WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

TERRY MARTINEZ, ***Applicant,*** **vs.** **CALIFORNIA BUILDING SYSTEMS; CALIFORNIA INSURANCE GUARANTEE ASSOCIATION, on behalf of FREMONT INDEMNITY COMPANY, in liquidation, adjusted by CAMBRIDGE INTEGRATED SERVICES GROUP,** ***Defendants.***	**Case No. FRE 0194847** **OPINION AND DECISION AFTER RECONSIDERATION** **(EN BANC)**

The Appeals Board granted reconsideration to allow time to study the record and applicable law. Because of the important legal issue presented concerning the meaning and application of Senate Bill (SB) 899 (Stats. 2004, ch. 34) enacted April 19, 2004, regarding the repeal of the primary treating physician presumption statute (Lab. Code §4062.9), 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]

We hold that the repeal of Labor Code section 4062.9[2] applies to all cases, regardless of the date of injury, unless a decision has become final on or before April 19, 2004. We define "final" as a decision where appellate rights have been exhausted prior to April 19, 2004.

BACKGROUND

[1] The Appeals Board's en banc decisions are binding precedent on all Appeals Board panels and workers' compensation administrative law judges. (Cal. Code Regs., tit. 8, §10341; *Gee v. Workers' Comp. Appeals Bd.* (2002) 96 Cal.App.4th 1418, 1425, fn. 6 [67 Cal.Comp.Cases 236, 239, fn. 6].)

[2] All subsequent section references are to the Labor Code.

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

Applicant sustained an admitted industrial injury on October 19, 2000, when he fell approximately fifteen to twenty feet from a roof.

Issues were framed at a mandatory settlement conference (MSC) held May 15, 2003. Among other issues, the presumption of correctness of the primary treating physician under section 4062.9 was raised. The matter was set for trial on July 24, 2003. As a matter of law, discovery closed on May 15, 2003. (Lab. Code §5502(e)(3), formerly §5502(d)(3).)

In early July 2003, defendant Fremont Indemnity Company was placed in liquidation. California Insurance Guarantee Association (CIGA) took over its claims.

The matter eventually came on for trial on November 19, 2003. At trial stipulations and issues were reframed, exhibits were marked and admitted in evidence, and applicant and a defense witness testified. The matter was continued for further trial on March 16, 2004, for the presentation of additional defense witnesses. At the March 16, 2004 proceeding, the matter was ordered submitted for decision on April 16, 2004, after submission of points and authorities by the parties.

On April 19, 2004, SB 899 was enacted; it repealed section 4062.9.

On July 7, 2004, the workers' compensation administrative law judge (WCJ) issued a Findings and Award; it contained errors that were corrected in an Amended Findings and Award issued on July 19, 2004. In the amended decision, the WCJ found, among other things, that the industrial injury resulted in temporary total disability for a specified period, permanent disability, and the need for further medical treatment. In the Opinion on Decision, the WCJ indicated that he relied upon the opinion of Dr. Wilson, to whom he accorded the presumption of correctness, for the findings of the period of disability and the permanent and stationary date.

Both applicant and CIGA sought reconsideration of the WCJ's decision.

Applicant contended that the WCJ erred in determining applicant's permanent and stationary date for the purpose of finding the period of temporary disability.

CIGA asserted, among other contentions, that the WCJ erred in according Dr. Wilson's opinion the presumption of correctness under section 4062.9, because that section was repealed by the Legislature with the enactment of SB 899, effective April 19, 2004.

For the reasons discussed below, we will rescind the WCJ's decision and return this matter to the WCJ for further consideration without the application of the treating physician presumption of correctness under section 4062.9. Because of our disposition, our discussion will be limited to the issue raised by CIGA regarding the application of SB 899.

DISCUSSION

The repeal of Labor Code section 4062.9 applies to all cases, regardless of the date of injury, unless a decision has become final prior to April 19, 2004, meaning that all appellate rights have been exhausted prior to April 19, 2004.

The threshold issue is whether section 4062.9 is applicable to the instant case because that section was repealed effective April 19, 2004 by enactment of SB 899. In the instant case, the WCJ held an MSC and closed discovery before the enactment of SB 899. The Findings and Award was issued after the enactment. If section 4062.9 does not apply, the WCJ's decision must be rescinded, and the matter remanded for a new decision, because the WCJ applied the presumption of correctness of the medical opinions of the primary treating physician under section 4062.9 to reach his findings.

Section 4062.9 was repealed as of April 19, 2004. (SB 899, §22.) Section 46 of SB 899 states:

> "The repeal of the personal physician's or chiropractor's presumption of correctness contained in Section 4062.9 of the Labor Code made by this act shall apply to all cases, regardless of the date of injury, 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."

Thus, the issue arises whether section 46 requires returning the matter for a determination of the issues without benefit of the primary treating physician presumption of

section 4962.9, despite closing discovery or submission orders that existed prior to April 19, 2004.

