WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

JANELLE SCHEFTNER, ***Applicant,*** **vs.** **RIO LINDA SCHOOL DISTRICT, Permissibly Self-Insured,** ***Defendants.***	**Case No. SAC 0326274** **OPINION AND DECISION AFTER RECONSIDERATION** **(EN BANC)**

The Appeals Board granted reconsideration in this matter to allow time to study the record and applicable law. 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, to the apportionment issue in this case, 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.)[1]

For reasons discussed below, we hold that submission orders and orders closing discovery, that issued prior to the enactment of SB 899 on April 19, 2004, are "existing" orders that cannot be reopened due to the prohibition set forth in Section 47. We also hold that absent existing orders as so defined the amendments, additions, or repeals of SB 899 apply prospectively on or after April 19, 2004, to all cases, regardless of the date of injury, unless otherwise specified in SB 899.

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[1] The Appeals Board's en banc decisions are binding precedent on all Appeals Board panels and workers' compensation administrative law judges (WCJ). (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].)

BACKGROUND

The relevant facts of this case do not appear to be in dispute.

Applicant sustained an admitted industrial injury to her low back on February 12, 2002. The applicant previously strained her back in 1997 and had continuing back problems prior to February 12, 2002. In fact, she received treatment through January 31, 2002 for her low back, just a few weeks before her industrial injury, and had a treatment appointment scheduled for February 13, 2002.

According to the January 31, 2002 records of Mark Pedroncelli, D.C., applicant complained of "constant pain in lower left side of back going down into leg, butt and side." (Def. Exh. C, page 3.) The pain was aggravated by sitting, bending, twisting, pushing, lifting, reaching, stooping, kneeling, standing, pulling and arising from sitting. Dr. Pedroncelli's record on this date notes that the problem "was worsening."

The matter came on for Mandatory Settlement Conference on November 13, 2003, at which time issues were framed, including permanent disability, apportionment, and further medical treatment, exhibits and witnesses identified, and the matter was set for trial.

At trial on February 18, 2004, permanent disability and apportionment were listed as issues, among other issues, and applicant testified. At the conclusion of trial the WCJ gave the following disposition:

> "This matter may be referred to the Disability Evaluation Unit. If a recommended rating issues, then the parties will have 7 days to file a motion to strike. If no motion is filed, the matter will then stand submitted. If it is not referred to the Disability Evaluation Unit, then it will be submitted as of today."

The matter was not submitted to the Disability Evaluation Unit. Therefore, the matter was deemed ordered submitted as of February 18, 2004.

On April 19, 2004, SB 899 was enacted.

On April 23, 2004, the WCJ found, in relevant part, that Janelle Scheftner (applicant), sustained industrial injury to her low back on February 12, 2002, while employed as a teacher by defendant. The WCJ further found that the injury resulted in 34% permanent partial

disability, without apportionment, and with a need for further medical treatment. In his Opinion on Decision, the WCJ explained that although applicant had problems with her back pre-existing this injury, the employer was responsible for all disability "lit up" by the industrial injury and thus he did not apportion the disability. His decision was based in part on the medical opinion of Dr. Nijjar, applicant's Qualified Medical Evaluator. The WCJ arrived at the 34% permanent disability figure without consulting the Disability Evaluation Unit (DEU).

On July 19, 2004, the Appeals Board granted the petition for reconsideration filed by Rio Linda Union Elementary (defendant).

Defendant contends in substance: (1) that substantial evidence does not support the finding of 34% permanent partial disability; (2) that the WCJ erroneously relied on the medical opinion of Dr. Nijjar with regard to permanent disability because Dr. Nijjar did not comply with newly enacted Labor Code section 4663, effective April 19, 2004, that provides for apportionment based on causation; (3) that the WCJ incorrectly rated the factors of disability to arrive at the 34% figure, even if the subjective factors of disability described by Dr. Nijjar are to be accepted; and (4) that the award of future medical treatment by the WCJ is not supported by substantial evidence.

In his Report and Recommendation on defendant's petition for reconsideration, the WCJ disagrees with defendant's contentions except, upon further reflection, the WCJ indicates that he probably should have called for a consultative rating by the Disability Evaluation Unit to rate the factors of disability described by Dr. Nijjar. He recommends that the matter be returned to him for this purpose only, but otherwise deny all other counts raised by defendant. As to the defendant's argument regarding the application of newly enacted Labor Code section 4663, the WCJ states that the change in the law enacted by SB 899, effective April 19, 2004, is not applicable to the instant case because the case had been submitted for decision as of February 18, 2004, a submission order existing prior to enactment of SB 899.

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DISCUSSION

A. "Existing order, decision or award" includes orders of closure of discovery at mandatory settlement conferences and orders of submission for decision.

