WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

JOSH PENDERGRASS, ***Applicant,*** **vs.** **DUGGAN PLUMBING; and STATE COMPENSATION INSURANCE FUND,** ***Defendants.***	**Case No. SAL 0110868** **OPINION AND ORDER GRANTING RECONSIDERATION AND DECISION AFTER RECONSIDERATION (EN BANC)**

In *Aldi v. Carr, McClellan, Ingersoll, Thompson & Horn* (2006) 71 Cal.Comp.Cases 783 (Appeals Board en banc), we held that pursuant to Labor Code section 4660(d)[1] the 2005 Schedule for Rating Permanent Disabilities (2005 Schedule) "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." Thus, if the injured worker establishes that one of the exceptions set forth in the third sentence of section 4660(d) is applicable, then the 1997 Schedule for Rating Permanent Disabilities (1997 Schedule) is used to calculate the permanent disability caused by the industrial injury. (*Id.*)

In this matter, we address the narrower issue of when the section "4061 notice requirement exception" to application of the 2005 Schedule to pre-2005 injuries arises. Specifically, whether the employer's duty to provide the section 4061 notice exists with the first or the last payment of temporary disability indemnity.

In light of the important legal issue presented herein, and in order to secure uniformity of decision in the future, the Chairman of the Appeals Board, upon a majority vote of its members,

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[1] All further statutory references are to the Labor Code, except where otherwise noted.

assigned this case to the Appeals Board as a whole for an en banc decision. (Lab. Code, § 115.)[2]

For the reasons explained below, we hold, for purposes of determining the applicable permanent disability rating schedule pursuant to Labor Code section 4660, that an employer's duty "to provide the notice required by" section 4061 arises with the first payment of temporary disability indemnity. Therefore, if the first date of compensable temporary disability occurred prior to January 1, 2005, then the 1997 Schedule applies to determine the extent of permanent disability.

BACKGROUND

The relevant facts do not appear to be disputed.

Applicant sustained an admitted industrial injury to his right lower extremity/ankle on June 29, 2004, while employed as a plumber by Duggan Plumbing, State Compensation Insurance Fund's insured on the date of injury, when he fell at work.

Defendants accepted liability for applicant's industrial injury and paid temporary disability indemnity uninterrupted from June 30, 2004, through July 19, 2005.

The parties proceeded to trial on November 20, 2006, primarily on the issue of whether applicant's permanent disability should be determined under the 1997 Schedule or the 2005 Schedule.

In the Findings and Order of December 11, 2006, the workers' compensation administrative law judge (WCJ) found, in relevant part, that the extent of applicant's permanent disability should be determined using the 2005 Schedule. The WCJ reasoned that none of the three exceptions enumerated in section 4660(d) to application of the 2005 Schedule to pre-2005 injuries applies.

Applicant sought reconsideration of the WCJ's decision, contending that the permanent disability should be determined pursuant to the 1997 Schedule because defendants were required

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[2] The Appeals Board's en banc decisions are binding precedent on all Appeals Board panels and workers' compensation administrative law judges. (Cal. Code Regs., tit. 8, §10341; *City of Long Beach v. Workers' Comp. Appeals Bd. (Garcia)* (2005) 126 Cal.App.4th 298, 313, fn. 5 [70 Cal.Comp.Cases 109]; *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).)

to provide the notice required pursuant to section 4061 on June 30, 2004, when temporary disability commenced. Thus, applicant argues that the 4061 notice exception to application of the 2005 Schedule to pre-2005 injuries applies.

DISCUSSION

The new permanent disability rating schedule mandated by section 4660 was adopted by the Administrative Director in Rule 9805 (Cal. Code Regs., tit. 8, § 9805), and became effective on January 1, 2005.

Subsection (d) of section 4660 provides as follows:

> "The [2005] 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 [2005] 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."

