

1 **WORKERS' COMPENSATION APPEALS BOARD**

2 **STATE OF CALIFORNIA**

3 **Case No. GRO 0023699**

4 **CLARENCE A. PEBWORTH,**

5 *Applicant,*

6 **vs.**

7 **ALLAN HANCOCK COLLEGE,**
8 **Permissibly Self-Insured; and**
9 **WORKERS' COMPENSATION**
10 **ADMINISTRATORS (Third Party**
11 **Administrators),**

12 *Defendant(s).*

13 **OPINION AND DECISION**
14 **AFTER RECONSIDERATION**
15 **(EN BANC)**

16 On July 2, 2003, the Appeals Board granted reconsideration of the Finding of Fact and
17 Order issued by the workers' compensation administrative law judge ("WCJ") on May 6, 2003.
18 In that decision, the WCJ held in substance that, although Labor Code section 4646 has been
19 amended to permit a defendant and a represented employee to settle prospective vocational
20 rehabilitation services under certain circumstances, this amendment applies only to injuries
21 sustained on or after the January 1, 2003 effective date of the amendments.¹ Therefore, the WCJ
22 affirmed a Determination of the Rehabilitation Unit, which had disapproved of the parties'
23 proposed settlement of prospective vocational rehabilitation services on the basis that the
24 applicant's date of injury occurred before January 1, 2003.

25 In their respective petitions for reconsideration, applicant, Clarence A. Pebworth
26 ("applicant"), and defendant, Allan Hancock College ("defendant"), both contend: (1) the plain
27 meaning of section 4646, as amended, authorizes the settlement of prospective vocational
28 rehabilitation services, irrespective of the employee's date of injury, if the section's criteria have

¹ All further statutory references are to the Labor Code, unless otherwise specified.

1 been met; (2) the amendments to section 4646 are remedial (i.e., the amendments do not affect
2 existing contractual or vested rights, but simply provide a means for an injured worker to settle his
3 or her prospective claim for vocational rehabilitation) and, therefore, the amendments are subject
4 to retrospective application; and (3) a letter from the Assemblyman who authored the amendments
5 to section 4646 establishes it was the Legislature's intent that the amendments be considered
6 procedural, not substantive, and that they be applied to all dates of injury.

7 Because of the important legal issue presented, and in order to secure uniformity of
8 decision in the future, the Chairman of the Appeals Board, upon a majority vote of its members,
9 has assigned this case to the Appeals Board as a whole for an en banc decision. (Lab. Code,
10 §115.)² Based on our review of the relevant statutory and case law, we conclude that the
11 amendments to section 4646, which permit a defendant and a represented employee to settle
12 prospective vocational rehabilitation services under specified circumstances, cannot be applied to
13 injuries sustained before the January 1, 2003 effective date of the amendments because the
14 amendments are substantive, not procedural, and because there is no clear indication that the
15 Legislature as a whole intended that the amendments operate retrospectively.

16 **I. BACKGROUND**

17 Applicant claimed to have sustained industrial injuries to both knees while employed by
18 defendant on November 6, 1997 and from 1985 to August 20, 2002.³

19 Formerly, Labor Code section 4646 had provided:

20 "Settlement or commutation of prospective vocational
21 rehabilitation services shall not be permitted under Chapter 2
22 (commencing with Section 5000) or Chapter 3 (commencing with
23 Section 5100) of Part 3 except upon a finding by a workers'
24 compensation judge that there are good faith issues that, if
25 resolved against the employee, would defeat the employee's right

24 ² The Appeals Board's en banc decisions are binding precedent on all Appeals Board panels and
25 WCJs. (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].)

26 ³ Applicant originally filed an application for the November 6, 1997 injury, which was admitted by
27 defendant. When the parties entered into a compromise and release agreement, they also included a
28 cumulative trauma from 1985 to August 20, 2002 that was not previously pleaded.

1 to all compensation under this division.”⁴

2 Effective January 1, 2003, however, section 4646 was amended to provide:

3 “(a) Settlement or commutation of prospective vocational
4 rehabilitation services shall not be permitted under Chapter 2
5 (commencing with Section 5000) or Chapter 3 (commencing with
6 Section 5100) of Part 3 except as set forth in subdivision (b), or
7 upon a finding by a workers’ compensation judge that there are
8 good faith issues that, if resolved against the employee, would
9 defeat the employee’s right to all compensation under this
10 division.

11 “(b) The employer and a represented employee may agree to settle
12 the employee’s right to prospective vocational rehabilitation
13 services with a one-time payment to the employee not to exceed
14 ten thousand dollars (\$10,000) for the employee’s use in self-
15 directed vocational rehabilitation. The settlement agreement shall
16 be submitted to, and approved by, the administrative director’s
17 vocational rehabilitation unit upon a finding that the employee has
18 knowingly and voluntarily agreed to relinquish his or her
19 rehabilitation rights. The rehabilitation unit may only disapprove
20 the settlement agreement upon a finding that receipt of
21 rehabilitation services is necessary to return the employee to
22 suitable gainful employment.