The first issue here is whether the new statutes on apportionment, specifically section 4663,[2] enacted on April 19, 2004, should be applied to the facts of the instant case, where the WCJ held an MSC and issued an order of submission prior to the enactment of SB 899 on April 19, 2004, followed by the issuance of Findings and Award after its enactment. If the new statutes do apply, the WCJ's decision should be rescinded, the submission order rescinded, and the matter remanded for further development of the record, because the reporting physicians did not address causation of permanent disability as required by newly enacted section 4663(c).

Section 47 of SB 899 states:

> "The amendment, addition, or repeal of, any provision of law made by this act shall apply prospectively from the date of enactment of this act, regardless of the date of injury, unless otherwise specified, but shall not constitute good cause to reopen or rescind, alter, or amend any existing order, decision, or award of the Workers' Compensation Appeals Board."

SB 899 repeals former statutes on apportionment contained in Labor Code sections 4663, 4750, and 4750.5, without a savings clause (see, 7 Witkin**,** Summary of Cal. Law (9th ed. 1988) Constitutional Law, §497, pp. 690-691). Substituted in place thereof are amended section 4663 and added section 4664, the former dealing with apportionment to causation with a requirement that physicians address apportionment to causation, and the latter including a conclusive presumption of a pre-existing disability if the applicant received a prior award of permanent disability. Neither section specifies an effective date other than the date of enactment of SB 899. However, Section 47 proscribes reopening of "any existing order, decision or award" to apply the new statutes. The question now arises as to what is meant by "existing order."

[2] All section references are to the Labor Code unless otherwise specified.

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]; *Cal. Ins. Guar. Ass'n v. Workers' Compensation Appeals Bd*. (*Karaiskos*) 117 Cal.App.4th 350, 355 [69 Cal.Comp.Cases 183, 185].) 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]; *Cal. Ins. Guar. Ass'n v. Workers' Compensation Appeals Bd*. (*Karaiskos*), *supra*, 117 Cal.App.4th at p. 355 [69 Cal.Comp.Cases at p. 185]; *Reeves v. Workers' Comp. Appeals Bd.* (2000) 80 Cal.App.4th 22, 27 [65 Cal.Comp.Cases 359, 362]; *Boehm & Associates v. Workers' Comp. Appeals Bd.* (*Lopez*), *supra*, 76 Cal.App.4th at p. 516 [64 Cal.Comp.Cases at p. 1351]; *Williams v. Workers' Comp. Appeals Bd.* (1999) 74 Cal.App.4th 1260, 1265 [64 Cal.Comp.Cases 995, 998].)

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; *Moyer v. Workmen's Comp. Appeals Bd*., *supra*, 10 Cal.3d at pp. 230-231;

Gee v. Workers' Comp. Appeals Bd. (2002) 96 Cal.App.4th 1418, 1427 [67 Cal.Comp.Cases 236]; *American Psychometric Consultants, Inc. vs. Workers' Comp. Appeals Bd.* (*Hurtado*) (1995) 36 Cal.App.4th 1626, 1639 [60 Cal. Comp. Cases 559].)

Generally, there are three categories of orders, decisions, and awards (hereinafter referred to collectively as "orders") that are authorized by the Labor Code or by the Workers' Compensation Appeals Board's Rules of Practice and Procedure (hereinafter WCAB Rules), [Cal. Code Regs., tit. 8, §10300, et seq.]: (1) orders that have become final because the parties have exhausted all of their appellate rights or have not pursued them (see, *Leinon v. Fishermen's Grotto* (2004) 69 Cal.Comp.Cases 995, Appeals Board en banc) but are subject to reopening under sections 5803 and 5804; (2) final orders made and filed by the appeals board or a workers' compensation judge that are subject to reconsideration pursuant to section 5900; and (3) interlocutory orders that are not final and are subject to removal under section 5310.

Under any interpretation, "existing order" must include orders subject only to reopening, but must exclude orders that are not affected by SB 899, such as orders changing venue (section 5501.6), orders to submit to medical examination (section 4054), and orders allowing attorney's fees for depositions (section 5710). However, in order to determine the meaning of "existing order" within this range, we must consider the language of Section 47 in the light of the entire statutory scheme and the wider historical circumstances surrounding the legislation, because the statutory language is not "plain" (if it were, the members of this Board would not be proposing three different readings of "existing order").

We first consider whether "existing order" refers only to orders subject to reopening under section 5803. Section 47 provides that the provisions of SB 899 "shall not constitute good cause to reopen or rescind, alter or amend." "Rescind, alter, or amend" is the exact language of section 5803. Although "reopen" is not the statutory language of section 5803, it is used as a synonym for the language of section 5803 in WCAB Rule 10455, and it is also used by common practice in the workers' compensation community.

