



**New Case Brief**  
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*Joseph Baglione v. Hertz Car Sales and AIG, et. al.*  
**(WCAB No. SJO 0251644, 72 Cal. Comp. Cases)**  
**En Banc Decision, 1/24/07**

**OLD RATING SCHEDULE APPLIES WHEN PRE-2005 COMPREHENSIVE  
MEDICAL-LEGAL REPORT EXISTS**

Labor Code §4660(d), as amended by SB 899, provides, in effect, that the new permanent disability rating schedule (PDRS) utilizing the AMA Guides applies to pre-2005 injuries if “there has been either no comprehensive medical-legal report or no report by a treating physician indicating the existence of permanent disability....” In this 4 to 3 en banc decision, the WCAB holds that the existence of a comprehensive medical-legal report prior to 1/1/05 is sufficient to preclude the application of the new PDRS even when that report does not “indicate the existence of permanent disability”.

Applicant was injured on 6/18/03. A comprehensive medical-legal report was issued by Dr. Arthur Messinger on 6/18/04, ie., prior to 1/1/05. There was no dispute that Dr. Messinger’s report did not indicate the existence of PD.

The WCJ issued an F&A on 10/23/06 stating that applicant was P&S on 4/18/05, based upon an AME report from Dr. David Graubard dated 4/25/06. The WCJ found that applicant’s PD should be rated under the new PDRS because prior to 1/1/05 there was neither a report from a treating physician nor a comprehensive medical-legal report indicating the existence of PD. According to the WCJ, Dr. Messinger’s 6/18/04 report did not satisfy any of the exceptions set forth in LC §4660(d) because it did not “indicate the existence of permanent disability”.

The WCAB majority reversed and amended the F&A to state that applicant’s PD should be rated utilizing the 1997 PDRS, reasoning that the phrase “indicating the existence of permanent disability” refers only to treating physician reports in existence prior to 1/1/05 and not to “comprehensive medical-legal reports” in existence prior to that date.

The majority distinguished similar language in LC §4658(d)(4) which states that the schedule provided for in that subdivision (i.e., number weeks/amount of PD for injuries on or after 1/1/05) “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.”* (emphasis added). Because the legislature inserted a comma after the word “physician” in §4658(d)(4) but did not do likewise in §4660(d), the majority concluded the legislature must have intended the difference and thus, construed §4660(d) differently.

The minority, however, also relied on the identical language in §4658(d)(4) to support its view that the WCJ had correctly applied the new PDRS. It can be expected this case will be the subject of a Petition for Writ of Review should the composition of the WCAB not change within the time for filing a Petition for Reconsideration before the Board.