23 “(c) Prior to entering into any settlement agreement pursuant to this
24 section, the attorney for a represented employee shall fully disclose
25 and explain to the employee the nature and quality of the rights and
26 privileges being waived.”⁵

27 On or about November 19, 2002, the parties submitted (and the WCJ approved) a
28 compromise and release agreement (“C&R”), settling most issues relating to applicant’s
November 6, 1997 specific injury and 1985 to August 20, 2002 cumulative injury claims. Among
other things, the approved C&R provided that applicant “does not wish to pursue vocational
rehabilitation services and benefits at this time,” that applicant waives any and all claims for
retroactive vocational rehabilitation benefits or services to date, and that applicant was settling
“all injuries...that might occur in the future during participation in vocational rehabilitation.” The

⁴ Added by Stats. 1989, ch. 892, §33, p. 2986; amended by Stats. 1998, ch. 524, §1, p. 2995. The 1998 amendment inserted the word “prospective,” but the Legislature concurrently proclaimed that this amendment did not constitute a change in, but was declaratory of, existing law. (Stats. 1998, ch. 524, §3, p. 2995; but see, *Estrada v. Workers’ Comp. Appeals Bd.* (1997) 58 Cal.App.4th 1458 [62 Cal.Comp.Cases 1384].)

⁵ Stats. 2002, ch. 6, §64, p. 126.

1 C&R did not seek to resolve prospective vocational rehabilitation benefits or services, presumably
2 because, at the time the C&R was executed and approved, such prospective benefits or services
3 unquestionably could not be settled absent a good faith issue that could have defeated applicant's
4 right to *all* workers' compensation benefits. (Former Lab. Code, §4646; see also, Lab. Code,
5 §5100.6; *Thomas v. Sports Chalet, Inc.* (1977) 47 Cal.Comp.Cases 625 (Appeals Board en banc).)

6 However, on January 29, 2003 (i.e., after the effective date of the amendments to section
7 4646), the parties submitted to the Rehabilitation Unit a "Settlement of Prospective Vocational
8 Rehabilitation Services [Lab. Code, §4646(b)]" (DWC Form RU-122). This proposed settlement,
9 which was signed by applicant and his attorney,⁶ stated: "The parties hereby agree to settle the
10 employee's right to prospective Vocational Rehabilitation services with a one-time payment to the
11 employee for the sum of \$10,000... ."

12 Thereafter, the Rehabilitation Unit issued a Determination that disapproved of the parties'
13 proposed settlement of prospective vocational rehabilitation services because "the injured
14 employee's date of injury predates 1-1-03."

15 Defendant filed a timely appeal with the Workers' Compensation Appeals Board
16 ("WCAB"), together with a declaration of a readiness, challenging the Rehabilitation Unit's
17 Determination.

18 At the trial on the rehabilitation appeal, applicant submitted into evidence a September 1,
19 2002 letter to Richard Gannon, the Administrative Director of the Division of Workers'
20 Compensation, from Assemblyman Thomas M. Calderon, the Chair of the Assembly's Insurance
21 Committee. We take judicial notice that it was Assemblyman Calderon who introduced Assembly
22 Bill No. 749 ("AB 749"), which made the amendments to section 4646 at issue here and which
23 was signed by the Governor on February 15, 2002. In this letter, Assemblyman Calderon stated,
24 in relevant part:

25 "I have recently reviewed various proposed regulations to
26 implement AB 749 (Calderon), including regulations relating to

27 ⁶ The copy of the RU-122 in the Appeals Board's record was not signed by defendant's counsel, but
28 it appears undisputed that defendant had agreed to the settlement.

1 settlement of prospective vocational rehabilitation.

2 “It appears as though the Department of Industrial Relations (DIR)
3 has taken the position that the legislative intent of AB 749 is to
4 limit such settlements to injuries occurring on or after Jan[uary] 1,
5 2003, and are proposing regulations to bar settlement of vocational
6 rehabilitation for injuries prior to that date.⁷

7 “Such an interpretation flies in the face of our intent. If the
8 legislature wishes to specify the effective date of a provision
9 relating to benefits, it does so specifically (i.e., the cap on
10 vocational rehabilitation benefits).

11 “If a question as to legislative intent remains, it is clarified in a
12 trailer bill. It is important to note that neither AB 749 (Calderon)
13 nor AB 486 (Calderon)⁸ contain language specifying that
14 settlement of prospective vocational rehabilitation applies only to
15 injuries occurring post January 1, 2003. Therefore, no such
16 limitation is intended by the legislature. The ability to settle such
17 claims beginning January 1, 2003 applies to all injuries, regardless
18 of date of injury.

19 “I would also note that the changes in California Labor Code
20 Section 4646 are procedural, not substantive. They neither expand
21 nor diminish the rights of either party. Thus, any settlement must
22 be less than the maximum allowable under the cap.”