In turn, subsection (a) of section 4061 provides as follows:

> "Together with the last payment of temporary disability indemnity, the employer shall, in a form prescribed by the administrative director pursuant to Section 138.4, provide the employee one of the following:
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> "(1) Notice either that no permanent disability indemnity will be paid because the employer alleges the employee has no permanent impairment or limitations resulting from the injury or notice of the amount of permanent disability indemnity determined by the employer to be payable. The notice shall include information concerning how the employee may obtain a formal medical evaluation pursuant to subdivision (c) or (d) if he or she disagrees with the position taken by the employer. The notice shall be accompanied by the form prescribed by the administrative director for requesting assignment of a panel of qualified medical evaluators, unless the employee is represented by an attorney. If the employer determines permanent disability indemnity is

> payable, the employer shall advise the employee of the amount determined payable and the basis on which the determination was made and whether there is need for continuing medical care.
> "(2) Notice that permanent disability indemnity may be or is payable, but that the amount cannot be determined because the employee's medical condition is not yet permanent and stationary. The notice shall advise the employee that his or her medical condition will be monitored until it is permanent and stationary, at which time the necessary evaluation will be performed to determine the existence and extent of permanent impairment and limitations for the purpose of rating permanent disability and to determine the need for continuing medical care, or at which time the employer will advise the employee of the amount of permanent disability indemnity the employer has determined to be payable. If an employee is provided notice pursuant to this paragraph and the employer later takes the position that the employee has no permanent impairment or limitations resulting from the injury, or later determines permanent disability indemnity is payable, the employer shall in either event, within 14 days of the determination to take either position, provide the employee with the notice specified in paragraph (1)."

We conclude for purposes of section 4660 that an employer's duty "to provide the notice required by" section 4061 arises with the first payment of temporary disability indemnity. There is no obligation to provide any section 4061 notice unless temporary disability indemnity has been paid or should have been paid. Thus, as soon as the first date of compensable temporary disability occurs, the duty to give section 4061 notice comes into existence. This is an absolute duty, and there is no circumstance under which an employer may avoid that duty.

We distinguish here between when the duty arises and when the duty is required to be executed. The duty arises when the first payment of temporary disability indemnity is made. The execution of that duty occurs when the last payment of temporary disability indemnity is made. If there is no temporary disability, no duty to give notice under section 4061 arises.

We also note that the first two exceptions to the general provision of section 4660(d), applying the 2005 Schedule to pre-2005 injuries are phrased in the past perfect tense (i.e. "when there has been"), but that the third exception is phrased in the present tense (i.e. "is not required"). Thus, the most persuasive interpretation of that phrase is that the employer "is required" to provide the notice required by section 4061 once the first payment of temporary disability indemnity is

made, although the timing of the notice is contingent on the duration of temporary disability indemnity and the content of the notice is contingent on the employee's medical condition at the time of "the last payment" of temporary disability indemnity.

Thus, here, defendants' duty to provide the notice required by section 4061 arose on June 30, 2004, when the first payment of temporary disability indemnity was made. Accordingly, the 1997 Schedule applies to calculate applicant's permanent disability. Therefore, we will grant reconsideration and, as our Decision After Reconsideration, amend the Findings and Order of December 11, 2006, to find that the 1997 Schedule applies herein.

For the foregoing reasons,

IT IS ORDERED that reconsideration of the Findings and Order of December 11, 2006, is hereby **GRANTED**.

IT IS FURTHER ORDERED, as the Decision After Reconsideration of the Workers' Compensation Appeals Board (En Banc), that the Findings and Order of December 11, 2006, is hereby **AFFIRMED**, except that finding of fact number 7 is **AMENDED** as follows**:**

FINDINGS OF FACT

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7. The 1997 Schedule for Rating Permanent Disabilities applies herein.

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IT IS FURTHER ORDERED that the above-entitled matter be, and hereby is, **RETURNED** to the trial level for further proceedings and decision by the workers' compensation administrative law judge, as necessary, consistent with the opinion herein.

WORKERS' COMPENSATION APPEALS BOARD (EN BANC)

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

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

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

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

WE DISSENT
(See attached Dissenting Opinion)

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

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

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

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA 1/24/2007

SERVICE BY MAIL ON ALL PARTIES SHOWN ON THE OFFICIAL ADDRESS RECORD EFFECTED ON ABOVE DATE, EXCEPT LIEN CLAIMANTS.

