WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

JOSEPH BAGLIONE, ***Applicant,*** **vs.** **HERTZ CAR SALES, and AIG, Adjusted by CAMBRIDGE INTEGRATED SERVICES,** ***Defendant(s).***	**Case No. SJO 0251644** **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 under Labor Code section 4660(d)[1] as enacted by Senate Bill 899 (SB 899),[2] regarding the application of the new permanent disability rating schedule (PDRS) effective January 1, 2005, to the pre-2005 injury 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).[3]

For the reasons discussed below, we hold that because a comprehensive medical-legal report issued in this case prior to January 1, 2005, the former PDRS applies under section 4660(d), whether or not the comprehensive medical-legal report indicates the existence of permanent disability.

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[1] Unless otherwise indicated, all further statutory references are to the Labor Code.

[2] Stats. 2004, ch. 34, §32.

[3] 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; see also Govt. Code, §11425.60(b)].) Unless otherwise noted, all further statutory references are to the Labor Code.

BACKGROUND

In the Findings and Award issued on October 23, 2006, the WCJ found that applicant, while employed as a car salesman on June 18, 2003, sustained industrial injury to his low back causing permanent disability of 10%. The WCJ found that applicant was permanent and stationary on April 18, 2005, pursuant to the April 25, 2006 report of Dr. David Graubard, who acted in the capacity of an agreed medical examiner (AME) in this matter. The WCJ found that applicant's permanent disability should be rated under the new PDRS because none of the exceptions set forth in section 4660(d) for using the former PDRS were applicable. More specifically, the WCJ determined that prior to January 1, 2005, there was neither a report from a treating physician nor a comprehensive medical-legal report indicating the existence of permanent disability.

Applicant filed a timely petition for reconsideration from the WCJ's decision of September 22, 2006. Applicant contended that his permanent disability should have been rated under the former PDRS because a comprehensive medical-legal report issued prior to January 1, 2005.

Here, applicant had been examined for his low back injury by Dr. Arthur L. Messinger, who issued a comprehensive medical-legal report on June 18, 2004. There is no dispute that this report does not indicate the existence of permanent disability.

DISCUSSION

Section 4660(d) provides as follows:

> "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." (Emphasis added.)[4]

In *Aldi v. Carr, McClellan, Ingersoll, Thompson & Horn* (2006) 71 Cal.Comp.Cases 783 (Board en banc), writ den. sub nom. *Aldi v. Workers' Comp. Appeals Bd.* (2006) 71 Cal.Comp.Cases 1822, the Appeals Board concluded that the revised PDRS mandated by 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, unless one of the exceptions set forth above in section 4660(d) applied.

Section 4660(d) can be properly construed in accordance with accepted principles of statutory construction. In this regard, it is important to consider the entire part of the sentence in issue. After stating that the new rating schedule applies prospectively, the Legislature specifically described the exceptions for claims arising before January 1, 2005 to include cases, "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."

To properly construe this provision, it is only necessary to apply a longstanding rule of statutory construction: the last antecedent rule. Simply stated, the last antecedent rule means that "qualifying words, phrases and clauses are to be applied to the words of phrases immediately preceding and are not to be construed as extending to or including others more remote." (*Board of Port Commrs. v. Williams* (1937) 9 Cal.2d 381, 389; *People v. Corey* (1978) 21 Cal.3d 738, 742; *White v. County of Sacramento* (1982) 31 Cal.3d 676, 680 (*White*); *Garcetti v. Superior Court* (Blake) (2000) 85 Cal.App.4th 1113, 1120.) Evidence that a qualifying phrase is supposed to apply to all antecedents instead of only to the immediately preceding one may be found in the fact

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[4] The new rating schedule was implemented by Administrative Director (AD) Rule 9805 (Cal. Code Regs., tit. 8., §9805), which 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." (Emphasis added.)

that it is separated from the antecedents by a comma. (*White, supra,* 31 Cal. 3d at p. 680; *Blake, supra,* 85 Cal.App.4th at p. 1120.)

In section 4660(d), the reference to a "report by the treating physician" is the immediately preceding antecedent to the qualifying phrase "indicating the existence of permanent disability," and that qualifying phrase is not separated from "no comprehensive medical-legal report or no report by a treating physician" by a comma. For that reason, the plain language of section 4660(d), as construed by the last antecedent rule, provides that an indication of the existence of permanent disability is only required if the report is by a treating physician. If the report is a "comprehensive medical-legal report," no such qualification applies.