However, "existing" is not the same as "final." As of April 19, 2004, the effective date of SB 899, there were orders in existence that were potentially affected by the provisions of SB 899, even though they were not "final" for the purposes of reopening. If the Legislature meant to exclude those existing orders from the restrictions of Section 47, it would have said so. In fact, where the Legislature intended that the application of the 1999 amendments to section 3212.1 (cancer presumption for firefighters and peace officers) be limited only by "final" orders, it did so state.[3] Therefore, we believe that "existing" is more inclusive than "final," and that it includes orders that are not final for purposes of reopening.[4]

We next consider whether "existing order" includes only orders that are final for purposes of reconsideration or whether it also includes some interlocutory orders that might otherwise be subject to reopening because of the provisions of SB 899. While an order that is final for purposes of reconsideration is a significant event, an order closing discover at a mandatory settlement conference (MSC) pursuant to section 5502(d) can be as significant to the outcome of the case. As the Court of Appeal has noted, "[A]n employee's [as well as an employer's] case may be seriously damaged by application of this statute." (*San Bernardino Community Hospital v. Workers' Comp. Appeals Bd.* (*McKernan*) 74 Cal.App.4th 928 [64 Cal.Comp.Cases 986, 993]; see also *Telles Transport, Inc. v. Workers' Comp. Appeals Bd*. (*Zuniga*) 92 Cal.App.4th 1159 [66 Cal.Comp.Cases 1290, 1294-1295].) We believe that an order closing discovery at an MSC, including closure of discovery at an MSC by operation of law pursuant to section 5502(d), is an "existing order" that cannot be reopened because of SB 899. A fortiori, an order of submission after a case has been tried and the record has been closed is also an "existing order."

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[3]Section 3212.1(e) states: "The amendments to this section enacted during the 1999 portion of the 1999-2000 Regular Session shall be applied to claims for benefits filed or pending on or after January 1, 1997, including, but not limited to, claims for benefits filed on or after that date that have previously been denied, or that are being appealed following denial."

[4] See e.g., writ denied cases where WCJ issued a decision before 4/19/04, then Appeals Board issued decision after 4/19/04 (or before 4/19/04 in one case) not addressing SB 899, and then defendant's petition for writ of review raised SB 899: *General Motors Corp. v. Workers' Comp. Appeals Bd*. (*Seifert*, aka Abbenante) (2004) 69 Cal.Comp.Cases 805 (writ den.); *The Limited, Inc. v. Workers' Comp. Appeals Bd*. (*Grant*) (2004) 69 Cal.Comp.Cases 1038 (writ den); *Tarzana Medical Center v. Workers' Comp. Appeals Bd*. (*Haile*) (2004) 69 Cal.Comp.Cases 113 (writ den.).

While this interpretation of "existing order" will result in the apportionment statutes of SB 899 applying to fewer cases than would result from a more restrictive interpretation, it is consistent with the requirement of our Constitution that workers' compensation legislation "accomplish substantial justice in all cases expeditiously, inexpensively, and without encumbrance of any character." (Cal. Const. Article XIV, section 4.) Although Section 49 of SB 899 embodies the Legislature's determination that "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," to interpret "existing order" narrowly would thwart the Constitutional mandate by allowing discovery to be reopened, trials postponed, cases retried, and additional costs incurred. In balancing the apparently competing objectives of the Constitution and Section 49, we believe that the adverse consequences of the delay in final resolution and any additional costs that would be required by allowing discovery to be reopened where there has been no "final" order outweigh whatever "relief" that might result from application of the apportionment statutes of SB 899 to the relatively small number of cases where there has been closure of discovery or an order of submission prior to April 19, 2004, with a decision thereafter.

Therefore, we hold that the apportionment sections of SB 899 do not apply in this case, because the case was submitted for decision prior to April 19, 2004.

Accordingly, if discovery has closed or the matter has been ordered submitted for decision prior to April 19, 2004, as here, those orders are "existing orders" that may not be reopened to apply apportionment under SB 899. We agree with the WCJ's interpretation. His submission order may not be reopened pursuant to Section 47.

B. <u>Where there is no "existing order, decision or award," the apportionment provisions of SB 899 apply to all cases regardless of date of injury.</u>

Because the amendment to section 4663, the addition of section 4664, and the repeal of the prior apportionment statutes do not specify effective dates, the application of the now-

existing statutes is governed by Section 47. These statutes "shall apply prospectively from the date of enactment of this act, regardless of date of injury."

If "prospectively" is interpreted to require that the statutes only be applied to injuries occurring on or after the date of enactment, it stands in absolute contradiction to the next phrase of Section 47, "regardless of date of injury." Because of this contradiction, the legislative language is neither "clear" nor "unambiguous." Therefore, we must consider it in the light of the entire statutory scheme of SB 899 and harmonize it with related statutes.

