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In this issue...

- 1 *The Ramifications of Pendergrass & Baglioni by Don Barthel, Esq..*
- 4 *Bradford & Barthel, LLP, Proudly Announces New Partners by Mark Fletcher, Esq.*
- 4 *The 15% Question by Steven Schwartz, Esq.*
- 4 *B&B Office Locations and Venues*

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## The Ramifications of *Pendergrass & Baglioni*

by Donald R. Barthel, Esq.

### CAAA Celebrates Christmas in January with *Pendergrass v. SCIF (1/24/07)*

The WCAB's recent *en banc* decision, *Pendergrass v. SCIF (1/24/07)*, gave cause for unexpected celebration amongst California applicants' attorneys.

In a blatant attempt to apply the old, and significantly more expensive, 1997 Permanent Disability Rating Schedule (PDRS) to virtually all pre-1/1/05 injuries, the WCAB issued an *en banc* decision providing that applicants who are TD prior to 1/1/05 will not be rated pursuant to the 2005 PDRS/*AMA Guides* (5th). In so doing, greater than 50% more PD on average than would have been awarded pursuant to the 2005 PDRS/*AMA Guides*.\*

What happened? Applicant suffered an admitted injury and received TD from 6/30/04 through 7/19/05. With this information, the WCAB focused on Labor Code section 4660(d), which provides that the 2005 PDRS will apply to pre-1/1/05 injuries unless, *inter alia*, "the employer is...required to provide the notice required by Section 4061 to the injured worker." This rule, concluded the majority of the commissioners, placed applicant under the 1997 PDRS.

What is a "Section 4061" notice? It is the end-of-the-TD-gravy-train notice that advises the applicant that TD is ending and discusses the prospects of PD (that is, PD "will be paid", "may or is payable, but that the amount cannot be determined" and so on).

When do California's adjusters issue a 4061 notice? The statute requires that the notice issue "[t]ogether with the last payment of temporary disability indemnity..." [LC 4061(a)].

What was the WCAB's logic? If, per LC 4061, an employer is required to issue the notice along with the last payment of TD, why would an applicant (such as Mr. Pendergrass, who received TD through 7/05) qualify for the 1997 PDRS? The WCAB attempted to explain this with a strange twist of logic:

*We conclude for purposes of section 4660 that an employer's duty "to provide the notice required by" section 4061 arises with the first payment of [TD]. There is no obligation to provide any section 4061 notice unless [TD] has been paid or should have been paid. Thus, as soon as the first date of compensable [TD] occurs, the duty to give section 4061 notice comes into existence... We distinguish here between when the duty arises and when the duty is required to be executed. The duty arises when the first payment of [TD] is made. The execution of that duty occurs when the last payment of [TD] is made...*

The WCAB is WRONG! This case appears to be a clear-cut case of commissioners being more interested in achieving their own agenda (that is, avoiding the application of the 2005 PDRS/*AMA Guides* whenever possible) rather than in executing the California Legislature's intent:

\*California Commission on Health & Safety's "Permanent Disability Rating Schedule Analysis" (2/23/06).

...continued on page 2

## The Ramifications of *Pendergrass* and *Baglioni* continued from page 1

1. In the above quotation, the majority focuses on “when the duty arises” to issue a section 4061 notice, LC 4660(d) did not use the word *duty* or the phrase *when the duty arises*. Rather, the legislature used the word *required* (“the employer is...required to provide the notice required by Section 4061 to the injured worker.”) As Chairman Miller noted in the dissent, “The majority’s reading of sections 4061 and 4660(d) has no basis in the actual statutory language of the cited sections.”
2. LC 4660 was part of California’s workers’ compensation revolution in April, 2004, known as SB 899. Per Section 49 of SB 899, the legislature made it clear that SB 899 was “an urgency statute” that was to “go into immediate effect...at the earliest possible time...” The majority’s interpretation of LC 4660(d) conflicts with—and directly undercuts—this clear legislative intent.

What does this mean for California’s employers, carriers, and TPAs?

As an *en banc* decision, *Pendergrass* is the law of the land. It is binding on all Workers' Compensation Judges and all WCAB panel decisions. Thus, to successfully challenge this decision and apply the 2005 PDRS/*AMA Guides* (5th) to a pre-1/1/05 injury where TD was required prior to 1/1/05, the logic of *Pendergrass* must be overturned by another WCAB *en banc* decision, a Court of Appeals ruling and/or the California Supreme Court.