JSG/rrm

DISSENTING OPINION

We dissent. We agree with the WCJ. Section 4061 requires the employer to provide the injured worker with a notice regarding permanent disability "together with the last payment of temporary disability indemnity." Therefore, we conclude that if the last payment of temporary disability indemnity was made on or after January 1, 2005, the 2005 Schedule applies to determine the extent of permanent disability pursuant to section 4660(d).

In *Aldi v. Carr, McClellan, Ingersoll, Thompson & Horn* (2006) 71 Cal.Comp.Cases 783, 785 (Appeals Board en banc), we specifically held that: "…the revised permanent disability rating schedule, adopted by the Administrative Director of the Division of Workers' 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 rating schedule applies, unless one of the exceptions delineated in the third sentence of section 4660 (d) is present."

Unlike the majority, we do not believe that the section 4061 notice exception was triggered in this matter.

Section 4061(a) requires that notice be provided "[t]ogether with the last payment of temporary disability indemnity". Temporary disability indemnity was paid continuously from June 30, 2004, through July 19, 2005. The majority's reading of sections 4061 and 4660(d) has no basis in the actual statutory language of the cited sections. Section 4660(d) states that the new schedule will apply if, before January 1, 2005, the "employer is not required to provide the notice required by Section 4061 to the injured worker." Pursuant to the plain language of sections 4061 and 4660(d), defendants' obligation to provide notice did not arise until the actual last payment of temporary disability indemnity in July 2005. The fact that this quoted portion of section 4660(d) uses the present tense rather than the past tense does not alter the plain meaning of section 4660(d).

The majority's analysis, used in a prior panel decision, was the subject of the following editorial comment with which we agree: "*Here, however, the panel's interpretation has rendered an entire subdivision meaningless in violation of the basic rule that interpretations are to be*

avoided that render some words surplusage, defy common sense, or lead to mischief or absurdity. See Fields v. Eu (1976) 18 C3d 322. *If the exception applies whenever there is TD, the exception swallows the rule."* (34 Cal. Workers' Comp. Rptr. 331 [December 2006].)

Additionally, the language of section 4660(d) must be viewed in light of the entire statutory scheme of which it is a part. (See *Chevron U.S.A., Inc. v. Workers' Comp. Appeals Bd.* (*Steele*) (1999) 19 Cal.4th 1182 [64 Cal.Comp.Cases 1].) In this regard, we note that the first sentence of section 4660(d) clearly expresses the legislative intent to "promote consistency, uniformity, and objectivity" by adopting the revised rating schedule. Section 4660(d) was adopted as part of a comprehensive reform of the workers' compensation statutes (Senate Bill 899). Section 49 of Senate Bill 899 provides a clear expression of the legislative intent:

> "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 necessities 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."* (Italics added.)

Thus, it is clear that the Legislature intended that the changes in the law take effect "immediately" so as to provide relief "*at the earliest possible* time." In *Aldi*, *supra*, 71 Cal.Comp.Cases at p. 793, fn. 6, we noted the Court of Appeal's observation in *Green v. Workers' Comp. Appeals Bd.* (2005) 127 Cal.App.4th 1426, 1441 [70 Cal.Comp.Cases 294] 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.' " (See also *Kleemann v. Workers' Comp. Appeals Bd.* (2005) 127 Cal.App.4th 274 [70 Cal.Comp.Cases 133]; *Rio Linda Union School District v. Workers' Comp. Appeals Bd. (Sheftner)* (2005) 131 Cal.App.4th 517 [70 Cal.Comp.Cases 999].)

Consequently, if section 4660(d) is to be construed so as to effectuate the Legislature's intent to provide relief "*at the earliest possible time"*, it is clear that it must be construed in the manner that ensures that the revised rating schedule applies "*at the earliest possible time*." We

believe that interpreting section 4660(d) so that the triggering of the employer's obligation to provide section 4061 notice attaches with the last payment of temporary disability accomplishes this Legislative intent.

We find no error in the WCJ's application of the 2005 Schedule. Accordingly, we would affirm the Findings and Order of December 11, 2006.

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

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

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

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