As we read the act, the most relevant provision is Section 49: "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]. If we were to read "prospectively" as requiring that the apportionment statutes take effect only as to injuries on or after the date of enactment, we would not only negate the express language of Section 47 ("regardless of the date of injury"), but we would also ignore the "clear, unambiguous, and plain meaning" of Section 49, requiring that the act take effect "immediately." For this reason, we believe that any interpretation of Section 47 that limits application of the apportionment statutes to injuries on or after the date of enactment of SB 899 is not tenable.

Therefore, we read "prospectively" to mean that the apportionment statutes must be applied after April 19, 2004, to all cases, regardless of date of injury, except for any case in which there was an "existing order, decision, or award."

For these reasons, we hold that absent an "existing order, decision or award" prior to April 19, 2004, the apportionment statutes apply to all cases regardless of the date of injury.

C. <u>We affirm the WCJ's findings of permanent disability, apportionment, and need for further medical treatment</u>.

We have considered the allegations of the Petition for Reconsideration and the contents of the report and recommendation of the WCJ with respect to permanent disability, apportionment under the old law, and need for further medical treatment. Based on our review of the record, and for the reasons stated in the WCJ's report dated May 25, 2004, which we

adopt and incorporate by reference, except that part requesting the matter to be remanded to obtain a formal disability rating, we will affirm the Findings and Award that issued on April 23, 2004.

The WCJ may rely on a medical opinion that is not erroneous, is germane, and is based on an adequate history or examination, and without surmise, speculation, or conjecture. (*Place v. Workers' Comp. Appeals Bd.* (1970) 3 Cal.3d 372, 278 [35 Cal.Comp.Cases 525, 529].) Dr. Nijjar's reports meet that standard and justify the WCJ's reliance. In addition, we have given the WCJ's evaluation of applicant's credibility the great weight to which it is entitled. (*Garza* v. *Workers' Comp. Appeal Bd.* (1970) 3 Cal.3d 312 [35 Cal.Comp.Cases 500].)

According to our calculations, the WCJ has correctly rated the factors of permanent disability described by Dr. Nijjar in his report of July 23, 2003, without the need of the Disability Evaluation Unit. The subjective factors rate at 35% standard, based on pain of frequent slight to moderate becoming moderate with bending, turning, twisting or lifting. The 35% standard figure is higher than the work preclusions alone which rate at 30% standard. As stated by the WCJ in his Report and Recommendation, the trier-of-fact may determine the percentage of disability without the need for the expertise of DEU. (See, *West American Insurance Co. v. Workers' Comp. Appeals Bd*. (*Lopez*) (1983) 48 Cal. Comp. Cases 652 (writ den.); *American Motorists Insurance Company v. Workers' Comp. Appeals Bd*. (*Henderson*) (1982) 47 Cal.Comp.Cases1209 (writ den.).)

DISPOSITION

As our Decision After Reconsideration, we will affirm the WCJ's Findings and Award of April 23, 2004, for all the reasons given above.

For the foregoing reasons,

IT IS ORDERED that as the Decision After Reconsideration of the Workers Compensation Appeals Board (En Banc), the Findings and Award issued by the workers'

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compensation administrative law judge on April 23, 2004 be, and hereby is, **AFFIRMED**.

WORKERS' COMPENSATION APPEALS BOARD (EN BANC)

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***MERLE C. RABINE*, Chairman**

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WILLIAM K. O'BRIEN, Commissioner

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JANICE JAMISON MURRAY, Commissioner

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RONNIE G. CAPLANE, Commissioner

I CONCUR IN PART AND DISSENT IN PART
(See attached concurring and dissenting opinion)

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FRANK M. BRASS, Commissioner

I DISSENT
(See attached dissenting opinion)

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JAMES C. CUNEO, Commissioner

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

October 4, 2004

SERVICE BY MAIL ON SAID DATE TO ALL PARTIES AS SHOWN ON THE OFFICIAL ADDRESS RECORD.
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CONCURRING AND DISSENTING OPINION OF COMMISSIONER BRASS

I concur with the majority, for the reasons stated, that "prospectively" means that the apportionment statutes must be applied to all cases after April 19, 2004, regardless of the date of injury, unless there is an "existing order, decision, or award."

Unfortunately, the Legislature did not make clear what it meant by the phrase "any existing order, decision, or award."

Nevertheless, it would be prudent to assume that the drafters of the section did not intend to include procedural orders such as orders taking off calendar, orders closing discovery, and orders of submission. It follows logically that the lawmakers were referring only to *final* orders, decisions, or awards.

