



Old and New Schedule

In Sensient Technologies v. WCAB and Noel Rivera (2008) 5th Appellate District, Unpublished (F056325), the 5th District addressed the issue of which rating system is applicable. This decision is of concern since the court relied on the panel QME's subjective description of the applicant's condition as the basis for determining there would be permanent disability (PD), even prior to finding the applicant permanent and stationary (P&S). Under the old system both "subjective" and "objective" findings were to balance when compared with the work restrictions for purposes of consistency. Prior courts have held the applicant must be P&S before the existence of PD can be determined. This court rejected those opinions. Instead it seized upon the language, or the "ratable terms" of disability from the panel QME's report, which were based on the applicant's "subjective complaints." Still the court found this description as a comprehensive report demonstrating the existence of PD and eligibility for rating under the 1997 rating schedule. The discussion is based on Labor Code section 4660(d) and its three prong test to determine whether a pre-2005 date of injury falls under the old or new system.

This case reflects the remaining exposure on pre-2005 cases even where there is no P&S report. The court appears to be willing to substitute pre-P&S subjective complaints for a description of PD that normally is found in a post-P&S evaluation. This is erroneous since what separates "ratable language" from mere subjective complaints is *the event* of the injured worker becoming "P&S." If consideration is being given to filing a Writ of Review, this unpublished decision is a window into the court's reasoning. This may also provide a preview of possible arguments by applicant's attorney's on behalf of their clients.