23
24 On May 16, 2003, the WCJ issued his decision determining that the section 4646
25 amendments allowing the settlement of prospective vocational rehabilitation services do not apply
26 to injuries prior to their January 1, 2003 effective date. The WCJ observed that “[t]he general rule
27 in workers’ compensation is that the rights and liabilities of the parties are determined by the law
28 in existence on the date of injury.” Although the WCJ further indicated that there might be
exceptions to this general rule when there is clear indication of a contrary legislative intent, the
WCJ concluded that an individual legislator’s opinion could not be equated with legislative intent.

⁷ The regulation, as finally adopted by the Administrative Director, did provide, in relevant part: “A represented employee who was injured *on or after January 1, 2003* can settle prospective vocational rehabilitation services for an amount not to exceed \$10,000 in self directed vocational rehabilitation when the following conditions have been met” (Cal. Code Regs., tit. 8, §10131.2(a) [emphasis added].)

⁸ AB 486 (the “clean-up bill”), which was also authored by Assemblyman Calderon and which was signed into law on September 15, 2002, made a number of changes to the workers’ compensation laws, however, it neither made any amendments to section 4646 nor specifically addressed the issue of the settlement of prospective vocational rehabilitation.

1 Applicant and defendant then filed their timely petitions for reconsideration.

2 **II. DISCUSSION**

3 **A. The Amendments To Section 4646 Were Substantive, Not Procedural; Therefore, They**
4 **Do Not Apply Retrospectively In The Absence Of Clear Legislative Intent.**

5 The general rule is that statutes are presumed to apply only prospectively; a retrospective
6 application will be not be found unless there is a clear expression of legislative intent.
7 (*Evangelatos v. Superior Court* (1988) 44 Cal.3d 1188, 1207-1208; *Subsequent Injuries Fund v.*
8 *Industrial Acc. Com. (Erickson)* (1957) 48 Cal.2d 355, 361 [22 Cal.Comp.Cases 92, 96]; *Aetna*
9 *Cas. & Surety Co. v. Industrial Acc. Com. (Charlesworth)* (1947) 30 Cal.2d 388, 393 [12
10 Cal.Comp.Cases 123, 125]; *American Psychometric Consultants, Inc. v. Workers' Comp. Appeals*
11 *Bd. (Hurtado)* (1995) 36 Cal.App.4th 1626, 1643 [60 Cal.Comp.Cases 559, 571].)

12 A retrospective law “is one which affects rights, obligations, acts, transactions and
13 conditions which are performed or exist prior to the adoption of the statute” (*Aetna Cas. & Surety*
14 *Co. v. Industrial Acc. Com. (Charlesworth)*, *supra*, 30 Cal.2d 388, 391 [12 Cal.Comp.Cases 123,
15 124]; accord, *Myers v. Philip Morris Companies, Inc.* (2002) 28 Cal.4th 828, 839; *Evangelatos v.*
16 *Superior Court, supra*, 44 Cal.3d at p. 1206) or which “substantially changes the legal effect of
17 past events.” (*Kizer v. Hanna* (1989) 48 Cal.3d 1, 7.) “ ‘[E]very statute, which takes away or
18 impairs vested rights acquired under existing laws, or creates a new obligation, imposes a new
19 duty, or attaches a new disability, in respect to transactions or considerations already past, must be
20 deemed retrospective.’ ” (*Myers v. Philip Morris Companies, Inc., supra*, 28 Cal.4th at p. 839
21 [quoting from *Landgraf v. USI Film Products* (1994) 511 U.S. 244, 269, 114 S.Ct. 1483, 128
22 L.Ed.2d 229].)

23 Nevertheless, a new or newly amended statute that is purely “procedural” may be applied
24 to pending and future litigation, even if the event underlying the cause of action occurred before
25 the statute took effect. (*Kuykendall v. State Bd. of Equalization* (1994) 22 Cal.App.4th 1194,
26 1211; *Pacific Coast Medical Enterprises v. Dept. of Benefit Payments* (1983) 140 Cal.App.3d
27 197, 204-205.) This, however, is not because purely “procedural” statutes constitute an exception
28 to the general rule against retrospective operation, but rather because purely “procedural” statutes

1 are not in fact retrospective, i.e., a statute that addresses the procedures to be utilized in legal
2 proceedings not yet concluded operates in the future, regardless of the time of occurrence of the
3 events giving rise to the cause of action. (*Aetna Cas. & Surety Co. v. Industrial Acc. Com.*
4 (*Charlesworth*), *supra*, 30 Cal.2d at p. 394 [12 Cal.Comp.Cases at p. 126]; *ARA Living Center-*
5 *Pacific, Inc. v. Superior Court* (1993) 18 Cal.App.4th 1556, 1561-1562.)

