



**Law Review Article**  
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**Labor Code 4660:**  
**The Inconsistency, the Controversy, and the Relevancy –**  
**Which PD Schedule Applies??**

One of the more controversial provisions of SB899 was the amendment to Labor Code Section 4660. This is the code section that requires the determination of the percentage of permanent disability to take into account the nature of the physical injury or disfigurement, the occupation of the injured employee, his or her age at the time of injury, and consideration to diminished future earning capacity (LC 4660(a)). It is also the section that incorporates the descriptions and measurements of physical impairments and the corresponding percentages of impairments published in the American Medical Association (AMA) Guides to the Evaluation of Permanent Impairment (5<sup>th</sup> Edition) (LC 4660(b)(1)). It is also the code section that states, “The schedule shall promote consistency, uniformity, and objectivity” (LC 4660(d)).

**The Inconsistency**

The inconsistency lies not in the schedule itself, but in its application to injuries pre-1/1/05. The second sentence of subdivision (d) states, “The schedule . . . shall apply prospectively and shall apply to and govern only those permanent disabilities that result from compensable injuries received or occurring on and after the effective date of the adoption of the schedule . . .” Since the schedule was adopted 1/1/05, this seems to indicate that the schedule will only apply to injuries on or after 1/1/05. Such an application of the new schedule would be consistent with a number of other workers’ compensation laws and regulations where the date of injury controls the application of the subject provision. It would also be consistent with a plain reading of Labor Code Section 4660 prior to SB899 which includes this exact same language.

The conflict is created by the third sentence in subdivision (d), along with the “2004 Note” at the end of the code section. The third sentence reads: “For compensable claims arising before January 1, 2005, the schedule as revised pursuant to changes made in legislation enacted during the 2003-2004 Regular and Extraordinary Sessions shall apply to the determination of permanent disabilities when there has been either 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 the notice required by Section 4061 to the injured worker.” This sentence directly contradicts the second sentence by stating that the new schedule will apply to pre-1/1/05 injuries if certain exceptions are met.

Added to the mix is the “2004 Note”: “The amendment to Section 4660 made by this act shall apply prospectively from the date of enactment of this act, *regardless of the date of injury*, unless otherwise specified . . .” (emphasis added). Is this simply the

legislature's way of reminding us that the legislation was intended to take effect immediately, "unless otherwise specified", or is it an expressed departure from prior legislation that allowed the date of injury to control?

### **The Controversy**

There is no inconsistency in the above language with respect to injuries on or after 1/1/05. For those injuries, the new schedule applies, and this carries with it its own controversy as the Applicant Bar contends that the new schedule has dramatically reduced the percentages of permanent disability in comparison to the old schedule (and their attorney fees as well!). However, the inconsistencies of subdivision (d) have created a controversy in a number of cases with dates of injury pre-1/1/05 where the issue of permanent disability was not decided pre-1/1/05. In those limited cases, Labor Code Section 4660 creates a real controversy for the parties.

So which schedule applies, the old 1997 schedule or the new 2005 schedule? Given the inconsistencies of Labor Code Section 4660 documented above, and a lack of judicial precedent, nobody knows! In January 2006, the Applicant Bar circulated a decision from WCALJ Hettick of the San Francisco WCAB in the case *Elizabeth Aldi v. Republic Indemnity Company of America*, SFO 0485703, wherein it was concluded that the new 2005 permanent disability rating schedule applies only to injuries on or after 1/1/05. This is one obvious way to interpret Section 4660, but given the inconsistency in the language, it can just as easily be interpreted to apply to pre-1/1/05 injuries if the exceptions are met.

Let us assume that the new rating schedule does apply to injuries pre-1/1/05. There is still more controversy within the controversy. For example, what constitutes a comprehensive medical-legal examination, and would it still be comprehensive if the report does not find permanent disability and instead recommends additional treatment? What constitutes a report by a primary treating physician indicating the existence of permanent disability? Are those pre-1/1/05 generic reports stating that applicant has some level of permanent disability, the exact amount to be determined at a later date, sufficient? What about a pre-1/1/05 MRI revealing a herniated disc commented upon by the treating physician? There is likely even controversy as to when an employer is required to provide notice required by Section 4061. Thus, even if we get past the first controversy over whether the schedule can apply to injuries pre-1/1/05, there can still be confusion and controversy over the exceptions to its application.

### **The Relevancy**

The controversy within the controversy is only going to arise in a handful of cases, as many times it will be abundantly clear to both parties that one of the exceptions has been met. For example, if you have a comprehensive QME report prior to 1/1/05, or temporary disability was terminated prior to 1/1/05 giving rise to the notice requirements of Section 4061. Nonetheless, for the next year or so there are going to be those cases where reasonable minds can differ, and the controversy becomes quite relevant when the difference between the two rating schedules is a substantial amount of money.

In a case currently set for Trial, both the defense and applicant QME were asked to address permanent disability under both the old and new rating schedules. The defense QME suggested restrictions precluding lifting greater than 20 pounds, any more than occasional bending and stooping, or standing or walking for greater than 45 minutes without an opportunity to sit for 5 minutes. There is a further preclusion from performing work which requires assuming a forward flexed posture such as mopping, shoveling, etc., which together rate to 64%, equivalent to \$69,976.25 at 2003 rates. Applicant's QME is actually more favorable having only suggested a preclusion from substantial work, rated at 54%. On the other hand, both physicians seemed to agree that under the 2005 schedule adopting the AMA Guides, 5<sup>th</sup> Edition, applicant was to be assessed using the DRE III method of impairment (10% - 13% possible). After adjustment, the defense QME report rates 21%, equivalent to \$13,967.50. The difference in the two ratings: \$56,008.75.

This is not an extreme case, and the differences are even more pronounced when the old 1997 schedule would have provided a permanent disability percentage in the life pension range of 70% or greater. This is obviously troubling for many injured workers with significant injuries after 1/1/05, but more so for injuries pre-1/1/05 if the new rating schedule applies. It is also troubling for the applicant attorneys who are seeing their incomes cut in half, and so don't be surprised if there is some modification to the new rating schedule to appease the Applicant Bar. However, for the time being, the parties must deal with the inconsistencies and the controversies in the relevant cases, and numbers in excess of \$50,000 are difficult to compromise. It can't be expected that an applicant will simply concede to application of the new rating schedule when there are decisions such as that from Judge Hettick concluding that the new schedule only applies to injuries on or after 1/1/05. At the same time, why should a defendant compromise in a case where there has been no comprehensive medical-legal exam, either questionable or no treating physician report indicating the existence of permanent disability, and temporary disability indemnity benefits were paid through 1/1/05? There will be cases where the discrepancy in ratings is insignificant, and the parties can compromise based on an average of the various ratings. As for the rest, it appears that we will have to wait for guidance from the higher courts.