What is a *final* order, decision, or award? An answer to that question may be found in the Labor Code and the case law.

A party may only petition for reconsideration from a *final* order, decision, or award. (Lab. Code, §§5900, 5903.)

A decision is *final* only if it resolves an issue affecting the substantive rights of the parties (*Safeway Stores, Inc. v. Workers' Comp. Appeals Bd. (Pointer)* (1980) 104 Cal.App.3d 528 [45 Cal.Comp.Cases 410]).

If a WCJ defers resolution of one issue, but makes a determination of the rights of the parties on other issues, only the latter determination is subject to reconsideration.

Procedural orders, such as orders taking off calendar, orders closing discovery, or orders of submission, which are issued before a decision is made on a substantive question, are not subject to attack by a petition for reconsideration. (2 *Cal. Workers' Comp. Practice* (Cont. Ed. Bar, 4th ed. June 2003 update), §21.9, pp. 1381-1382; see, e.g., *Jablonski v. Workers' Comp. Appeals Bd.* (1987) 52 Cal.Comp.Cases 399 (writ den.); *Beck v. Workers' Comp. Appeals Bd.* (1979) 44 Cal.Comp.Cases 190 (writ den.).)

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In view of the admitted ambiguity of section 47, this interpretation is certainly reasonable and would provide a clear and practical guide for our community.

Accordingly, in the instant case because the orders of the WCJ were procedural and not final, the decision should be rescinded and the matter should be remanded to the trial level for the application of SB 899, specifically the newly enacted section 4663.

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FRANK M. BRASS, *Commissioner*

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

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

ed

COMMISIONER CUNEO

I dissent.

This is this Board's first pronouncement on SB 899. The majority has taken a position that delays and prevents, for the longest possible time, implementation of SB 899 to pending workers' compensation cases.

The majority's decision is directly contrary to the legislative intent of SB 899. Their decision is based upon fiction not fact. Their decision is based upon legal sophistry not legal analysis.

DELAY CONTRARY TO LEGISLATIVE INTENT

SB 899 was signed into law on April 19, 2004. Section 49 of SB 899 is a clear expression of the legislative intent and reasons for enactment of SB 899.

Section 49 provides as follows:

> "This act is 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 affect immediately.'"*

The Legislature has stated in simple and clear terms that it was its intention that this act takes effect immediately. This decision will delay implementation of SB 899 for the longest possible time and will limit application of SB 899 to the fewest possible pending workers' compensation cases.

A reviewing court's "first task in construing a statute is to ascertain the intent of the Legislature so as to effectuate the purpose of the law." (*Dyna-Med, Inc. v. Fair Employment and Housing Commission* (1987) 43 Cal.3d 1376, 1386.) To determine the intent of the Legislature, a statue should not be interpreted in a vacuum. Instead, the court should look to a wide variety of extrinsic evidence, including the problem the Legislature faced when it considered a particular

bill, the public policy issues which the problem raised, and the drafting solutions which emerged during legislative consideration of the bill. (See, Sutherland on Statutory Construction, Section 48.03 (2002); see, e.g., *People v. Jefferson* (1999) 21 Cal.4th 86, 94 [in determining legislative intent, "we look to a variety of extrinsic aids, including the ostensible objects to be achieved, the evils to be remedied, the legislative history, public policy, contemporaneous administrative construction, and the statutory scheme of which the statute is a part."].)

SB 899 was introduced in the midst of a crisis in the workers' compensation system caused by rapidly increasing costs. As noted by one committee report, under the existing law:

> "[the] cost of the system, which was originally created to achieve the dual purposes (1) insuring compensation for occupational injuries; and (2) protection of employers from high costs of occupational injury litigation, have increased dramatically over the passed few years. These skyrocketing costs have resulted in employers threatening to take action such as discontinuing employee coverage, diminishing other employee benefits or closing their businesses." (See, Assembly Committee on insurance report on SB 899 at p. 4 (July 9, 2003).)

Under the existing system, "workers' compensation total incurred costs" would have reached $3 billion in 2004 with another $1.8 billion in out-patient costs. (See, Senate Labor and Industrial Relations Committee Report on SB 899, at p. 1 (June 3, 2003).) Faced with these staggering costs, the Legislature set out to fix the "effects of the current workers' compensation crisis at the earliest possible time" by expressly declaring SB 899 an urgency statute.

Part of the skyrocketing cost was due to the existing law on apportionment. As SB 899 moved through the legislative process, the issue of causation and apportionment remained a key area of the workers' compensation system that the Legislature wanted to change:

> "Existing law contains provisions with respect to the apportionment of permanent disability in connection with an employee's injury or condition. This bill would repeal and recast these provisions. This bill would additionally require any physician who prepares a report addressing the issue of permanent disability due to a claimed industrial injury to address the issue of causation of disability." (See Legislative Counsel's digest, proposed conference report number 1 on SB 899 (April 14, 2004).)

