

1 WORKERS' COMPENSATION APPEALS BOARD

2 STATE OF CALIFORNIA

3 Case No. LBO0363837

4 USAMA HABIBALLAH,

5 *Applicant,*

6 vs.

7 STARBUCKS COFFEE CO.; ZURICH
8 AMERICAN INSURANCE CO.,
9 administered by GALLAGHER BASSETT
10 SERVICES,

11 *Defendant(s).*

OPINION AND DECISION
AFTER RECONSIDERATION

12
13 On December 12, 2005, the Workers' Compensation Appeals Board (Appeals Board)
14 granted reconsideration to further study the factual and legal issues. This is our decision after
15 reconsideration.

16 In the Findings and Award of September 13, 2005, the workers' compensation
17 administrative law judge (WCJ) found, in relevant part, that applicant sustained industrial injury
18 to his low back during the period March 2004 through September 28, 2004, that applicant's
19 actual earnings at the time of injury, from all sources, were \$446.25 per week, that the injury
20 caused permanent disability of 24% and the need for further medical treatment, and that there is
21 no evidence to support apportionment.

22 Defendant sought reconsideration of the WCJ's decision, contending that the WCJ erred
23 in finding that applicant had earnings of \$446.25 per week, that the WCJ erred in applying the
24 1997 rating schedule and should have applied the new rating schedule pursuant to Labor Code
25 section 4660(d), and that the WCJ erred in not finding apportionment based on Dr. Easley's
26 report.

27 Applicant filed an answer.

1 Applicant first saw his treating physician, Dr. Easley, on October 6, 2004. The doctor's
2 report of that date states that applicant is temporarily totally disabled. Dr. Easley's reports of
3 November 23, 2004 and December 16, 2004 state that applicant is temporarily totally disabled
4 from his job at Starbucks but able to work as a bank teller, with restrictions. On April 6, 2005,
5 Dr. Easley issued a permanent and stationary report finding subjective and objective factors of
6 disability, as well as work restrictions. In this report, the doctor offered opinions on permanent
7 disability corresponding to both the 1997 and 2005 rating schedules. The WCJ relied on Dr.
8 Easley to find permanent disability of 24%, without apportionment, based on the 1997 rating
9 schedule.

10 While defendant's petition for reconsideration now does not contest the WCJ's finding of
11 cumulative injury over the employment period March 2004 through September 28, 2004,
12 defendant initially denied applicant's claim based on the November 15, 2004 "Comprehensive
13 Orthopedic Evaluation" of Dr. Paul. The report was obtained under Labor Code section 4060.
14 Dr. Paul also authored a "Supplemental Report" dated January 19, 2005, again opining that
15 applicant did not sustain an injury. Since the doctor found no injury, he did not find any
16 permanent disability.

17 Labor Code section 4660(d) provides as follows:

18 "The schedule shall promote consistency, uniformity, and objectivity. The schedule and
19 any amendment thereto or revision thereof shall apply prospectively and shall apply to
20 and govern only those permanent disabilities that result from compensable injuries
21 received or occurring on and after the effective date of the adoption of the schedule,
22 amendment or revision, as the fact may be. For compensable claims arising before
23 January 1, 2005, the schedule as revised pursuant to changes made in legislation enacted
24 during the 2003-04 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." (Emphasis added.)¹

25 ¹ The new rating schedule was implemented by Administrative Director (AD) Rule 9805 (8 Cal.Code Regs. §9805),
26 which provides: "The method for the determination of percentages of permanent disability is set forth in the
27 Schedule for Rating Permanent Disabilities, which has been adopted by the Administrative Director effective January
1, 2005, and which is hereby incorporated by reference in its entirety as though it were set forth below. The schedule
adopts and incorporates the American Medical Association (AMA) Guides to the Evaluation of Permanent
Impairment 5th Edition. The schedule shall be effective for dates of injury on or after January 1, 2005 and for dates

1 With regard to the phrase, "[f]or compensable claims arising before January 1, 2005," we
2 conclude that the phrase includes both accepted injuries before January 1, 2005, and denied
3 injuries that occurred before January 1, 2005 but were not accepted and/or adjudicated as being
4 compensable claims until after January 1, 2005. Thus, the present case involves a 'compensable
5 claim arising before January 1, 2005.'

6 The third sentence of subdivision (d) states that for such a claim, the new rating schedule
7 "shall apply to the determination of permanent disabilities when there has been either no
8 comprehensive medical-legal report or no report by a treating physician indicating the existence
9 of permanent disability, or when the employer is not required to provide the notice required by
10 Section 4061 to the injured worker."

11 As pointed out by the Court of Appeal in *Garcetti v. Superior Ct. of Los Angeles (Blake)*
12 (2000) 85 Cal. App. 4th 1113, 1120 [102 Cal. Rptr. 2d 703]:

13 "...[T]he punctuation of a statute can be helpful in ascertaining its proper
14 interpretation. [¶] A longstanding rule of statutory construction--the 'last
15 antecedent rule'--provides that 'qualifying words, phrases and clauses are to be
16 applied to the words or phrases immediately preceding and are not to be
17 construed as extending to or including others more remote.' [Citations.] (*White*
18 *v. County of Sacramento* (1982) 31 Cal. 3d 676, 680 [183 Cal. Rptr. 520, 646
19 P.2d 191] (*White*.) Evidence that a qualifying phrase is supposed to apply to all
20 antecedents instead of only to the immediately preceding one may be found in the
21 fact that it is separated from the antecedents by a comma. (*Ibid.*)" [Internal
22 quotations marks omitted.]

