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New Case Brief
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August 6, 2007

<u>Vera v. WCAB (SCIF)</u>
(2007) SDO 0318989 [Court of Appeal D049629]

On March 14, 2003, applicant suffered admitted injury to his neck, back and right shoulder. Temporary Total Disability (TTD) benefits were paid from 03/17/03 through 02/01/05. During the TTD period, the primary treating physician (PTP) issued a "Supplemental Primary Treating Physician's Report" dated 04/26/04 indicating the applicant was not yet permanent and stationary, but preliminarily found the existence of permanent disability (PD).

The applicant argued that his level of PD should be determined using the 1997 Permanent Disability Rating Schedule (PDRS), based on 2 factors: 1) PTP report indicating existence of PD prior to 01/01/05; and 2) the employer had a duty to provide the notice required by LC section 4061 (a) indicating the end of TTD and PD is, or may be, beginning, together with the first payment of TTD. If applied, the old schedule would result in a 59% PD, worth $62,576.25. If the new schedule were to apply, the level of PD would be 26%, worth $18,823.75.

After the trial judge found the old schedule applied, defendants filed a Petition for Reconsideration. The Court of Appeal affirmed the decision of a divided WCAB and held the new PDRS applied for two different reasons. First, because the PTP report of 04/26/04 did not find a ratable permanent disability, it was not sufficient to apply the old PDRS. The Court found that the terms "permanent and stationary" and "permanent disability" are interchangeable and the legislative intent in drafting LC 4660 (d) was to apply the new PDRS to claims arising before 01/01/05 when there is no PTP report indicating a *ratable permanent* disability that has become *permanent and stationary* prior to 01/01/05.

The second reason the Court applied the new PDRS was because the plain reading of LC section 4061 makes it clear that an employer does not have a duty to provide the notice required by LC 4061 (d) until the employer is making the last payment of TTD. If the last payment of TTD occurs after 01/01/05, then the duty to provide a LC 4061 (d) notice also arises post 01/01/05 which warrants a PD finding under the new PDRS.