The majority is delaying and preventing application of SB 899 directly contrary to

legislative intent.

DELAY BASED ON FICTION NOT FACT

Section 47 of SB 899 states:

> "The amendment, addition, or repeal of, any provision of law made by this act shall apply prospectively from the date of enactment of this act, regardless of the date of injury, unless otherwise specified, but shall not constitute good cause to reopen or rescind, alter, or amend any existing order, decision, or award of the Workers' Compensation Appeals Board."

The majority holds in part that the apportionment sections of SB 899 cannot apply to a pending case after there is an order closing discovery by virtue of its interpretation of the words "existing order" in Section 47. An order closing discovery is usually issued at a mandatory settlement conference (MSC). A MSC takes place at least 30 days if not up to six months before an order of submission may issue at a trial. The majority, by so holding, delays implementation of SB 899 even longer than that part of its holding that defines "existing order" as an order of submission.

This delay in the implementation of SB 899 is based on fiction not fact. There is no order closing discovery in this matter. The majority must recognize that is true since it spends time in its opinion discussing what it calls "closure of discovery by operation of law." The majority refers to Labor Code section 5502(e) as its basis for closure of discovery by operation of law. What the majority is doing is not simply interpreting Section 47, but rather by its interpretation adding the words "by operation of law" to Section 47 so that it now reads in pertinent part *any existing order or order by operation of law*.

Moreover, cases cited by the majority in support of its position are cases that interpret the language of section 5502(e) as self-limiting language. In other words, a party can discover evidence subsequent to a MSC and a party can have that evidence submitted and admitted if it meets the standards set by the very terms of section 5502(e), which states that a party must show that such *evidence was not available or could not have been discovered by the exercise of due*

diligence prior to the MSC. This is not the same as a showing of good cause to reopen or rescind, alter or amend an existing order.

An order closing discovery by operation of law or otherwise is an order that does not resolve an issue affecting the substantive rights of the parties.

Moreover, an order closing discovery may have a life of five minutes. A workers' compensation judge (WCJ) can set aside an order closing discovery within five minutes of issuing that order at that same MSC based on the need to have a complete record. It is an order issued by a Workers Compensation Judge not the Workers' Compensation Appeals Board.

An order closing discovery is not subject to a petition to reopen or rescind, alter or amend, on the basis of good cause. An order closing discovery by operation of law or otherwise is subject only to appeal pursuant to Labor Code section 5310, which states in part that:

"The Appeals Board may … remove to itself the proceedings on any claim."

The standard for such a removal is not a good cause standard as set out in Section 47. Rather, a party must show as a basis for a granting of its petition for removal to set aside an order closing discovery, (or any other order not affecting the substantive rights of the parties) that either the order will result in significant prejudice or that the order will result in a irreparable harm. The party must also demonstrate that a petition for reconsideration would not be an adequate remedy. (Cal. Code of Regs., tit. 8, §10843.)

What the majority has done in this part of its holding is to substitute in place of a good cause standard, the standard used under section 5310. The logical conclusion of the majority's interpretation of Section 47 is a rewriting of the section to read that the added apportionment sections of SB 899 *shall not constitute significant prejudice or irreparable harm to set aside by way of a petition for removal any existing order closing discovery, or the closing of discovery by operation of law, issued by a Workers Compensation Judge*. Such is the logical conclusion of this part of the majority's holding and such is the result when philosophy trumps reason.

Finally, I would point out that in this matter there was no order closing discovery, rather there was an agreement by the parties that further discovery could take place between the first

trial date of December 11, 2003, and the new trial date, consisting of a further report following an examination by Dr. Downs, and a further report following record review by Dr. Nijjar. (Minutes of Hearing, February 18, 2004.)

DELAY BASED ON LEGAL SOPHISTRY NOT LEGAL REASONING

The majority holds that a submission order issued prior to April 19, 2004, is an "existing order" within their interpretation of Section 47. That prohibits the application of SB 899 to all pending cases with a submission order. The majority seizes on only two words in Section 47, "existing order", and ignores the remainder of that section.

The submission order in this matter was issued on February 18, 2004 and stated as follows:

> "This matter may be referred to the Disability Evaluation Unit. If a recommended rating issues, then the parties will then have seven days to file a motion to strike. If no motion is filed, the matter will then stand submitted. If it is not referred to the Disability Evaluation Unit, then it will be submitted as of today."

