Significant Decision

The adjusted permanent disability rating schedule adopted on January 1, 2005 applies to all pending matters regardless of the date of injury. The only cases it does not apply to are those claims arising before January 1, 2005 in which, prior to January 1, 2005, there is a comprehensive medical-legal report or treating physician report indicating the existence of permanent disability, or the employer was required to provide notice to the injured worker pursuant to Labor Code §4061.

Rachel Chang v. Workers' Compensation Appeals Board and State Compensation Insurance Fund
Court of Appeal, Third District (Sacramento)
(Filed 7/24/07)
Civ. No. C053854
WCAB Nos. STK19269OM and FRE192692

Significance: Finding it to be sound, the Court of Appeal confirmed and adopted the WCAB's reasoning in *Aldi v. Carr, McClellan, Ingersoll, Thompson & Horn* (2006) 71 Cal.Comp.Cases 783 (*Aldi*) when it upheld this decision requiring use of the permanent disability rating schedule that became effective January 1, 2005 for rating an injured worker's permanent disability resulting from a claim of cumulative injury ending in July 2004 since none of the three exceptions set forth in Labor Code §4660(d) apply.

Facts: While employed as a typist for State Fund, Applicant sustained an admitted industrial cumulative trauma injury to her back and upper extremities during a period ending in July 2004. It was undisputed the injuries became permanent and stationary in 2005. The WCJ determined that none of the three exceptions to Labor Code §4660(d) applied and so permanent disability was to be determined under the "new" rating schedule in accordance with the en banc decision in *Aldi*, which he was bound to follow.

Applicant sought reconsideration arguing that *Aldi* was wrongly decided. The WCJ recommended denial of the petition since he was bound to follow the Board's en banc decision under 8 Cal. Code Regs §10341 and the *Gee* case. The Board

adopted the WCJ's report and denied reconsideration. Applicant sought a writ of review that was granted.

Discussion: For all intents and purposes, this case is actually not much more than an *Aldi* "redo" except to the extent that in *Chang* the WCJ found none of the three exceptions under 4660 apply. In *Aldi*, the Board noted Applicant first raised the exception relating to 4061 (the TD notice requirement) at the reconsideration stage and so returned the matter to the WCJ for a decision on that issue at the trial level. As described by the Court of Appeal in *Chang*, the issue was whether the Legislature intended a new permanent disability rating schedule to apply to injuries sustained before the schedule was adopted. And although they appreciated their role was to construe the meaning of section 4660 de novo, the Court acknowledged they would accord "great weight to the Board's construction in *Aldi* unless it is clearly erroneous." The Court found nothing erroneous about the Board's construction of the statute, finding it comported with "the urgent nature of the reform package to avert a crisis in workers' compensation coverage."

The Court considered the clear, unambiguous and plain meaning of the statutory language of 4660 as amended in 2004. The Court's view of the language was the same as that of the Board in *Aldi*:

> (I) the second sentence of 4660(d) states the general rule that the new schedule is to be applied prospectively and this is consistent with the history of 4660 and the express language of former section 4660(c);
>
> (II) the third sentence of 4660(d) provides a clear and specific exception to the general rule and mandates the application of the revised rating schedule to injuries occurring before 1/1/05 in specified instances.

The Court rejected (as did the Board in *Aldi*) Applicant's argument that this interpretation fails to harmonize all parts of 4660, subdivision (e) in particular which called for adoption of the revised rating schedule on or before 1/1/05. Applicant's contention was that the Legislature intended the third sentence to apply only if a revised rating schedule was adopted before 1/1/05 since there would have been many injuries that occurred after April 19, 2004 but before 1/1/05. Since the revised schedule did not become effective until 1/1/05, the third sentence of (d) became moot. The Court (and Board) found such an interpretation nullified the central condition for the application of the revised schedule as mandated by the

statute. Explaining that there is no clear language indicating such a legislative intent, the Court quoted the Board:

> . . .there is no inconsistency between the second and third sentence. The second sentence carries forward the prospective application language that has been present for many years. The third sentence delineates which injuries occurring before January 1, 2005 are subject to the revised rating schedule, and which are to be rated according to the prior rating schedule. These sentences may be harmonized whether the revised rating schedule became effective on January 1, 2005 or became effective at some earlier date in 2004. (*Aldi*, *supra*, 71 Cal.Comp.Cases at p. 792.)

In the final paragraphs of the opinion the Court noted CAAA's "passion unhinged" from the narrow issue before them, demonstrated by way of their plea to the Court to intervene immediately on behalf of injured workers given that the savings to the state from the 2004 reforms have been "enormous", "insurance profits are skyrocketing, businesses are not fleeing the state as feared, and disputes over the legislation are increasing." In addition, CAAA argued, there is no legislative history to support the assertion that "every provision" of SB899 "should be construed to reduce benefits to injured workers", that the system "was failing both employers and injured workers" before reform legislation was passed in 2004. Commenting that as far as they could tell no one is making such a "radical assertion", the Court went on to observe that CAAA seemed to be "mistaking us for a legislative committee and forgetting that our sole task is to interpret the language of the statute before us."

Holding: The revised rating schedule that became effective January 1, 2005 applies to all pending matters regardless of the date of injury unless, for those claims arising before January 1, 2005, there is a comprehensive medical-legal report or treating physician report indicating the existence of permanent disability, or when the employer is required to provide notice required by Labor Code §4061 to the injured worker.

Note: There are a good number of pending appellate cases regarding the application of various exceptions under 4660(d) so it is likely we will see more decisions relating to application of this Labor Code section over the next few months as they make their way through the appellate process. Incrementally the decisions on the appellate court level involving interpretation of §4660(d) are

providing us with guidance on when it is appropriate to apply the "new" versus the "old" permanent disability rating schedule. And the appellate courts appear to be affirming the Board's construction of 4660 as seen here in *Chang* and the decision by the 1st DCA (Division 4) in *Costco v. WCAB (Chavez)* which incorporated the reasoning of the Board in the *Pendergrass II* and *Baglione II* en banc decisions. Moreover, we are seeing some consistency in the decisions as between the various appellate court districts. For example, the C*hang* case comes out of the 3rd DCA (Sacramento) which also recently issued a decision in *Energetic Painting and Drywall, Inc. v. WCAB et al.*, (Filed 7/24/07), Civ. No. C055273, WCAB No. STK0193461 regarding application of the TD notice exception.[1] In *Energetic Painting* the 3rd DCA agreed with the interpretation of 4660(d) given by the 1st DCA (Division 4) in *Costco vs. WCAB (Chavez)* [when considering the TD notice requirement exception, the relevent date is the last payment of TD.] This holding from *Costco* was also relied upon in the recent 1st DCA (Division 3) case of *Zenith Insurance Co. v. Worker's Compensation Appeals Board and Nader Azizi* (Azizi), 72 Cal.Comp. Cases 785 (6/19/07 and Order Certifying Opinion for Publication 7/18/07).

The court's opinion becomes final 30 days after the filing date. Once it becomes final, the parties have 10 days to file for review by the Supreme Court . The official case citation for this decision is not yet available. The full opinion is available at the Court's website at:
http://www.courtinfo.ca.gov/opinions/documents/C053854.DOC
(press CTRL and click on the link)

[1] http://www.courtinfo.ca.gov/opinions/documents/C055273.DOC)