23 Applying the foregoing rule of construction to the third sentence of Labor Code section
24 4660(d), we note that the qualifying phrase "indicating the existence of permanent disability" is
25 not separated from the antecedents "no comprehensive medical-legal report or no report by a
26 treating physician" by a comma.

27 Accordingly, we read section 4660(d) as providing that the new schedule applies where:
(1) there has been no comprehensive medical-legal report; or (2) no report by a treating physician
indicating the existence of permanent disability; or (3) when the employer is not required to

of injury prior to January 1, 2005, in accordance with subdivision (d) of Labor Code section 4660, and it shall be
amended at least once every five years." (Emphasis added.)

1 provide the notice required by Section 4061 to the injured worker.

2 In other words, the grammar of the third sentence of section 4660(d) does not require a
3 "comprehensive medical-legal report" that also indicates the existence of permanent disability, in
4 order for the "old" 1997 rating schedule to apply. Stated another way, for the "old" schedule to
5 apply to a "compensable claim[] arising before January 1, 2005," it is sufficient that "there has
6 been" a "comprehensive medical-legal report" for any reason.

7 In this case, there is a defense "Comprehensive Orthopedic Evaluation" dated November
8 15, 2004, authored by Dr. Paul. In her Report and Recommendation herein, the WCJ offers a
9 persuasive analysis as to why both the November 15, 2004 report of Dr. Paul and the November
10 23, 2004 report of treating physician Easley could be construed as "indicating the existence of
11 permanent disability." As explained above, however, the fact that Dr. Paul issued a
12 "comprehensive medical-legal report" on November 15, 2004, even if it did not 'indicate the
13 existence of permanent disability,' is sufficient to have applicant's permanent disability rated
14 under the 1997 schedule. Therefore, we will affirm the WCJ's decision.

15 With regard to defendant's contentions on earnings and apportionment, we deny the
16 contentions for the reasons stated in the WCJ's Report, which we adopt and incorporate on those
17 issues.

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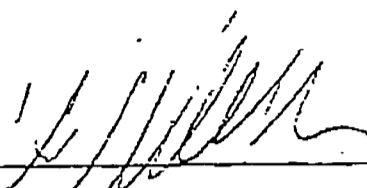
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1 For the foregoing reasons,

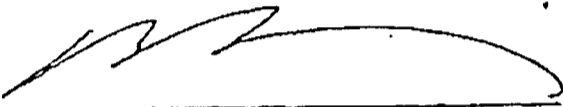
2 IT IS ORDERED, as the Appeals Board's Decision After Reconsideration, that the
3 Findings and Award of September 13, 2005 is hereby **AFFIRMED**.

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5 WORKERS' COMPENSATION APPEALS BOARD

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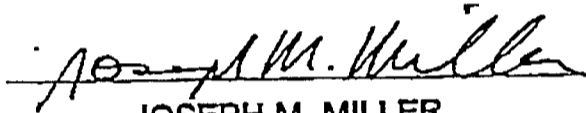
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9 WILLIAM K. O'BRIEN

10 I CONCUR,

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13 MERLE C. RABINE

14 I DISSENT (See attached Dissenting Opinion),

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17 JOSEPH M. MILLER

18 DATED AND FILED IN SAN FRANCISCO, CALIFORNIA

19 SERVICE BY MAIL ON SAID DATE TO ALL PARTIES SHOWN ON THE OFFICIAL
20 ADDRESS RECORD, EXCLUDING LIEN CLAIMANTS.

21 jl/rrm



1 DISSENTING OPINION

2 I dissent. I read Labor Code section 4660(d) as requiring application of the new rating
3 schedule when there has been neither a comprehensive medical-legal report before January 1,
4 2005 nor a report by a treating physician before January 1, 2005 indicating the existence of
5 permanent disability.

6 In this case, I disagree with the WCJ's conclusion that the reports issued by Dr. Paul and
7 Dr. Easley before January 1, 2005 indicate the existence of permanent disability. In fact, Dr.
8 Easley's October 6, 2004 report (p. 1, ¶3) states that it "is premature to speculate as to any
9 residual permanent disability..." The new rating schedule applies because neither the defense
10 medical-legal evaluator nor the treating physician authored reports before January 1, 2005
11 indicating that there is or may be permanent disability. Therefore, while I would affirm the
12 WCJ's findings on injury, earnings, and medical treatment, I would return this case to the WCJ
13 for a determination of permanent disability under the new rating schedule.

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15 WORKERS' COMPENSATION APPEALS BOARD

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19 JOSEPH M. MILLER, CHAIRMAN

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24 jl/rmm
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