the determination of percentages of permanent disability is set forth in the Schedule for Rating Permanent Disabilities, which has been adopted by the Administrative Director effective January 1, 2005, and which is hereby incorporated by reference in its entirety as though it were set forth below. The schedule adopts and incorporates the American Medical Association (AMA) Guides to the Evaluation of Permanent Impairment 5th Edition. *The schedule shall be effective for dates of injury on or after January 1, 2005 and for dates of injury prior to January 1, 2005, in accordance with subdivision (d) of Labor Code section 4660*, and it shall be amended at least once every five years." (Italics added.)

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[6] Section 49 of SB 899 provides: "This act is an urgency statute necessary for the immediate preservation of the public peace, health or safety within the meaning of Article IV of the Constitution and shall go into immediate effect. The facts constituting the necessity are: In order to provide relief to the state from the effects of the current workers' compensation crisis at the earliest possible time, it is necessary for this act to take effect immediately." (Stats. 2004, ch. 34, § 49; see also *Green v. Workers' Comp. Appeals Bd*. (2005) 127 Cal.App.4th 1426, 1441 [70 Cal.Comp.Cases 294] (observing that section 49 reflects "the Legislature's intent to solve the [workers' compensation] crisis as quickly as possible by bringing as many cases as possible under the umbrella of the new law."); *Abney v. Aera Energy*, *supra*, 69 Cal.Comp.Cases at pp. 1557-1558; see generally *McCarthy v. Workers' Comp. Appeals Bd*., *supra*, 135 Cal.App.4th at p. 1235; *Rio Linda Union School Dist. v. Workers' Comp. Appeals Bd*. (*Scheftner*), *supra*, 131 Cal.App.4th at pp. 521, 526, 529 (fn. 6), 532.)

IV.

Applying this interpretation of section 4660(d) to the instant case, where the applicant sustained an injury to her neck and upper extremities over the cumulative period ending November 18, 2002, the revised schedule will apply to the rating of her permanent disability, unless one of the exceptions provided in the third sentence is established. Applicant's injury occurred prior to January 1, 2005, and thus falls within the class of cases to which the revised rating schedule may or may not apply, depending on whether one of the exceptions exists. While defendant asserts that none of the exceptions which trigger the use of the prior rating schedule are present, applicant argues in its answer to the defendant's petition that one of the exceptions is applicable in this case. Applicant asserts that the section 4061 notice exception was met when defendant commenced payment of temporary disability benefits in November of 2003, arguing that the initial payment of temporary disability mandates the subsequent section 4061 notice that such benefits are being terminated. As this issue was first raised in applicant's answer and not at the hearing on January 6, 2006, it must be addressed in the first instance at the trial level. Therefore, we return the matter to the WCJ for further proceedings and decision on this issue.

For the reasons set forth above, we reverse the determination reached by the WCJ, that "the permanent disability rating schedule in effect prior to the adoption of the revised rating schedule on January 1, 2005, is applicable to calculating permanent disability caused by applicant's injury herein." We amend the Conclusions of Law and Finding of Fact to find the revised permanent disability rating schedule applies to the rating of permanent disability for injuries occurring prior to the January 1, 2005 effective date of the revised rating schedule, unless applicant can establish that one of the exceptions set forth in the third sentence of section 4660(d) is applicable. We return this matter to the WCJ to make a determination on this and all remaining issues.

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For the foregoing reasons,

IT IS ORDERED that, as our Decision After Reconsideration, the Conclusions of Law and Finding of Fact issued January 12, 2006, is **RESCINDED** and the following is **SUBSTITUTED** therefor:

Conclusion of Law

The revised permanent disability rating schedule mandated by Labor Code section 4660, and adopted by the Administrative Director effective January 1, 2005, is applicable to pending cases where the injury occurred before January 1, 2005, 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.

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IT IS FURTHER ORDERED that this matter be **RETURNED** to the trial level for further proceedings and decision consistent with this opinion.

WORKERS' COMPENSATION APPEALS BOARD (EN BANC)

/s/ Joseph M. Miller
JOSEPH M. MILLER, Chairman

/s/ Merle C. Rabine
MERLE C. RABINE, Commissioner

/s/ William K. O'Brien
WILLIAM K. O'BRIEN, Commissioner

/s/ James C. Cuneo
JAMES C. CUNEO, Commissioner

/s/ Janice J. Murray
JANICE J. MURRAY, Commissioner

/s/ Frank M. Brass
FRANK M. BRASS, Commissioner

/s/ Ronnie G. Caplane
RONNIE G. CAPLANE, Commissioner

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

June 21, 2006

SERVICE BY MAIL ON SAID DATE TO ALL PARTIES AS SHOWN ON THE OFFICIAL ADDRESS RECORD