The language of section 46 beginning with "but shall" is identical with that used in section 47 of SB 899. Section 47 applies to all other sections of SB 899 except section 4062.9. 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 repeal of section 4062.9 is covered individually in section 46 and separately from section 47. The beginning phrases of section 46 and section 47 use different language. Section 46 uses the phrase "this act shall apply to all cases" whereas section 47 states, "this act shall apply prospectively." Where the Legislature uses a different word or phrase in one section than it does in another section concerning the same or similar subject, it is presumed the Legislature intended those words or phrases to have different meanings. (*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.) It appears from the differing language of sections 46 and 47 that the former has a broader reach. Section 46 applies the repeal of section 4062.9 "to *all* cases" (emphasis added), while section 47 of SB 899 does not apply "to all cases," but applies only "prospectively from the date of enactment." In light of these differences in section 46 and section 47, we conclude that "all cases" in section 46 must include all pending cases where there is no final decision. Moreover, because this construction applies only to non-final cases, it does not violate the section 46 preclusion against reopening, rescinding, altering, or amending any “existing” order, decision, or award.

In our en banc decision of *Scheftner v. Rio Linda School District* (2004) 69 Cal. Comp. Cases 1281, we discussed various ways that the phrase "existing orders" in section 47 could be interpreted. We concluded that "existing orders" included orders closing discovery and orders of submission that were issued prior to April 19, 2004, based on a balancing of competing objectives between article XIV, section 4, of the California Constitution, and section 49 of SB 899. We held in *Scheftner* that submission orders and orders closing discovery issued prior to the enactment of SB 899 on April 19, 2004, were "existing" orders that could be reopened due to the prohibition in section 47. We further held 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. We stated in *Scheftner*:

> "While this interpretation of 'existing order' will result in the apportionment statutes of SB 899 [i.e. section 4663 and section 4664] 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." (69 Cal.Comp.Cases at 1287)

However, application of the repeal of the treating physician presumption to all cases where decisions have not become final prior to April 19, 2004, does not result in the need for additional discovery and its associated costs or in significant delay in final resolution of those cases. The WCJ, or the Appeals Board, needs only to reweigh the evidence without application of the presumption to reach a decision. The repeal of section 4062.9 by enactment of SB 899

does not present a serious conflict of objectives between the California Constitution (art. XIV, §4) requiring expeditious proceedings and the response to the emergency crisis noted in section 49 of SB 899.

Accordingly, we believe under these circumstances that the scales balance in favor of the crisis objective set forth in section 49 of SB 899 in reaching an interpretation of "existing orders." This balancing analysis satisfies the immediate implementation mandate of SB 899 without violating the constitutional mandate of inexpensive, unencumbered, and expeditious proceedings.

Finally, section 4062.9 is a procedural statute. Thus, its repeal by SB 899 applies to all non-final cases. (*Pebworth v. Workers' Comp. Appeals Bd*. (2004) 116 Cal.App.4th 913 [69 Cal.Comp.Cases 199].)

Thus, we conclude that "existing orders" as used in section 46 of SB 899 are decisions that become final before April 19, 2004. We define "final" as a decision where the appellate rights have been exhausted prior to April 19, 2004.[3]

DISPOSITION

In the instant case, there was no order, decision or award that was final within the meaning of section 46 of SB 899 prior to April 19, 2004. Because the WCJ erroneously applied the treating physician presumption under section 4062.9, based on our analysis above, and as our Decision After Reconsideration, we will rescind the WCJ's Amended Findings and Award of July 19, 2004. We will return this matter to the trial level for further consideration and new decision consistent with the opinions expressed herein. At that time, the WCJ should consider and decide all other issues raised in the petitions for reconsideration filed by applicant and CIGA that are not disposed of herein.

For the foregoing reasons,

---

[3] We note that this holding is consistent with the opinions of panels of the Appeals Board in three recent writ denied cases: *Garcia v. Workers' Comp. Appeals Bd*. (2004) 70 Cal.Comp.Cases __, 2004 Cal. Wrk. Comp. LEXIS 422; *Garnett v. Workers' Comp. Appeals Bd*. (*Johnson*) (2004) 69 Cal.Comp.Cases 1467; *Gonzales v. Workers' Comp. Appeals Bd*. (2004) 69 Cal.Comp.Cases 1472.

IT IS ORDERED, as the Decision After Reconsideration of the Workers' Compensation Appeals Board (En Banc), that the Amended Findings and Award, issued on July 19, 2004 be, and hereby is **RESCINDED,** and the matter is **RETURNED** to the trial level for further consideration and new decision consistent with the opinions expressed herein.

WORKERS' COMPENSATION APPEALS BOARD (EN BANC)

_____

MERLE C. RABINE, Chairman

_____

WILLIAM K. O'BRIEN, Commissioner

_____

JAMES C. CUNEO, Commissioner

_____

JANICE J. MURRAY, Commissioner

_____

FRANK M. BRASS, Commissioner

_____

RONNIE G. CAPLANE, Commissioner

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA
2/22/05

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

cef/ed