The next legal event in this matter is a Findings and Award issued by the workers' compensation administrative law judge (WCJ) on April 23, 2004. That is four days after the enactment of SB 899. So, by the terms of this submission order, if the WCJ serendipitously had decided on April 22, 2004, to refer the matter to the Disability Evaluation Unit (DEU) instead of rating the matter himself (which he now wishes to do), then according to the majority's holding the apportionment provisions of SB 899 would apply to this matter.

SB 899 is a serious enactment. SB 899 is a serious enactment addressing a serious problem. SB 899 was enacted to provide immediate relief to employers. SB 899 has a serious impact on employees and employers. I will not advance such a serendipitous interpretation of when the Legislature meant that the provisions of SB 899 should be applied to pending cases. Application of SB 899 cannot depend upon whether or not a WCJ decides to rate permanent disability versus referring to the DEU.

Something more serious must have been meant by the Legislature. Moreover, the legal

sophistry engaged by the majority in analyzing different routes of appeals with regard to interpreting Section 47 ignores all the words of the section except for two, "existing order", and ignores the specific legislative intent of Section 49.

I would interpret Section 47 by reading all its words. I would interpret SB 899 by applying the specific legislative intent of SB 899. I would interpret the language in Section 47 in terms of the reality of the workers' compensation system and what a submission order really is in this system. As anyone who has practiced workers' compensation knows, you could have a wide variety of different types of submission orders from the one herein that is depended upon a possible referral to DEU, to orders conditioned upon the filing of briefs, to orders conditioned upon the filing of exhibits, to orders conditioned upon the taking of depositions, etc. etc. etc. And the submission orders may or may not have time lines that cross April 19, 2004.

The Legislature could not have meant such a serious bill to be implemented based upon the serendipitous phrasing of a submission order.

Rather, Section 47 must be read in total and in light of the new and existing sections of the Labor Code.

Section 47 reads:

> "The amendment, addition, or repeal of, any provision of law made by this act shall apply prospectively from the date of enactment of this act, regardless of the date of injury, unless otherwise specified, but shall not constitute good cause to reopen or rescind, alter, or amend any existing order, decision, or award of the Workers' Compensation Appeals Board."

There are no "otherwise specified" provisions in sections 4663 and 4664. Therefore pursuant to the clear language of Section 47 and the intent of the Legislature as expressed in Section 49 of SB 899, these sections must be applied immediately and prospectively to all pending cases including this pending case regardless of date of injury.

The language used in Section 47 mirrors the language in Labor Code sections 5803 and 5804 relating to a petition to reopen. The Legislature is deemed to have knowledge of existing Labor Code sections. (*Blew v. Horner* (1986) 187 Cal.App.3d 1380, 1388 [51 Cal.Comp.Cases

615, 621].)

Section 5803 states, in part:

> "The Appeals Board has continuing jurisdiction over all its orders, decisions, and awards made and entered under the provisions of this division,…At any time, upon notice and after an opportunity to be heard is given to the parties in interest, the appeals board *may rescind, alter, or amend any order, decision, or award, good cause appearing therefor*…."

Section 5804 provides in pertinent part:

> "No award of compensation shall *be rescinded, altered, or amended* after five years from the date of the injury except upon a petition by a party in interest filed within such five years…."

A petition to reopen under sections 5803 and 5804 can only be filed when there is a prior existing order, decision, or award that affected the substantive rights of the parties and with regard to which a party has exhausted all of its appellate rights or has chosen not to proceed with those appellate rights. (See, *Safeway Stores, Inc. vs. Workers' Comp. Appeals Bd*. (1980) (*Pointer*) 104 Cal.App.3d 528 [45 Cal.Comp.Cases 410, 413]; *Tivenon v. Workers' Comp. Appeals Bd*. (2000) 65 Cal.Comp.Cases 1345, 1347 (writ den.).).

Moreover, one of the bases for a petition to reopen is a change in law. (*State Compensation Insurance Fund v. Industrial Accident Comm*. (*Dean*) (1946) 73 Cal.App.2d 148 [11 Cal.Comp.Cases 30].); *Knowles v. Workmen's Comp. Appeals Bd*. (1970) 10 Cal.App.3d 1027 [35 Cal.Comp.Cases 411]; *Caress & Sons v. Workers' Comp. Appeals Bd*. (*Gilliam*) (1977) 42 Cal.Comp.Cases 462 (writ den.), *General Insurance Company of America v. Workers' Comp. Appeals Bd*. (*Sale*) 104 Cal.App.3d 278 [45 Cal.Comp.Cases 403]; *Rodriguez v. Vineyards, Inc*. (1980) 45 Cal.Comp.Cases 1158 (writ den.).) Section 47 is a limitation provided by the Legislature to application of the provisions of SB 899 to prohibit the SB 899 "changes in law" from constituting good cause to reopen or rescind, alter, or amend any existing order, decision, or award under Labor Code sections 5803 and 5804.

