

**WORKERS' COMPENSATION APPEALS BOARD
STATE OF CALIFORNIA**

GUADALUPE RON CRUZ, *Applicant*

vs.

**FIRST DATA CORPORATION; ZURICH AMERICAN INSURANCE administered by
SEDGWICK; ACE AMERICAN INSURANCE administered by SEDGWICK, *Defendants***

**Adjudication Number: ADJ1455561
Los Angeles District Office**

**OPINION AND ORDER
GRANTING PETITION FOR
RECONSIDERATION
AND DECISION AFTER
RECONSIDERATION**

Applicant seeks reconsideration of the Findings and Order (F&O), issued by the workers' compensation administrative law judge (WCJ) on November 9, 2022, wherein the WCJ found that the 2005 Permanent Disability Rating Schedule (PDRS) applies.

Applicant contends that the WCJ erred and the 1997 PDRS applies because defendant's obligation to provide notice pursuant to Labor Code section 4061 arose prior to January 1, 2005.

We received an answer from defendant. Defendant contends that applicant's Petition was not timely filed as it was filed on the twenty-sixth day after service of the F&O, but defendant does not address the merits of applicant's Petition, including applicant's contention that the 1997 PDRS applies.

The WCJ issued a Report and Recommendation on Petition for Reconsideration (Report) recommending that the Petition be denied.

We have considered the allegations in the Petition, the answer, and the contents of the Report with respect thereto.

Based on our review of the record, and for the reasons discussed below, we will grant the Petition and amend the F&O to find that the 1997 PDRS applies.

At the outset, we note that the Report states, and defendant alleges, that applicant's Petition was untimely filed. There are twenty-five days allowed within which to file a petition for reconsideration from a "final" decision that has been served by mail upon an address in California. (Lab. Code, §§ 5900(a), 5903; Cal. Code Regs., tit. 8, § 10605(a)(1).) This time limit is extended to the next business day if the last day for filing falls on a weekend or holiday. (Cal. Code Regs., tit. 8, § 10600(b); see Code of Civ. Proc., §§ 12, 12a, 12b [computation of time when filing day is a Sunday]; Gov. Code, § 6700.) The proof of service for the F&O reflects that it was served on November 9, 2022. Twenty-five days from November 9, 2022 falls on December 4, 2022, which was a Sunday.¹ Pursuant to WCAB Rule 10600, applicant had until the following business day, December 5, 2022, to file a timely petition for reconsideration. Thus, the Petition was timely filed on December 5, 2022.

BACKGROUND

We briefly review the relevant facts.

On October 13, 2022, the matter proceeded to trial on the sole issue of "whether to utilize the old PD schedule rather than the new PD schedule." (Minutes of Hearing and Summary of Evidence, October 13, 2022 trial, p. 2 (MOH/SOE).) All other issues were deferred. (*Id.*)

A benefits printout was admitted as Exhibit A at trial. (MOH/SOE, p. 2, Ex. A, benefits printout, dated February 16, 2022.) Defendant made indemnity payments for total temporary disability for the periods February 17, 2004 through May 10, 2004; October 7, 2004 through December 1, 2004; March 3, 2005 through April 6, 2005; August 4, 2005 through February 23, 2006; and February 25, 2006 through March 14, 2006. (Ex. A, p. 2.) Defendant made indemnity payments for partial temporary disability for the periods from December 2, 2004 through March 2, 2004 and April 7, 2005 through July 14, 2005. (*Id.*) Defendant made indemnity payments for permanent partial disability from May 11, 2004 through September 13, 2004 and permanent partial disability for the period from March 14, 2006 through December 2, 2009. (*Id.*)

On November 9, 2022, the WCJ issued the F&O, finding as follows:

1. GUADALUPE RON CRUZ, born on [], during the period between July 16, 2004 and July 16, 2005 as a Data Entry Clerk at Cerritos, California, by First Date Corporation whose workers' compensation insurance carrier was Zurich American Insurance Company, administered by Ace Insurance, sustained injury

¹ The Appeals Board takes judicial notice of the day of the week, e.g., that December 4, 2022 fell on a Sunday, pursuant to Evidence Code section 451(f). (Evid. Code, § 451(f).)

arising out of and occurring in the course of employment to the cervical spine, bilateral upper extremities, sleep apnea, psyche, and stress.

2. The 2005 Permanent Disability Schedule applies.

3. All other issues are deferred.

(November 9, 2022 F&O.)

