



New Case Brief  
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**Costa v. Hardy Diagnostic and State Compensation Insurance Fund**  
**(2006) GRO 0031810 [WCAB En Banc]**

In an en banc decision on December 7, 2006, the Workers' Compensation Appeal Board dealt with various issues concerning the validity and uncertainty of the new Permanent Disability Rating Schedule (PDRS) under Labor Code 4660.

In Costa, the applicant sustained a cumulative back injury ending in August 2004. On January 20, 2006, the WCJ, in a Findings and Award determined applicant's permanent disability by utilizing the new PDRS. Applicant subsequently filed a Petition for reconsideration contending among other things that the new PDRS (1) "lacked adequate empirical studies" and did not adhere to the Statutory requirement of Labor Code 4660 (b)[2], (2) did not apply to pre-January 1, 2005 injuries and (3) whether a rating could be rebutted under this new PDRS.

In its en banc decision, the WCAB addressed the issue of whether the Administrative Director of the Division of Workers' Compensation actions were "arbitrary, capricious or inconsistent" with Labor Code 4660. The WCAB looked at the Court of Appeal decision in Mineral Associations Coalition v. State Mining and Geology Bd. (2006) 138 Cal. App. 4<sup>th</sup> 574, 582-583. The Court of Appeal held in that case, that an Administrative Regulation's validity depended on (1) whether the agency acted within its statutory boundaries and (2) whether the regulation was "necessary to effectuate" the purpose of the statute. The WCAB in delivering its judgment determined that applicant had failed to show that the Director's actions were inconsistent with Labor Code 4660 requirements.

In formulating their decision, the WCAB decided to consider evidence that was previously excluded by the WCJ. Importantly, amongst the exhibits excluded was a report compiled by the vocational rehabilitation consultant. The WCJ had determined that neither party was responsible for costs associated with the report or testimony given. However, after deliberations, the WCAB agreed with the WCJ and disallowed the consultant report. They cited lack of probative value, being cumulative and not timely served as their reasons. Of interest though is the fact that although the WCAB deemed this report inadmissible, they rescinded the WCJ decision and held that defendant was liable for costs relating to that report/ testimony.

The WCAB then turned its attention to the validity of the PDRS. The Court firstly, rejected applicant's claim that the new PDRS "failed to increase permanent partial

disability benefits” due to the legislative intent of Labor Code 4660. The Court ruled that Section 4660 is “devoid of any such language.” Secondly, this Court looked at applicant’s claim that the new PDRS was invalid because it was not based on “empirical studies” as demanded by Labor Code 4660(b) (2). The Court ruled that the Administrative Director did in fact adhere to Labor Code 4660 requirements in adopting the new PDRS by utilizing the data from RAND 2003 Interim Report. The Court decided against “superimposing its own policy judgment upon the agency.”

The WCAB next addressed the issue of whether parties could present evidence to rebut a rating under the new PDRS. The Court held that despite several changes made to Labor Code 4660 by SB 899, “rebuttal evidence” could be introduced, although the PDRS remained “prima facie evidence” of the level of permanent disability. Significantly, that rebuttal evidence cost may be allowable. However, the WCAB believed that the kind of rebuttal evidence will be decided on a case by case basis.

Finally, the WCAB ruled that the new PDRS applied to injuries prior to January 1, 2005 as held previously in *Aldi v. Carr, McClellan, Ingersoll, Thompson & Horn* (2006) 71 Cal.Comp.Cases 783 (*Appeals Board en banc*) unless an exception exist as denoted by Labor Code 4660 (d). These exceptions include instances where “no comprehensive medical-legal report or no report by a treating physician indicating the existence of permanent disability, or when the employer is not required to provide notice required by Section 4061 to the injured worker.” As applicant had not indicated that anyone of these exceptions existed, the WCAB concluded that applicant’s injury was “properly rated under the new PDRS.”