6 It has been said that a statute is “procedural” where it merely provides a new remedy for
7 the enforcement of existing rights (*Kuykendall v. State Bd. of Equalization, supra*, 22 Cal.App.4th
8 at p.1211, fn. 20; *Pacific Coast Medical Enterprises v. Dept. of Benefit Payments* (1983) 140
9 Cal.App.3d 197, 205), where it neither creates a new cause of action nor deprives defendant of
10 any defense on the merits (*Kuykendall v. State Bd. of Equalization, supra*, 22 Cal.App.4th at
11 p.1211, fn. 20), or where it does not affect substantive rights. (*Wertin v. Franchise Tax Bd.* (1998)
12 68 Cal.App.4th 961, 979.) It has also been said that a statute is “substantive” when it “ ‘imposes a
13 new or additional liability and substantially affects existing rights and obligations.’ ” (*In re*
14 *Marriage of Buol* (1985) 39 Cal.3d 751, 758 [quoting from *Aetna Cas. & Surety Co. v. Industrial*
15 *Acc. Com. (Charlesworth)*, *supra*, 30 Cal.2d at p. 395 [12 Cal.Comp.Cases at p. 126]].) Yet, as
16 stated by the California Supreme Court in *Charlesworth*:

17 “ [There is no] clear-cut distinction between purely ‘procedural’
18 and purely ‘substantive’ legislation. In truth, the distinction relates
19 not so much to the form of the statute as to its effects. If
20 substantial changes are made, even in a statute which might
21 ordinarily be classified as procedural, the operation on existing
22 rights would be retroactive because the legal effects of past events
23 would be changed, and the statute will be construed to operate only
24 in futuro unless the legislative intent to the contrary clearly
25 appears.” (*Aetna Cas. & Surety Co. v. Industrial Acc. Com.*
(Charlesworth), *supra*, 30 Cal.2d at p. 394 [12 Cal.Comp.Cases at
26 p. 126]; see also, *Subsequent Injuries Fund v. Industrial Acc. Com.*
(Erickson), *supra*, 48 Cal.2d at p. 361 [22 Cal.Comp.Cases at p.
27 96]; *ARA Living Centers-Pacific, Inc. v. Superior Court, supra*, 18
28 Cal.App.4th at pp. 1561-1562.)

26 Similarly, the California Supreme Court has said: “ ‘[a]lteration of a substantial right ... is not
27 merely procedural, even if the statute takes a seemingly procedural form.’ ” (*In re Marriage of*
28

1 *Buol* (1985) 39 Cal.3d 751, 758 [quoting from *People v. Smith* (1983) 34 Cal.3d 251, 260].)

2 For the reasons that follow, we conclude that the amendments to section 4646, allowing
3 the settlement of prospective vocational rehabilitation benefits and services under certain
4 circumstances, are not procedural because they effect substantial changes to a substantive right.
5 Therefore, these amendments cannot be retrospectively applied to injuries occurring before their
6 effective date, absent a clear expression of legislative intent.

7 More than 25 years ago, the issue of the settlement of vocational rehabilitation was
8 addressed in depth by the Appeals Board in *Thomas v. Sports Chalet, Inc., supra*, 42
9 Cal.Comp.Cases 625 (Appeals Board en banc).

10 In *Thomas*, we observed that the April 1965 Report of the California Workmen’s
11 Compensation Study Commission had recommended that “[t]he Labor Code should be amended
12 to make it clear beyond question that injured workers have a right to ... vocational rehabilitative
13 services as may be reasonably necessary to restore the worker to suitable employment ...” and that
14 “[t]he worker *should have no right to convert his right to rehabilitation into cash* [and] proposed
15 compromise and release agreements should be screened by the rehabilitation unit to see the
16 suitable candidates are encouraged to avail themselves of their right to rehabilitation, and to
17 counteract the well-meaning but mistaken advice of attorneys, family members or others who may
18 fail to recognize wherein the workers’ best advantage lies.” (*Thomas v. Sports Chalet, Inc.*, 42
19 Cal.Comp.Cases at pp. 628-629 [emphasis added].)

20 *Thomas* also discussed other significant commentaries regarding the importance of
21 prohibiting the settlement of vocational rehabilitation benefits and services. (*Thomas v. Sports*
22 *Chalet, Inc.*, 42 Cal.Comp.Cases at p. 628.) Among other things, *Thomas* observed that the April
23 1965 recommendations of the California Workmen’s Compensation Study Commission had been
24 essentially adopted by the July 1972 Report of the National Commission on State Workmen’s
25 Compensation Laws, and that the National Commission had stated: “We recommend ... that every
26 worker who could benefit from vocational rehabilitation services be offered those services” and
27 “[w]e recommend that the agenc[ies] [responsible for overseeing vocational rehabilitation] *be*
28 *particularly reluctant to permit compromise and release agreements which terminate ...*

1 *rehabilitation benefits.*” (*Thomas v. Sports Chalet, Inc.*, 42 Cal.Comp.Cases at p. 628 [emphasis
2 added].)