DISCUSSION

Labor Code² “[s]ections 4060 and 4061, like section 4062, are dispute resolution provisions. Section 4060 governs disputes over the compensability of an injury, and section 4061 covers disputes over permanent disability.” (*State Compensation Ins. Fund v. Workers’ Compensation Appeals Bd. (Sandhagen)* (2008) 73 Cal.Comp.Cases 981, 987.)

Relevant here, section 4061 provides:

(a) Together with the last payment of temporary disability indemnity, the employer **shall ... provide the employee one of the following:**

(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. 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, whether there is need for future medical care, and whether an indemnity payment will be deferred pursuant to paragraph (2) of subdivision (b) of Section 4650.

(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 whether there will be the need for future 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.

(Lab. Code, § 4061(a) [emphasis added].)

² All statutory references are to the Labor Code unless otherwise noted.

Pursuant to the notice requirement of section 4061, an injured worker is advised of an employer's position regarding the entitlement to permanent disability indemnity at the time the last payment of temporary disability is made. (*Costco Wholesale Corp. v. Workers' Comp. Appeals Bd. (Chavez)* (2007) 151 Cal.App.4th 148, 154 [72 Cal.Comp.Cases 582].)

Labor Code section 4660 provides in pertinent part that:

(d) ... 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.**³

(Lab. Code, § 4660(d) [emphasis added].)

Stated another way, for compensable injuries suffered prior to January 1, 2005, the 1997 PDRS applies to determine the extent of permanent disability in three circumstances: (1) when a comprehensive medical-legal report issued prior to 2005 indicates permanent disability, or (2) when a report from a treating physician issued prior to 2005 indicates the existence of permanent disability, or (3) when the requirement to give notice under section 4061 regarding permanent disability indemnity arises prior to January 1, 2005. (Lab. Code, § 4660(d); *Chavez, supra*, at 157.)

Where, as here, the last payment of temporary disability indemnity was made prior to January 1, 2005, the 1997 PDRS is used 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....” (*Pendergrass v. Duggan Plumbing* (2007) 72 Cal.Comp.Cases 456, 458 (Appeals Bd. en banc), quoting Lab. Code, § 4061(a).) Defendant does not maintain that it complied with section 4061 and defendant apparently does not dispute that it made indemnity payments. According to the evidence submitted by defendant at trial, defendant made indemnity payments for various periods, including temporary disability for the period February 17, 2004 through May 10, 2004, followed by permanent disability for the period May 11, 2004 through September 13, 2004. (Ex. A, benefits printout, pp. 1-2.) Relevant here, the employer's obligation to serve notice

³ The plain and ordinary meaning of the word “or” is well established. When used in a statute, the word “or” indicates an intention to designate separate, disjunctive categories. (*Smith v. Selma Community Hospital* (2010) 188 Cal.App.4th 1, 30; *White v. County of Sacramento* (1982) 31 Cal.3d 676, 680.)

required by Section 4061 arose when it began making permanent disability indemnity payments in May 2004. (Lab. Code, § 4660(d)(2).)

Accordingly, we grant the Petition and amend the F&O to find that the 1997 PDRS applies.

For the foregoing reasons,

IT IS ORDERED that the Petition for Reconsideration of the November 9, 2022 Findings and Order is **GRANTED**.

IT IS FURTHER ORDERED as the Decision After Reconsideration of the Workers' Compensation Appeals Board that the Findings and Order of November 9, 2022 is **AFFIRMED**, **EXCEPT** that it is **AMENDED** as follows:

FINDINGS OF FACT

* * *

2. The 1997 Permanent Disability Rating Schedule applies.

* *

ORDER

The 1997 Permanent Disability Rating Schedule applies.

WORKERS' COMPENSATION APPEALS BOARD

/s/ KATHERINE WILLIAMS DODD, COMMISSIONER

I CONCUR,

/s/ KATHERINE ZALEWSKI, CHAIR

/s/ JOSÉ H. RAZO, COMMISSIONER



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

February 3, 2023

SERVICE MADE ON THE ABOVE DATE ON THE PERSONS LISTED BELOW AT THEIR ADDRESSES SHOWN ON THE CURRENT OFFICIAL ADDRESS RECORD.

**GUADALUPE RON CRUZ
SOLOV AND TEITELL
TESTAN LAW**

JB/mc

I certify that I affixed the official seal of the
Workers' Compensation Appeals Board to this
original decision on this date. *mc*