



New Case Brief
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Josh Pendergrass v. Duggan Plumbing and SCIF
(WCAB No. SAL 0110868, 72 Cal. Comp. Cases)
En Banc Decision, 1/24/07

**OLD RATING SCHEDULE APPLIES WHEN COMPENSABLE
TEMPORARY DISABILITY COMMENCES BEFORE 2005**

In this decision, carrying the same date as the decision in *Joseph Baglione v. Hertz Car Sales*, (en banc, 2007) 72 Cal. Comp. Cases, the same four member WCAB majority addresses the third exception to the application of the new PDRS in LC §4660(d) to pre-2005 injuries. That exception provides in substance that the new PDRS applies to pre-2005 injuries “when the employer is not required to provide the notice required by §4061 to the injured worker” prior to 1/1/05. Section 4061, of course, states that the notices set forth in that section shall be provided to the employee “Together with the last payment of temporary disability”.

In what would appear to be a decision contrary to the plain meaning of the words of LC §§4660(d) and 4061, the WCAB majority holds that an employer’s duty “to provide the notice required” by §4061 arises with the first payment of temporary disability, not the last. The majority explains that it distinguishes between when the duty arises and when the duty is required to be executed. “If there is no temporary disability, no duty to give notice under §4061 arises”, *Pendergrass*, at page 4. The majority, however, fails to mention that the legislature did not speak in terms of when the duty arises, but “when the employer is (not) required to provide the notice required by §4061 to the injured worker”. (emphasis added)

Applicant was injured on 6/29/04 and was paid TTD benefits continuously from 6/30/04 through 7/19/05. The WCJ found that since the last payment of TTD did not occur until 2005, the §4061 notice was not required to be provided to the employee prior to 1/1/05 and thus, the new PDRS applied.

As indicated above, the majority, in a surprisingly brief decision, grafted a “duty” rationale onto what would otherwise appear to be the plain meaning of the language in question.

It should be noted that the Board term of Commissioner and former Chairman Rabine, who sided with the majority in the three en banc decisions issued on 1/24/07, expired on 1/26/07. It has been reported by WorkCompCentral that Rabine acknowledged that the three en banc decisions decided during his last week were timed so he could participate in the decisions and “avoid a possible 3-3 deadlock”.

Petitions for Writs of Review will likely be filed with the Sixth District Court of Appeal in San Jose on both Rating Schedule decisions.