3 In *Thomas*, we also recognized, in particular, the significance of precluding the settlement
4 of *prospective* vocational rehabilitation rights:

5 “Considering the concepts of reopening and of new and further
6 disability in the Workers’ Compensation Law, an employee not
7 initially in need of vocational rehabilitation may, through changes
8 in circumstances, become in need.⁹ If an employee does not
9 initially qualify, there would be nothing to settle except future
10 rights. However, to allow a settlement of future rights would be
11 subject to the same objections as allowing settlement of a current
12 need and might well encourage an employee to refuse, against his
13 own best interest, necessary rehabilitation in order to receive a
14 monetary amount. This was a matter of great concern to the 1965
15 Study Commission.” (*Thomas v. Sports Chalet, Inc.*, 42
16 Cal.Comp.Cases at p. 632.)

17 *Thomas* further pointed out that, when the Legislature first enacted a vocational
18 rehabilitation statute (former Lab. Code, §139.5),¹⁰ it made the provision of vocational
19 rehabilitation by defendants voluntary, and “[a]n injured employee had no right to rehabilitation
20 unless [it] was conferred upon him by his employer or insurance carrier.” (*Thomas v. Sports
21 Chalet, Inc.*, 42 Cal.Comp.Cases at p. 627; see also, *Moyer v. Workmen’s Comp. Appeals Bd.*
22 (1973) 10 Cal.3d 222 [38 Cal.Comp.Cases 652].) Yet, even though an injured employee’s
23 entitlement to vocational rehabilitation was then entirely conditioned upon a defendant’s
24 agreement to provide it, *Thomas* emphasized that the Legislature nevertheless prohibited an
25 injured employee from “the commutation or settlement of compensation indemnity payments or
26 other benefits to which the employee is entitled under rehabilitation.” (Lab. Code, §5100.6;
27 *Thomas v. Sports Chalet, Inc.*, 42 Cal.Comp.Cases at p. 627.)

28 Effective January 1, 1975, the Legislature amended section 139.5 to provide that “when a

26 ⁹ There are a variety of circumstances in which an injured employee might make a claim for
27 vocational rehabilitation after his or her claim for ordinary benefits has been adjudicated or otherwise
28 resolved. (See, e.g., Lab. Code, §§5405.5, 5410, 5803, 5804.)

¹⁰ Stats. 1965, ch. 1513, §44.5, p. 3565.

1 qualified injured workman chooses to enroll in a rehabilitation program, he shall continue to
2 receive temporary disability indemnity payments, plus additional living expenses necessitated by
3 the rehabilitation program, together with all reasonable and necessary vocational training, at the
4 expense of the employer or the insurance carrier.” (*Thomas v. Sports Chalet, Inc.*, 42
5 Cal.Comp.Cases at p. 627.)¹¹ Thus, starting in 1975, a qualified injured worker became “entitled
6 to vocational rehabilitation *as a matter of right.*” (*Thomas v. Sports Chalet, Inc.*, 42
7 Cal.Comp.Cases at p. 628 (emphasis added).) However, *Thomas* highlighted the fact that, when
8 the Legislature amended section 139.5 to establish mandatory vocational rehabilitation for
9 qualified injured employees who elected to participate, the Legislature left intact the provisions of
10 section 5100.6 prohibiting the commutation or settlement of vocational rehabilitation benefits.
11 (*Thomas v. Sports Chalet, Inc.*, 42 Cal.Comp.Cases at pp. 630-631.)

12 Given the statutory prohibition against settling or commuting vocational rehabilitation
13 benefits and services (Lab. Code, §5100.6), and given the strong public policy concerns expressed
14 by the state and national workers’ compensation study commissions, we concluded in *Thomas* that
15 an employee’s entitlement to vocational rehabilitation benefits could *not* be settled, except in
16 those instances where there was a good-faith issue which, if resolved against the injured
17 employee, would defeat his or her right to *all* benefits.¹² This holding of *Thomas* was later
18 codified by former section 4646. (Stats. 1989, ch. 892, §33, p. 2986.)

19 Similarly, here, given the long-standing reluctance of the state and national workers’
20 compensation study commissions, of the Appeals Board (*Thomas v. Sports Chalet, Inc., supra*, 42

21 ¹¹ Stats. 1974, ch. 1435, §1, p. 3138.

22 ¹² In allowing the settlement of vocational rehabilitation under these very limited circumstances,
23 *Thomas* noted that the 1972 National Study Commission report had recognized that compromise and
24 release agreements “perform a useful function, as when there are legitimate doubts concerning the
25 employer’s liability and the worker might receive nothing if he pursues his claim.” (*Thomas v. Sports
26 Chalet, Inc.*, 42 Cal.Comp.Cases at p. 632.) *Thomas* also expressed the Appeals Board’s concern that, if a
27 complete release could not be executed in cases where there is a genuine doubt regarding the defendant’s
28 liability for *any* benefits, this “would put the Board in the position of requiring a determination in every
case that the employee is or is not entitled to [vocational rehabilitation], thereby effectively doing away
with settlements in those cases where legitimate and serious issues, which would totally bar recovery if
successfully proved by the defense, exist.” (*Thomas v. Sports Chalet, Inc.*, 42 Cal.Comp.Cases at pp. 632-
633.)

