WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

JOSEPH BAGLIONE, ***Applicant,*** **vs.** **HERTZ CAR SALES; AIG; and CAMBRIDGE INTEGRATED SERVICES (Adjusting Agent),** ***Defendant.***	**Case No. SJO 0251644** **OPINION AND ORDER GRANTING RECONSIDERATION AND DECISION AFTER RECONSIDERATION (EN BANC)**

Defendant, being newly aggrieved, seeks reconsideration of the en banc decision issued by the Appeals Board on January 24, 2007. In that decision, the Appeals Board held, by a 4 to 3 majority, that because a comprehensive medical-legal report had issued in this case prior to January 1, 2005, the 1997 Schedule for Rating Permanent Disabilities (1997 Schedule) applied under Labor Code section 4660(d),[1] whether or not the comprehensive medical-legal report indicated the existence of permanent disability. In so holding, the Appeals Board majority reversed the workers' compensation administrative law judge (WCJ) who, in the Findings and Award issued on October 23, 2006, had applied the 2005 Schedule for Rating Permanent Disabilities (2005 Schedule) to the applicant's June 18, 2003 industrial low back injury because there was no report from a treating physician indicating the existence of permanent disability and no dispute that the comprehensive medical-legal report likewise did not indicate the existence of permanent disability. In accordance with the majority's opinion, this matter was returned to the trial level for the applicant's permanent disability to be rated under the 1997 Schedule. The three dissenting commissioners disagreed with the majority's interpretation of section 4660(d), and would have affirmed the WCJ's decision.

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

Defendant contends that (1) the majority's opinion is contrary to the intent of the Legislature in enacting Senate Bill (SB) 899; (2) as explained by the WCJ, the last antecedent rule relied on by the majority "is only a grammatical guide and not particularly probative or persuasive as to the meaning of the language in [section] 4660(d);" and (3) the WCJ and the dissenting commissioners are correct that the 2005 Schedule applies in this case.

Applicant filed an answer to defendant's petition asserting that not only was the decision of January 24, 2007 correctly decided, but that the Appeals Board is bound by that prior en banc decision.

We hold that for the 1997 Schedule to apply under section 4660(d), the existence of permanent disability must be indicated in either a pre-2005 comprehensive medical-legal report or a pre-2005 report from a treating physician.[2]

I.

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

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

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

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

[2] But see the companion case, issued concurrently, of *Pendergrass v. Duggan Plumbing* (2007) 72 Cal.Comp.Cases ___ (Appeals Board en banc) discussing the section 4061(a) exception to section 4660(d).

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

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

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

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

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

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

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

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

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Accordingly, we now reverse our prior en banc decision. Therefore, for the reasons discussed below, we will grant defendant's petition for reconsideration, rescind our prior decision, and affirm in its entirety the Findings and Award issued by the WCJ on October 23, 2006, applying the 2005 Schedule.

II.

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.)

We read the exceptions under section 4660(d) for applying the 1997 Schedule to require that a "comprehensive medical-legal report," as well as a report from a treating physician, must 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 v. Carr, McClellan, Ingersoll, Thompson & Horn* (2006) 71 Cal.Comp.Cases 783, 793, fn. 6 (Appeals Board en banc), writ den. sub nom. *Aldi v. Workers' Comp. Appeals Bd.* (2006) 71 Cal.Comp.Cases 1822, 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].)

Against this background, we must decide if the Legislature intended that the 2005 Schedule not be used in *all* pre-2005 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 2005 Schedule merely because a comprehensive medical-legal report has issued. Delaying use of the 2005 Schedule 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 rating schedule 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 2005 Schedule should apply in all cases, except those where either a pre-2005 treating physician report indicates the existence of permanent disability or a pre-2005 comprehensive medical-legal 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.[3]

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. The language and the need to consider the obvious purpose of section 4660(d) 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. v. Superior Court* (2001) 26 Cal.4th 735, 743-744 (*Renee J.*):

> "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).)[4]

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[3] See fn. 2, *supra*.

[4] 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.

Moreover, 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.*, *supra*, 26 Cal.4th at p. 743 (citations omitted, emphasis added); cf. *Phelps v. Stostad* (1997) 16 Cal.4th 23, 32 [62 Cal.Comp.Cases 863, 868].)

Thus, our holding that either a comprehensive medical-legal report or a treating physician's report must "indicate the existence of permanent disability ..." for the exception to apply most comports with the legislative intent and construes that language in the context of the entire statute and statutory scheme of which it is a part.

Finally, we recognize that section 4658(d)(4) provides that the amended 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 … . " We disagree, however, with the dissent's assertion that this section further supports its position (i.e., that the comma after the word "physician" evidences a different legislative intent). 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 analysis of

section 4660(d). In other words, we disagree that the implementation of the 2005 Schedule 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 existence of permanent disability exception allowing use of the 1997 Schedule only applies in cases where there has issued either a pre-2005 treating physician report indicating the existence of permanent disability or a pre-2005 comprehensive medical-legal report indicating the existence of permanent disability.[5]

Accordingly, we affirm in its entirety the WCJ's decision of October 23, 2006, applying the 2005 Schedule.

For the foregoing reasons,

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

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[5] See fn. 2, *supra*.

IT IS FURTHER ORDERED, as the Decision After Reconsideration of the Workers' Compensation Appeals Board (En Banc), that the Opinion and Order Granting Reconsideration and Decision After Reconsideration January 24, 2007, is **RESCINDED** and that the Findings and Award of October 23, 2006, is **AFFIRMED** in its entirety**.**

WORKERS' COMPENSATION APPEALS BOARD (EN BANC)

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

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

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

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

WE DISSENT
(See attached Dissenting Opinion)

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

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

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

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

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

DISSENTING OPINION

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

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

In *Aldi v. Carr, McClellan, Ingersoll, Thompson & Horn* (2006) 71 Cal.Comp.Cases 783, 793 (Appeals 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 2005 Schedule mandated by section 4660 is applicable to pending cases where the injury occurred before January 1, 2005, unless one of the exceptions set forth 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 stated that there is an exception for claims arising before January 1, 2005, "when there has been either no comprehensive medical-legal report or no report by a treating physician indicating the existence of permanent disability … ."

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." (*Bd. 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 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 indicates the existence of permanent disability. Therefore, we would affirm the prior en banc decision of January 24, 2007, in which we determined that the permanent disability rating schedule that was in effect at the time of Dr. Messinger's June 18, 2004 comprehensive medical-legal report is applicable, and which returned this matter to the trial level to rate applicant's permanent disability under the 1997 Schedule.

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

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

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

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