

Law & Order



It's The Law

First Appellate Court Opinion Cements WCAB En Bancs: Top [05/25/07]

The San Francisco-based 1st District Court of Appeal beat three other district courts to the punch with a ruling on exceptions to the new permanent disability rating schedule.

The court's published opinion on the exception clause in Labor Code Section 4660 effectively affirms the conclusion reached by the Workers' Compensation Appeals Board the second time in *Baglione and Pendergrass*.

The board on April 6 issued en banc opinions saying that a doctor's medical-legal report written before Jan. 1, 2005, must indicate permanent disability to qualify for an exception to the 2005 rating schedule. The commissioners on a 4-3 re-vote also decided that an employer's duty to notify an employee begins with the last payment of temporary disability, rather than the first.

Justice Maria Rivera of the 1st District Court of Appeal wrote an opinion released Wednesday in which the judges rejected a claimant's construction of Labor Code Section 4660(d) to require no indication of permanent disability in a comprehensive medical-legal report.

Such an interpretation of the provision in Senate Bill 899 would be "contrary to the spirit of the statute and the workers' compensation reform package as a whole," Rivera wrote.

"Under Labor Code Section 4660(d), a medical-legal report, like a treating physician's report, must contain an indication of permanent disability to trigger use of the pre-2005 rating schedule," her opinion said.

The case is *Costco Wholesale Corp. v. WCAB (Chavez)*, A116145, 05/23/2007, and is the first of as many as 11 appeals before California courts on the old vs. new disability rating schedule.

The 1st District Court also decided that the final payment -- rather than the first one -- triggers the employer's obligation to notify an injured worker whether permanent disability is expected.

With 4660(d) exceptions before the 3rd, 4th and 6th District Courts of Appeal, it remains to be seen if there will be a split among the courts. And the 1st District Court in San Francisco has three more of the permanent disability rating cases accepted on appeal. It's

even possible the separate panels within the 1st District Court could disagree on what qualifies for exception to the 2005 schedule.

The opinion can be viewed by clicking on the case title in the side bar at right.

Utilization Review Enforcement Regs Approved: Top [06/08/07]

California workers' compensation carriers may get their first visits by state utilization-review inspectors as early as October.

The Office of Administrative Law on Thursday approved utilization-review enforcement regulations proposed by the Division of Workers' Compensation, the DWC announced.

The regulations took effect immediately after they were filed with the Secretary of State's Office, so any missed utilization-review deadlines, failures to respond to requests for treatment or improper denials of care after Thursday could result in fines, said DWC spokesman Susan Gard.

And she said even though routine compliance audits won't begin until October, the DWC can conduct a "target audit" in response to complaints at any time.

"The idea here isn't to prevent claims administrators from doing utilization review, the idea is to do utilization review effectively so that injured workers are getting appropriate care," Gard said.

The regulations establish a monitoring system similar to the annual profile audits that are used to ensure timely claims payment.

State regulations require every insurer and self-insured employer to have and use a utilization review process. The regulations also set out timelines and conditions to be met whenever a request for authorization of medical treatment will be delayed, modified or denied.

The regulations provide for a routine investigation to be initiated at each claims adjusting location at least once every five years, and at each utilization review organization at least once every three years. The DWC said it can also launch "target investigations" if it receives complaints about a specific claims adjusting location or utilization-review firm.

The DWC can assess penalties of up to \$50,000 against claims administrators that do not comply, although smaller fines would be more common.

The approved regulations, as filed with the secretary of state, can be found on the DWC Web site at:

http://www.dir.ca.gov/dwc/DWCPropRegs/UREnforcementRegulations/UR_EnforcementRegulations.htm

In The News

**By Marc Lifsher, Times Staff Writer
May 12, 2007**

SACRAMENTO — Lawyers for injured workers Friday claimed a major victory after a judge ruled that the state's formula for calculating permanent disability benefits was arbitrary.

The decision came amid a rising clamor from advocates for injured workers, labor unions and Democratic leaders of the state Legislature over a landmark overhaul of California's once-troubled workers' compensation insurance system. Critics charge that the 2004 law has slashed benefits to people injured on the job even as it boosted the bottom lines of employers and insurance companies.

In a ruling issued this week and made public Friday, a Workers' Compensation Appeals Board judge in San Francisco found that the administration of Gov. Arnold Schwarzenegger did not base its schedule of benefits on empirical evidence, such as lost future wages.

Judge Jacqueline C. Duncan concluded that permanent disability regulations issued by the state in January 2005 violated a law that the business community considers the signature achievement of Schwarzenegger's first term.

The opinion, which is expected to be appealed to the full board, marks a first major win in court in a two-year-long effort by opponents of the Schwarzenegger regulations that, according to some studies, reduced payments to permanently injured workers by 50%.

"This is the first time they've gotten a judge to rule on the merits that the schedule is invalid," said Lachlan Taylor, a workers' compensation judge and a researcher at the state-backed Commission on Health and Safety and Workers' Compensation in San Francisco.

The Schwarzenegger administration, however, called Duncan's ruling flawed and said it might be in conflict with a recent decision by a higher panel, the Workers' Compensation Appeals Board.

"We continue to maintain that the permanent disability schedule was constructed in compliance with the law," said Susan Gard of the California Division of Workers' Compensation.

The judge's ruling, if upheld, could boost efforts by statehouse Democrats to pass legislation to boost permanent disability payments.

"Injured workers are suffering with what I think are tremendous uncompensated losses from a schedule I believe is arbitrary and not following the mandates of the labor code," said Linda Atcherley, president of the California Applicants' Attorneys Assn. "We're trying to get a legislative fix to increase permanent disability benefits so that they are adequate."

To that end, aides to Assembly Speaker Fabian Nuñez (D-Los Angeles) and Senate President Pro Tem Don Perata (D-Oakland) held a first meeting Friday with representatives of labor unions, attorneys for injured workers, large employers and insurance companies in hopes of crafting legislation that would increase disability benefits without driving up costs for business.

Many business groups, however, remain skeptical of any type of legislative tinkering. Jerry Azevedo, a spokesman for the Workers' Compensation Action Network, denounced

the latest legal challenge as "another example of a concerted effort by the applicants' attorneys to undermine the 2004 workers' compensation reforms."