1 Cal.Comp.Cases 625), and even of the Legislature itself to allow the settlement of vocational
2 rehabilitation except in limited circumstances (see, Lab. Code, §5100.6; former Lab. Code,
3 §4646), we conclude that the amendments to the statutory preclusions against settling vocational
4 rehabilitation are *not* procedural because they effect substantial changes to a substantive right.
5 Accordingly, unless there is a clear contrary expression of legislative intent, the amendments
6 cannot be retrospectively applied to injuries occurring before their effective date.

7 **B. There Is No Clear Legislative Intent That The Amendments To Section 4646 Were To Be**
8 **Applied Retrospectively To Injuries Sustained Before The Amendments' Effective Date.**

9 The right to workers' compensation benefits is wholly statutory. (*DuBois v. Workers'*
10 *Comp. Appeals Bd.* (1993) 5 Cal.4th 382, 388 [58 Cal.Comp.Cases 286, 290]; *Graczyk v.*
11 *Workers' Comp. Appeals Bd.* (1986) 184 Cal.App.3d 997, 1002-1003 [51 Cal.Comp.Cases 408,
12 411].)

13 In general, it is the law in effect at the time of an employee's injury that governs all rights
14 and liabilities arising out of that injury, including the nature and amount of the injured employee's
15 compensation. (*Subsequent Injuries Fund v. Industrial Acc. Com. (Erickson)*, *supra*, 48 Cal.2d at
16 pp. 361-364 [22 Cal.Comp.Cases at pp. 96-99]; *Aetna Cas. & Surety Co. v. Industrial Acc. Com.*
17 (*Charlesworth*), *supra*, 30 Cal.2d at p. 392 [12 Cal.Comp.Cases at p. 125]; *Jimenez v. Workers'*
18 *Comp. Appeals Bd.* (1991) 1 Cal.App.4th 61, 67 [56 Cal.Comp.Cases 682, 686]; *Industrial*
19 *Indemnity Co. v. Workers' Comp. Appeals Bd. (Duncan)* (1978) 85 Cal.App.3d 1028, 1031 [43
20 Cal.Comp.Cases 1195, 1196-1197]; *Graczyk v. Workers' Comp. Appeals Bd.*, *supra*, 184
21 Cal.App.3d at p. 1007 [51 Cal.Comp.Cases at p. 415]; *Harrison v. Workmen's Comp. Appeals Bd.*
22 (1974) 44 Cal.App.3d 197, 202, fn. 5 [39 Cal.Comp.Cases 867, 870, fn. 5]; *Dickow v. Workmen's*
23 *Comp. Appeals Bd.* (1973) 34 Cal.App.3d 762, 764-765 [38 Cal.Comp.Cases 664, 665-666]; Lab.
24 Code, §4453.5.) Therefore, an amendment to the workers' compensation laws that is substantive
25 in character will not be applied to injuries sustained before the amendment's effective date, unless
26 it is clear that this was the Legislature's intent. (*Subsequent Injuries Fund v. Industrial Acc. Com.*
27 (*Erickson*). *supra*, 48 Cal.2d at p. 361 [22 Cal.Comp.Cases at p. 96]; *Aetna Cas. & Surety Co. v.*
28 *Industrial Acc. Com. (Charlesworth)*, *supra*, 30 Cal.2d at p. 393 [12 Cal.Comp.Cases at p. 125];

1 *American Psychometric Consultants, Inc. v. Workers' Comp. Appeals Bd. (Hurtado)*, *supra*, 36
2 Cal.App.4th at pp. 1643-1644 [60 Cal.Comp.Cases at p. 571]; *Industrial Indemnity Co. v.*
3 *Workers' Comp. Appeals Bd. (Duncan)*, *supra*, 85 Cal.App.3d at p. 1031 [43 Cal.Comp.Cases at
4 p. 1197]; *Graczyk v. Workers' Comp. Appeals Bd.*, *supra*, 184 Cal.App.3d at p. 1007 [51
5 Cal.Comp.Cases at p. 415]; *Harrison v. Workmen's Comp. Appeals Bd.*, *supra*, 44 Cal.App.3d at
6 p. 204 [39 Cal.Comp.Cases at p. 872].)

7 A legislative intent that a newly enacted or amended statute is to be retrospectively applied
8 may be established either by an express and unequivocal statutory provision or, where the statute
9 is silent, by a clear and unavoidable implication. (*Myers v. Philip Morris Companies, Inc.* (2002)
10 28 Cal.4th 828, 840; *Preston v. State Bd. of Equalization* (2001) 25 Cal.4th 197, 221-222;
11 *Evangelatos v. Superior Court*, *supra*, 44 Cal.3d at pp. 1208, 1209, 1210.)¹³ However, “a statute
12 that is ambiguous with respect to retroactive application is construed ... to be unambiguously
13 prospective.” (*Myers v. Philip Morris Companies, Inc.*, *supra*, 28 Cal.4th at p.840.)

