WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

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

Defendant, being newly aggrieved, seeks reconsideration of the en banc decision issued by the Appeals Board on January 24, 2007. In that decision, the Appeals Board held, by a 4 to 3 majority, that if the first date of compensable temporary disability occurred prior to January 1, 2005, then the 1997 Schedule for Rating Permanent Disabilities (1997 Schedule) applies to determine the extent of permanent disability, pursuant to Labor Code section 4660(d)[1], because an employer's duty "to provide the notice required by" section 4061 arises with the first payment of temporary disability indemnity. In so holding, the Appeals Board majority granted applicant's petition for reconsideration of the Findings and Order of December 11, 2006, wherein the workers' compensation administrative law judge (WCJ) found, in essence, that the extent of applicant's permanent disability caused by the admitted industrial injury he sustained to his right lower extremity/ankle on June 29, 2004, should be determined using the 2005 Schedule for Rating Permanent Disabilities (2005 Schedule). The WCJ also found that the injury caused temporary disability through July 19, 2005, and reasoned that none of the three exceptions enumerated in section 4660(d) to application of the 2005 Schedule to pre-2005 injuries applies. The three dissenting commissioners disagreed with the majority's interpretation of section 4660(d), and would have affirmed the WCJ's decision.

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

Defendant contends that the Appeals Board erred in concluding that the 1997 Schedule applies if an injury first caused temporary disability before January 1, 2005, arguing that the 2005 Schedule applies unless the last payment of temporary disability indemnity was made before January 1, 2005. Accordingly, defendant asserts that the 2005 Schedule applies in this matter because the last payment of temporary disability indemnity was made in July 2005.

Applicant filed an answer to defendant's petition for reconsideration, asserting that the Appeals Board is bound by its prior en banc decision in this case.

We hold that if the last payment of temporary disability indemnity was made for any period of temporary disability ending before January 1, 2005, then the 1997 Schedule applies to determine the extent of permanent disability, pursuant to section 4660(d), because section 4061 requires the employer to provide the injured worker with a notice regarding permanent disability "[t]ogether with the last payment of temporary disability indemnity ... ."[2]

I.

Before we turn to the merits of defendant's petition for reconsideration, we will address two preliminary issues: (1) applicant's contention that our prior en banc decision in this case is now binding and cannot be revisited; and (2) the change in the membership of the Appeals Board since our prior en banc decision.

We turn first to applicant's contention, which we reject.

This matter is pending before us again on a timely *petition for reconsideration*. The Labor Code expressly allows an aggrieved party to seek reconsideration of any final decision "made and filed *by the appeals board*" (Lab. Code, §§ 5900(a), 5902, 5903, 5906, 5907 (emphasis added)) and it expressly allows the Appeals Board, on reconsideration, to "affirm, *rescind, alter, or amend*" its prior decision. (Lab. Code, §§ 5906, 5907 (emphasis added).)

Further, there is no statute, rule, or case law that precludes the en banc Appeals Board from revisiting and reversing a prior Appeals Board en banc decision. Section 115 permits "the appeals board as a whole" to issue en banc decisions (see also Gov. Code, § 11425.60(b)), and Appeals

[2] It is likely self-evident, but our holding relates only to compensable claims arising before January 1, 2005.

Board Rule 10341 provides that "[e]n banc decisions of the Appeals Board are binding *on panels* of the Appeals Board and [WCJs] as legal precedent under the principle of stare decisis." (Cal. Code Regs., tit. 8, § 10341 (emphasis added).) Rule 10341 does not make en banc decisions binding on the Appeals Board sitting en banc.

Moreover, although an en banc decision in a particular case has immediate stare decisis effect on WCJs and Appeals Board panels in *other* cases (*Diggle v. Sierra Sands Unified Sch. Dist.* (2005) 70 Cal.Comp.Cases 1480 (Significant Panel Decision)), the principle of stare decisis does not apply *to this case* because a timely and proper petition for reconsideration was filed and, therefore, our prior en banc is not final *as to these parties*. This situation is analogous to the filing of a timely petition for rehearing with an appellate court – i.e., on rehearing, the appellate court is not bound by its original decision and may reverse itself in whole or in part. (E.g., *People v. Wright* (1990) 52 Cal.3d 367, 382-383; *In re Raphael P.* (2002) 97 Cal.App.4th 716, 722.)

Accordingly, we are free to reconsider our prior en banc decision and to reach a different conclusion.

We next address the change in the membership of the Appeals Board.

Subsequent to the January 24, 2007, en banc decision, the composition of the Appeals Board changed because the term of Commissioner Merle Rabine ended and the Governor appointed Alfonso J. Moresi as an Appeals Board member. (See Lab. Code, § 112.) However, this change of Appeals Board members does not affect our ability to reconsider that en banc decision. Because Commissioner Moresi is a duly-appointed and presently sitting member of the Appeals Board, he may properly participate in the deliberations and decision in this matter. (Lab. Code, § 111(a) ("The Workers' Compensation Appeals Board, *consisting of seven members*, shall exercise all judicial powers vested in it under this code." (Emphasis added).) This is true even though he did not participate in the initial en banc decision.