The legislative intent is further shown by the use of the word "or" between "comprehensive medical-legal report *or* report by a treating physician." (Emphasis added.) Use of the disjunctive word "or" in a statute indicates a legislative intent to designate alternative or separate categories. (*White*, *supra,* 31 Cal. 3d at p. 680; *People v. Smith* (1955) 44 Cal.2d 77, 78-79.) Moreover, the two kinds of reports are further distinguished as separate categories by the use of the introductory word "either." The section describes two distinct categories of reports: *either* a "comprehensive medical-legal report" *or* a "report by a treating physician indicating the existence of permanent disability." As to the rationale of the Legislature for drawing this distinction, we note that concerns of predictability and fairness, as discussed in the dissent, would apply equally in cases where either a comprehensive medical-legal report has been prepared or a treating physician has prepared a report indicating the existence of permanent disability.

We also note that section 4658(d)(4) provides that the schedule of weeks of compensable permanent disability set forth by that subdivision "shall not apply to the determination of permanent disabilities when there has been *either a comprehensive medical-legal report or a report by a treating physician, indicating the existence of permanent disability*. . . " As construed by the last antecedent rule, this statute requires that both the comprehensive medical-legal report and the report by a treating physician indicate the existence of permanent disability for the amended schedule of weeks not to apply. Because the language of section 4658(d)(4) is different

from the language of section 4660(d), we must assume that this difference is intended. (*American Airlines, Inc. v. County of San Mateo* (1996) 12 Cal.4th 1110, 1137-1138; *People v. Shabazz* (2004) 125 Cal.App.4th 130, 149; *People v. Stewart* (2004) 119 Cal.App.4th 163, 171; *Kray Cabling Co. v. County of Contra Costa* (1995) 39 Cal.App.4th 1588, 1593; *Campbell v. Zolin* (1995) 33 Cal.App.4th 489, 497.)

As the issue here is simply addressed by construing the plain language of the statute in accordance with accepted principles of statutory construction, it is not necessary to consider whether the comprehensive medical-legal report of Dr. Messinger indicates the existence of permanent disability. Therefore, we reverse the WCJ's determination to the contrary, and we find that the PDRS that was in effect at the time of Dr. Messinger's June 18, 2004 comprehensive medical-legal report is applicable. We amend the WCJ's decision to defer the issue of the extent of applicant's permanent disability and the attorney's fees payable therefrom, return this matter to the trial level to rate applicant's permanent disability under the former PDRS and for decision by the WCJ thereafter.

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For the foregoing reasons,

IT IS ORDERED as the Decision After Reconsideration of the Workers' Compensation Appeals Board (en banc) that the Findings and Award of October 23, 2006, is **AFFIRMED** except that Findings of Fact Nos. 6, 7, and 8 and the Award are **AMENDED** to read as follows:

FINDINGS OF FACT

6. The issue of the extent of applicant's permanent disability is deferred.

7. The issue of attorney's fees is deferred.

8. The April 1997 Schedule for Rating Permanent Disabilities is applicable.

AWARD

AWARD IS MADE in favor of **JOSEPH BAGLIONE**, against **HERTZ CAR SALES** and **AIG**, adjusted by **CAMBRIDGE INTEGRATED SERVICES**, of:

(a) Further medical treatment reasonably required to cure or relieve from the effects of the injury to the low back.

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

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.

VB

DISSENTING OPINION

We dissent.

We read the exceptions under section 4660(d) for applying the former PDRS to require that a "comprehensive medical-legal report" (as well as a report from a treating physician) must likewise indicate "the existence of permanent disability." We must consider the language in light of the entire statutory scheme of which it is a part. (*Chevron U.S.A., Inc. v. Workers' Comp. Appeals Bd.* (*Steele*) (1999) 19 Cal.4th 1182, 1194 [64 Cal.Comp.Cases 1, 8-9].) In this regard we note that the first sentence of section 4660(d) expresses the legislative intent to "promote consistency, uniformity, and objectivity" by adopting a new schedule. We also note that section 4660(d) was adopted as part of a comprehensive reform of the workers' compensation statutes (SB 899). Section 49 of SB 899 states the legislative intent and reasons for the enactment of SB 899 as follows:

> "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 the changes in the law it adopted as part of SB 899 to take effect at the earliest possible time. In *Aldi*, *supra*, at 71 Cal.Comp.Cases 793, fn. 6, the Appeals Board noted the observation of the Court in *Green v. Workers' Comp. Appeals Bd*. (2005) 127 Cal.App.4th 1426, 1441 [70 Cal.Comp.Cases 294, 306] 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, 282 [70 Cal.Comp.Cases 133, 137]; *Rio Linda Union School District v. Workers' Comp. Appeals Bd*. (*Scheftner*) (2005) 131 Cal.App.4th 517, 529 [70 Cal.Comp.Cases 999, 1007].)

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Against this background, we must decide if the Legislature intended that the new PDRS not be used in *all* cases where a comprehensive medical-legal report issued before January 1, 2005, or only in cases where such a report has issued that indicates the existence of permanent disability.