14 When reviewing a statute for an implied retroactive intent, consideration may be given to
15 such factors as the legislative history, the context of the enactment, the remedial nature of the
16 statute and the “evils to be remedied,” and public policy. (*Evangelatos v. Superior Court*, *supra*,
17 44 Cal.3d at p. 1210; *In re Marriage of Bouquet* (1976) 16 Cal.3d 583, 587-588; *American*
18 *Psychometric Consultants, Inc. v. Workers' Comp. Appeals Bd. (Hurtado)*, *supra*, 36 Cal.App.4th
19 at p. 1644 [60 Cal.Comp.Cases at p. 572]; *Industrial Indemnity Co. v. Workers' Comp. Appeals*
20 *Bd. (Duncan)*, *supra*, 85 Cal.App.3d at p. 1031 [43 Cal.Comp.Cases at p. 1197]; *Harrison v.*
21 *Workmen's Comp. Appeals Bd.*, *supra*, 44 Cal.App.3d at pp. 205-206 [39 Cal.Comp.Cases at pp.
22 872-873].)

23 Moreover, in construing a statute, the task is to ascertain the intent of the Legislature as a
24 whole. (*Quintano v. Mercury Casualty Co.* (1995) 11 Cal.4th 1049, 1062.) Thus, an individual
25 legislator's statement may be considered in determining legislative intent where the statement is

26
27 ¹³ See, Lab. Code, §4 [“No action or proceeding commenced before this code takes effect, and no
28 right accrued, is affected by the provisions of this code ...”]; *cf.*, Civ. Code, §§3, 6; Code Civ. Proc., §3;
Govt. Code, §4; Pen. Code, §3.)

1 not merely an expression of the legislator's personal opinion, e.g., where the statement is a
2 reiteration of the legislative discussion and events leading to the adoption of a proposed statute or
3 its amendments. (*People v. Overstreet* (1986) 42 Cal.3d 891, 900; *Cal. Teachers Assn. v. San*
4 *Diego Community College Dist.* (1981) 28 Cal.3d 692, 700; *In re Marriage of Bouquet, supra*, 16
5 Cal.3d at pp. 590-591; see also, *Roberts v. City of Palmdale* (1993) 5 Cal.4th 363, 377.)
6 Ordinarily, however, no consideration is given to the intentions and objectives of an individual
7 legislator (even an authoring legislator) if there is no reliable indication that, in enacting or
8 amending the statute, the Legislature as a whole was aware of the legislator's intentions and
9 objectives and believed the language of the statute would accomplish them. (*Robert L. v. Superior*
10 *Court* (2003) 30 Cal.4th 894, 904; *Kavanaugh v. West Sonoma County Union High School Dist.*
11 (2003) 29 Cal.4th 911, 920, fn. 6; *People v. Johnson* (2002) 28 Cal.4th 240, 247; *Quintano v.*
12 *Mercury Casualty Co., supra*, 11 Cal.4th at p. 1062; *In re Marriage of Bouquet, supra*, 16 Cal.3d
13 at pp. 588-590; *O'Loughlin v. Workers' Comp. Appeals Bd.* (1990) 222 Cal.App.3d 1518, 1523-
14 1524 [55 Cal.Comp.Cases 296, 300].) This is because, unless an individual legislator's opinions
15 regarding the purpose or meaning of the legislation were expressed in testimony or argument to
16 either a house of the Legislature or one of its committees, there is no assurance that the rest of the
17 Legislature even knew of, much less shared, those views. (*Cal. Teachers Assn. v. San Diego*
18 *Community College Dist., supra*, 28 Cal.3d at pp. 699-700; *People v. Patterson* (1999) 72
19 Cal.App.4th 438, 443; see also, *In re Marriage of Bouquet, supra*, 16 Cal.3d at pp. 589-590.)¹⁴
20 Moreover, if an individual legislator's views were never expressed in a legislative forum, then any
21 legislators having differing opinions as to the bill's meaning and scope had no opportunity to
22 present their views in rebuttal. (*Cal. Teachers Assn. v. San Diego Community College Dist.,*
23 *supra*, 28 Cal.3d at p. 701; *People v. Patterson, supra*, 72 Cal.App.4th at p. 443.) This is
24 particularly true, of course, with respect to statements by an individual legislator made *after* a
25 statute's enactment or amendment. (*El Dorado Palm Springs, Ltd. v. City of Palm Springs, supra*,

26 ¹⁴ The opinions or understandings of individual legislators, even a bill's author, are generally not
27 evidence of the Legislature's *collective* intent. (*El Dorado Palm Springs, Ltd. v. City of Palm Springs*
28 (2002) 96 Cal.App.4th 1153, 1173; *Metropolitan Water Dist. v. Imperial Irrigation Dist.* (2000) 80
Cal.App.4th 1403, 1426.)

1 96 Cal.App.4th at pp. 1173-1174; *cf.*, *Bravo Vending v. City of Rancho Mirage* (1993) 16
2 Cal.App.4th 383, 399, fn. 9.)