Section 47 and sections 5803 and 5804 do not contain the word "final". However Section 47 mirrors 5803 and 5804 in its language and should result in the same application to

existing orders, decisions or awards that have determined the substantive rights of the parties and are final because all appellate rights have been exhausted.

An order of submission has the same legal weight as an order closing discovery. It is an order that does not resolve an issue affecting the substantive rights of the parties. It can also have the same legal life of 5 minutes, or as seen in this matter, several months or no life if a WCJ exercises alternatives such as referral to the DEU. An order of submission is an order issued by a Workers Compensation Judge not the Workers' Compensation Appeals Board. An order of submission is not subject to a petition to reopen or rescind, alter or amend on the basis of good cause. As with an order closing discovery, an order of submission is subject to appeal by way of a petition for removal only under Labor Code section 5310. As with an order closing discovery an order of submission can be set aside only on a showing of significant prejudice or irreparable harm and not a showing of good cause. So again, as with an order closing discovery we have the majority interpreting Section 47 by rewriting it to substitute for the good cause standard language that would read *shall not constitute significant prejudice or irreparable harm to set aside an existing order of submission issued by a Workers' Compensation Judge.*

I have no reply to the majority's estimation that its interpretation of Section 47 will result in avoiding the adverse consequences of additional costs and will apply to a relatively small number of cases. This is speculation. There is no evidence to support their belief. I will not speculate.

I do agree somewhat with my co-dissenter, colleague Commissioner Brass, who has also concluded that a submission order or an order closing discovery is not of sufficient substance to prevent the application of this SB 899. However, I believe my colleague has not gone far enough. He has not done the analysis of comparing the language of Section 47 with Labor Code sections 5803 and 5804. While a decision consisting of a findings and award is deemed "final" for the purposes of being the subject of a petition for reconsideration, it is pending and not final until all appellate rights have been exhausted. (*Tivenon v. Workers' Comp. Appeals Bd*. (2000) 65 Cal.Comp.Cases 1345, 1347 (writ den.); Cal. Code Regs., tit. 8, §10348.) Once a timely filed

petition for reconsideration has been granted, the entire case is pending before the Appeals Board on reconsideration. The Appeals Board has power to change the decision rendered by the trial judge. (Lab. Code § 5907; *Garza v. Workers' Comp. Appeals Bd*. (1970) 3 Cal.3d 312 [35 Cal.Comp.Cases 500].) Furthermore, while reopening under sections 5803 and 5804 requires a finding of "good cause", and thus mirrors Section 47, reconsideration may be granted without a showing of "good cause" and whenever one of the grounds in Labor Code 5903 exists. (*United States Pipe and Foundry Company v. Industrial Accident Comm*. (*Hinojoza*) (1962) 201 Cal.App.2d 545 [27 Cal.Comp.Cases 73]; 2 Cal. Workers' Comp. Practice (Cont.Ed.Bar 4th ed. 2003) Reconsideration, § 21.4, p. 1377.) I see no reason to deny implementation of application of SB 899 to cases simply because there is a "final" findings and award that is still the subject of appellate review by way of reconsideration, even though I grant my colleague Brass' conclusion that his interpretation would be reasonable and a clear practical guide for the community that is much more in keeping with the realities of workers' compensation practice than the majority's focusing on the two words, "existing order", and seizing upon the concepts of closure of discovery, either by order or operation of law and seizing upon submission orders that are subject to the vagaries of each individual judge's peculiar phrasing.

Section 47 must be construed to mirror sections 5803 and 5804 and to provide a limitation in applying the apportionment "changes in law" enacted by the Legislature in SB 899, by prohibiting those changes from being considered "good cause" to be used as a basis to "reopen, or rescind, alter, or amend any existing order, decision, or award of the Workers' Compensation Appeals Board" that is an order, decision or award which affected the substantive rights of the parties and is not subject to further appeal rights.

Lastly, the majority concludes in section B of its opinion that section 4663 and section 4664 as added by SB 899 must be given retroactive effect. I agree with the majority's analysis since that analysis is based on the legislative intent as expressed in Section 49 of SB 899. SB 899 was enacted to provide relief "from the effects of the current workers' compensation crisis *at the earliest possible time…"*

However I disagree with the majority's conclusion. I conclude that the apportionment statutes in SB 899 must be applied after April 19, 2004, to all cases, regardless of date of injury, except for any case in which there is an order, decision or award which affected the substantive rights of parties and is not subject to further appeal rights.

Accordingly, I would rescind the WCJ's decision and remand the matter to the trial level for application of SB 899, specifically the newly enacted section 4663.

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JAMES C. CUNEO, Commissioner

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

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

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