

Return to : 3rd District Reviewing Retroactive PD Case

California -- 3rd District Reviewing Retroactive PD Case: Top [12/20/06]

A California appellate court has agreed to decide whether the new permanent disability rating schedule can be applied retroactively to injuries before 2005.

The 3rd District Court of Appeal granted review of *Chang v. Workers' Compensation Appeals State Compensation Insurance Fund*, C053854.

In that case, applicant Rachele Chang is challenging the WCAB's interpretation of the revised statute. The WCAB in June decided en banc that Labor Code 4660 was written to allow pre-2005 disability injuries to be rated under the American Medical Association Guides (AMA).

The WCAB decided in *Aldi v. Carr, McClellan, Ingersoll, Thompson & Horn*, Case No. SFO 0485703, 6/21/2006, that 4660(d) is written to allow permanent disability claims open on Jan. 1, 2005, to be rated under the AMA Guides when:

- 1) There has been either no comprehensive medical-legal report or
- 2) No report by a treating physician indicating the existence of permanent disability or
- 3) The employer is not required to provide the notice required by Section 4061 to the injured worker.

After issuing its *Aldi* opinion, the WCAB declined to review Chang's case for permanent disability benefits. She sought to be rated under the old rather than the new schedule, which generally awards lower benefits.

Chang worked as a legal secretary for State Fund and filed separate claims for injuries to her back and to both extremities, according to the court record. Both claims were for 2004 injuries.

Chang's attorney, John Frailing of Modesto, petitioned the appeals court for review, saying that the WCAB presented the "guiding principals behind statutory interpretation" of 4660, but its *Aldi* ruling ignored the "plain language" of the labor code section.

Frailing told WorkCompCentral that "if the court says that all cases after 1/1/05 are rated under the new PDRS and the injuries prior to 1/1/05 are the old PD rating schedule, then it gives everyone practicing out there a bright line in the sand."

The applicants' attorney wrote in his petition that the second and third sentences of 4660(d) cancel each other out.

"The statute states plainly and specifically that a new schedule, or any amendment to that schedule or any revision of it, can only apply to injuries that occur on or after the effective date of the revision," Frailing wrote.

The second sentence reads: "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 or after the effective date of the adoption of the schedule, amendment or revision, as the fact may be."

Frailing argued that the sentence that follows creates confusion.

"Each sentence (two and three) negates part of the other," he wrote in his review petition.

He asked the 3rd District Court to intervene in the matter and decide the legislative intent.

"The Legislature added provisions in Labor Code Section 4660(d) that would address problems that might arise if the regulation creating the new permanent disability rating schedule went into effect before Jan. 1, 2005,"

Frailing wrote.

"Since the schedule became effective only on that date, the contingencies in that statute are moot," he said, calling it the "only possible statutory interpretation" that gives effect to the language of the whole statute.

The appellate granted review Dec. 7. State Fund is the insurer in the case.

Her attorney, Frailing, is a law partner with former California Applicants' Attorney Association President David Rockwell.

The date for oral arguments has not been set.

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[Return to : 3rd District Reviewing Retroactive PD Case](#)

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