3 Here, there is no express and unequivocal statutory provision that the amendments to
4 section 4646 were intended to apply in cases where the injury occurred before the amendments'
5 effective date. (See, *Myers v. Philip Morris Companies, Inc.*, *supra*, 28 Cal.4th at p. 842; see also,
6 e.g., Lab. Code, §5500.5(h) ["The amendments to this section ... shall operate retroactively"];
7 Civ. Code, §1646.5 ["This section applies to contracts, agreements, and undertakings entered into
8 before, on, or after its effective date; it shall be fully retroactive."]; Gov. Code, §9355.8 ["This
9 section shall have retroactive application ..."].)¹⁵

10 Further, no such intent is manifested by a clear, necessary and unavoidable implication.
11 (See, *Myers v. Philip Morris Companies, Inc.*, *supra*, 28 Cal.4th at pp. 844-845.) Indeed, to our
12 knowledge, the only possible basis upon which to conclude that the amendments to section 4646
13 were intended to apply retrospectively is the September 1, 2002 letter from Assemblyman
14 Calderon, who introduced the bill that made the amendments to section 4646. Yet, for the reasons
15 that follow, this letter does not constitute *very clear* extrinsic evidence that the Legislature *must*
16 have intended a retroactive application.

17 Initially, as discussed above, it is well settled that the individual opinion of a legislator,
18 even the author of a bill, is ordinarily not probative of the collegial intent of the Legislature at the
19 time the bill was passed. There is nothing in Assemblyman Calderon's letter that persuades us
20 that his view regarding the retrospective effect of the amendments was considered by the
21 Legislature as a whole or, if his view was considered, that the Legislature collectively shared this
22 view.

23 In addition, Assemblyman Calderon's letter issued *after* the enactment of the amendments,
24 so it provides no indication of how the amendments were understood at the time they were

25 ¹⁵ Similarly, in adopting Labor Code section 3716.3, the Legislature made an express declaration
26 that "Section 2 of this act shall be retroactive in effect and shall apply to all obligations of illegally
27 uninsured employers to the director, regardless of the date of injury to the employee." (Stats. 1990, ch.
28 770, §4, p. 2823.) In adopting Labor Code section 3732, the Legislature made an express declaration that
"[t]he amendments to subdivision (c) of Section 3732 of the Labor Code ... are intended to be
retrospective." (Stats. 1985, ch. 666, §2, p. 607.)

1 enacted by those (other than Assemblyman Calderon) who voted to enact them.

2 Finally, Assemblyman Calderon’s letter suggests that, because neither AB 749 nor AB 486
3 (the “clean-up bill”) contained language specifying that the amendments to section 4646 were to
4 apply only to injuries occurring on or after January 1, 2003, no such limitation was intended by
5 the legislature. It is true that, on occasion, the Legislature will expressly declare that a new or
6 newly amended workers’ compensation statute shall apply only to injuries occurring on or after its
7 effective date. (E.g., *Jimenez v. Workers’ Comp. Appeals Bd.*, *supra*, 1 Cal.App.4th 61 [56
8 Cal.Comp.Cases 682].) This does not mean, however, that a new or newly amended statute will
9 be construed to operate retrospectively absent an express legislative declaration that it is to apply
10 prospectively only. To the contrary, as discussed above, the law is that a statute will be
11 interpreted to apply prospectively only, unless there is an unambiguous expression of legislative
12 intent that it be applied retrospectively.

13 Thus, we cannot conclude that Assemblyman Calderon’s letter establishes, either directly
14 or by necessary implication, that the Legislature as a whole intended the amendments to section
15 4646 to apply retrospectively.

16 Accordingly, we determine that the amendments to section 4646, which allow a defendant
17 and a represented employee to settle prospective vocational rehabilitation services under limited
18 circumstances, are substantive and that there is no clear and unmistakable evidence that the
19 Legislature as a whole intended these amendments to operate retrospectively. Therefore, the
20 amendments to section 4646 cannot be applied to injuries sustained before their January 1, 2003
21 effective date.

22 For the foregoing reasons,

23 **IT IS ORDERED**, as the Decision After Reconsideration of the Board (En Banc), that the

24 ///

25 ///

26 ///

27 ///

28 ///

1 Finding of Fact and Order issued by the workers' compensation administrative law judge on May
2 6, 2003 be, and it hereby is, **AFFIRMED**.

3 ***WORKERS' COMPENSATION APPEALS BOARD (EN BANC)***

4
5
6 _____
7 *MERLE C. RABINE, Chairman*

8
9 _____
10 *WILLIAM K. O'BRIEN, Commissioner*

11
12 _____
13 *JAMES C. CUNEO, Commissioner*

14
15 _____
16 *JANICE J. MURRAY, Commissioner*

17
18 _____
19 *FRANK M. BRASS, Commissioner*

20
21 _____
22 *A. JOHN SHIMMON, Commissioner*

23 ***DATED AND FILED AT SAN FRANCISCO, CALIFORNIA***

24 ***August 8, 2003***

25
26 ***SERVICE BY MAIL ON SAID DATE TO ALL PARTIES AS SHOWN ON THE OFFICIAL ADDRESS***
27 ***RECORD***

28 ***NPS/tab***