In light of the legislative goal of promoting consistency, uniformity, and objectivity at the earliest possible time, we perceive no rationale for delaying use of the new PDRS merely because a comprehensive medical-legal report has issued. Delaying use of the new PDRS in those cases interferes with this legislative goal and delays the full implementation of section 4660(d). However, we can understand why the Legislature would intend that the PDRS in effect at the time permanent disability is first indicated should apply to rate that permanent disability. This exception might facilitate the informal resolution of claims and provide certainty for the parties in concluding a case.

Based on the above, we conclude that the new PDRS should apply in all cases, except those where either a treating physician report or a comprehensive medical-legal report has issued and the report indicates the existence of permanent disability. This conclusion is consistent with the legislative intent expressed in adopting section 4660(d) and the language of the statute.

Furthermore, although the reference to a "comprehensive medical-legal report" is not directly antecedent to the phrase "indicating the existence of permanent disability" in section 4660(d), we do not find the mere order of the words to be determinative of the substantive issue presented in light of the overall legislative goal as discussed above. It has long been held that:

> "A fundamental rule of statutory construction is that a court should *ascertain the intent of the Legislature so as to effectuate the purpose of the law*. In construing a statute, our first task is to look to the language of the statute itself. When the language is clear and there is no uncertainty as to the legislative intent, we look no further and simply enforce the statute according to its terms. Additionally, however, *we must consider the [statutory language] in the context of the entire statute and the statutory scheme of which it is a part*. We are required to give effect to statutes according to the usual, ordinary import of the language employed in framing them. If possible, significance should be given to every word, phrase, sentence and part of an act in pursuance of the legislative purpose. *When used in a statute [words] must be construed in context, keeping in mind the nature and obvious*

> *purpose of the statute where they appear*. Moreover, the various parts of a statutory enactment must be harmonized by considering the particular clause or section in the context of the statutory framework as a whole." (*Renee J. v. Superior Court* (2001) 26 Cal. 4th 735, 743 (*Renee J.*) (citations omitted, emphasis added); cf. *Phelps v. Stostad* (1997) 16 Cal. 4th 23, 32 [62 Cal.Comp.Cases 863, 868].)

The ambiguity in the language and the need to consider the obvious purpose of the statute requires that we look beyond the mere order of the words to the underlying intent of the statute. In addressing the order of words in a statute, the Supreme Court further noted in *Renee J., supra,* 26 Cal. 4th at pp. 743-744:

> "A longstanding rule of statutory construction—the 'last antecedent rule'--provides that qualifying words, phrases and clauses are to be applied to the words or phrases immediately preceding and are not to be construed as extending to or including others more remote. Exceptions to the rule, however, have been identified. *One provides that when several words are followed by a clause that applies as much to the first and other words as to the last… Another provides that when the sense of the entire act requires that a qualifying word or phrase apply to several preceding words, its application will not be restricted to the last*. This is, of course, but another way of stating the fundamental rule that a court is to construe a statute so as to effectuate the purpose of the law. *Where a statute is theoretically capable of more than one construction [a court must] choose that which most comports with the intent of the Legislature.* Principles of statutory construction are not rules of independent force, but merely tools to assist courts in discerning legislative intent." (Citations and quotations omitted, emphasis added).)[1]

Finally, we disagree with the majority's assertion that section 4658(d)(4) further supports its position. On the contrary, given the legislative intent and purpose of the statutes enacted by SB 899, including section 4660(d), as set forth above, the fact that section 4658(d)(4) requires that both the comprehensive medical-legal report and the report by a treating physician indicate the existence of permanent disability for the amended schedule of weeks not to apply, supports our

[1] See also *In re Marriage of Walker* (2006) 138 Cal.App.4th 1408, 1421 [construing the phrase "upon request" in Family Code section 1100(e) to apply to the entire last sentence, not just to duties articulated immediately before that phrase]; *Anthony J. v. Superior Court* (2005) 132 Cal.App.4th 419, 425-426 [citing to *Renee J.* for the proposition that when several words are followed by a clause that applies as much to the first and other words as to the last, the natural construction of the language demands that the clause be read as applicable to all]; *Cal. School Employees Assn v. Governing Bd. of South Orange County Community College Dist*. (2004) 124 Cal.App.4th 574, 584.

analysis of section 4660(d). In other words, we disagree that the implementation of the new PDRS may be defeated by the omission of a comma.

Therefore, we conclude that the overall purpose of the law requires that section 4660(d) be read to require that the exception allowing use of the former PDRS only applies in cases where there has issued either a treating physician report indicating the existence of permanent disability or a comprehensive medical-legal report indicating the existence of permanent disability.

Accordingly, we would affirm the WCJ's decision of October 23, 2006, applying the new PDRS.

/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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