The circumstances here are analogous to those in *Metropolitan Water Dist. v. Adams* (1942) 19 Cal.2d 463 ("*Adams*"). In *Adams*, an appeal was argued before six Supreme Court justices and a Court of Appeal justice (Justice Pullen), who was sitting as a pro tempore ("pro

tem") justice of the Supreme Court in place of Justice Houser, who was absent. Following the oral argument, the Supreme Court affirmed the judgment of the trial court by 4-3 vote, with pro tem Justice Pullen joining in the majority. Thereafter, however, a timely petition for rehearing was filed, which was considered by all seven regular members of the Supreme Court, including Justice Houser (i.e., pro tem Justice Pullen did not participate), and an order granting rehearing was then signed by four Supreme Court justices, including Justice Houser. Defendant challenged the order granting rehearing, contending that because Justice Houser had not participated in the original argument and decision, he "was not authorized to sign the order granting the rehearing and that [the] order … is therefore void and of no effect." However, the Supreme Court unanimously rejected defendant's contention. In doing so, the Supreme Court pointed out that Justice Pullen had properly participated in the original decision, which had been submitted to him. However, "the application for a rehearing had never been submitted to him"; instead, "[t]he question whether a rehearing should be granted was … presented to the court with its regular membership participating, and Justice Houser had the power to act on the [petition for rehearing] unless disqualified … [because he was a] regularly constituted member of the Supreme Court … [who was] able, ready and willing to act … ." (*Adams, supra*, 19 Cal.2d at pp. 469-470.) Further, the Supreme Court declared: "The parties, of course, have the constitutional right to a judgment herein by a duly constituted court, but they have no right, constitutional or otherwise, to a decision by any particular judge or group of judges." (*Adams, supra*, 19 Cal.2d at p. 474; see also *Reeve v. Colusa Gas & Electric Co.* (1907) 151 Cal. 29 (similar).)

Here, Commissioner Moresi is a regularly constituted member of the Appeals Board, who is able, ready and willing to act – and who is not disqualified. Moreover, Commissioner Moresi has reviewed and considered the current petition for reconsideration, the current answer, and the entire record in this case – as well as all of the arguments previously made. Commissioner Moresi concurs with the analysis set forth in what was previously the dissenting opinion to the Opinion and Order Granting Reconsideration and Decision After Reconsideration of January 24, 2007.

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Accordingly, we now reverse that prior en banc decision. Therefore, for the reasons discussed below, we will grant defendant's petition for reconsideration, rescind our prior decision, and affirm in its entirety the Findings and Order issued by the WCJ on December 11, 2006, applying the 2005 Schedule.

II.

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.
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> "(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)."

In *Aldi v. Carr, McClellan, Ingersoll, Thompson & Horn* (2006) 71 Cal.Comp.Cases 783, 785 (Appeals Board en banc), writ den. sub nom. *Aldi v. Workers' Comp. Appeals Bd.* (2006) 71 Cal.Comp.Cases 1822, 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."

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." Section 4061(a) requires that notice be provided "[t]ogether with the last payment of temporary disability indemnity ... ." Here, temporary disability indemnity was paid continuously from June 30, 2004, through July 19, 2005. Pursuant to the plain language of sections 4660(d) and 4061, defendant's obligation to provide notice did not arise until the actual last payment of temporary disability indemnity in July 2005. Contrary to the dissenting opinion, 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).

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."* (Emphasis added.)

Thus, 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 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.

The dissent's analysis would render 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. (*Fields v. Eu* (1976) 18 Cal.3d 322, 328; *Cal. Insurance Guarantee Assn. v. Workers' Comp. Appeals Bd. (White/Torres)* (2006) 136 Cal.App.4th 1528, 1534 [71 Cal.Comp.Cases 139, 141-142].)

Accordingly, we will grant reconsideration, rescind the Opinion and Order Granting Reconsideration and Decision After Reconsideration of January 24, 2007, and affirm the initial Findings and Order of December 11, 2006, in its entirety.

For the foregoing reasons,

IT IS ORDERED that reconsideration of the Opinion and Order Granting Reconsideration and Decision After Reconsideration of January 24, 2007, is **GRANTED**.

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IT IS FURTHER ORDERED, as the Decision After Reconsideration of the Workers' Compensation Appeals Board (En Banc), that the Opinion and Order Granting Reconsideration and Decision After Reconsideration of January 24, 2007, is **RESCINDED** and that the Findings and Order of December 11, 2006, is **AFFIRMED** in its entirety**.**

WORKERS' COMPENSATION APPEALS BOARD (EN BANC)

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

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

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

/s/ Alfonso J. Moresi
ALFONSO J. MORESI, Commissioner

WE DISSENT
(See attached Dissenting Opinion)

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

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

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

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA
4/6/2007

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

DISSENTING OPINION

We dissent. We would deny reconsideration and affirm our prior en banc decision.

We first observe that the Appeals Board, as a judicial body, should not respond to hastily drafted legislation with the goal of affording relief to businesses "at the earliest possible time," as a catch-all for every situation. Nowhere does SB 899 state that such relief must come at the expense of injured workers, or that the express words of statutes are to be recrafted to suit this goal. Words are the tools of lawyers, courts, and legislators. We must assume that the words used were the words the Legislature intended to use. In construing the effect those words may have in everyday practice, we must look at the plain language before us and not presume that the Legislature meant something other than it stated in the statutes.

Therefore, as explained in our prior en banc decision in this case, we conclude, 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.

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.

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, defendant's 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 would deny reconsideration of the Opinion and Order Granting Reconsideration and Decision After Reconsideration of January 24, 2007.

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

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

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

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