Is such a challenge worth the effort? Obviously, such a determination depends in large part on how much money hangs in the balance. Given the aforementioned California Commission on Health & Safety’s “Permanent Disability Rating Schedule Analysis” (2/23/06), the level of PD owed will decrease dramatically (by more than 50%!) if the 2005 PDRS is applied. Thus, if, under the 1997 PDRS, \$100,000 in PD is owed, we could expect that a successful attack on *Pendergrass* will decrease that obligation by more than \$50,000!

### CAA Continues the Celebration with *Baglione v. AIG* (1/24/07)

In yet another stunning slap at California employers, the WCAB in *Baglione v. AIG* (1/24/07) issued an *en banc* decision providing that cases involving a pre-1/1/05 injury will not be rated pursuant to the 2005 PDRS/*AMA Guides* (5th) if any “comprehensive medical-legal report” issued prior to 1/1/05. In so doing, the WCAB (in this 4-3 decision) followed the logic of a recent panel opinion: *Torres v. SDM Precision Products*. (For an analysis of *Torres*, refer to Bradford & Barthel’s Blog, September/October 2006 issue, “Torres Commissioners: Go Back to School” at <http://www.bradfordbarthel.com/blog/V2N5>.)

This case involved the interpretation of Labor Code section 4660(d) on whether a “comprehensive medical-legal report” that issued prior to January 1, 2005, had to indicate evidence of the existence of PD in order for the 1997 Permanent Disability Rating Schedule (PDRS) to apply. Per 4660(d), the 2005 PDRS may apply to pre-1/1/05 injuries unless, *inter alia*, “there has been either...[a] comprehensive medical-legal report or [a] report by a treating physician indicating the existence of permanent disability...” Thus, in a nutshell, the issue was whether the phrase *indicating the existence of permanent disability* qualifies both the prior phrases (*comprehensive medical-legal* and *report by a treating physician*) or only the phrase immediately preceding it (*report by a treating physician*).

*Baglione* facts: Applicant suffered a pre-1/1/05 back injury. Prior to 1/1/05, a comprehensive medical-legal report issued. There was no dispute that this report did not indicate the existence of PD.

Decision: The four WCAB commissioners making up the majority concluded that 4660(d)’s phrase “indicating the existence of [PD]” qualifies only the phrase immediately preceding it: “report by a treating physician.” Thus, any comprehensive medical-legal report that issues prior to 1/1/05 (whether or not it finds PD, discusses PD, or even finds that there is no injury AOE/COE) will be sufficient to place applicant’s PD rating under the old, 1997 PDRS.

The WCAB is WRONG!

This case, much like the *Pendergrass* decision, appears to represent the commissioners’ desire to further their own agenda (that is, avoiding the application of the 2005 PDRS/*AMA Guides* whenever possible) rather than executing the California Legislature’s intent. LC 4660 was part of California’s workers’ compensation revolution in April, 2004, known as SB 899. Per Section 49 of SB 899, the legislature made it clear that SB 899 was “an urgency statute” that was to “go into immediate effect...at the earliest possible time...” The majority’s interpretation of LC 4660(d) conflicts with, and directly undercuts, this clear legislative intent.

What does this mean for California’s employers, carriers, and TPAs? As an *en banc* decision, *Baglione* is the law of the land. It is binding on all Workers' Compensation judges and all WCAB panel decisions. Thus, to successfully challenge this decision and apply the 2005 PDRS/*AMA Guides* (5th) to a pre-1/1/05 injury where a comprehensive medical-legal report issued prior to 1/1/05 but did not “indicat[e] the existence of PD,” the logic of *Baglione* must be overturned by another WCAB *en banc* decision, a Court of Appeals ruling, and/or the California Supreme Court.

...continued on page 3

## The Ramifications of *Pendergrass* and *Baglioni* *continued from page 2*

Is such a challenge worth the effort? Obviously, such a determination depends in large part on how much money hangs in the balance. Given the findings of the California Commission on Health & Safety's "Permanent Disability Rating Schedule Analysis" (2/23/06), the level of PD owed will decrease dramatically (by more than 50% on average) if the 2005 PDRS is applied. Thus, if under the 1997 PDRS \$100,000 in PD is owed, we could expect that a successful attack on *Baglione* will decrease that obligation by more than \$50,000!

### Chances of Successfully Challenging *Pendergrass* and *Baglione*? Excellent!

The *Pendergrass* and *Baglione* WCAB *en banc* decisions have, in this author's opinion, (1) performed a disservice to California's employers and carriers, (2) misinterpreted LC 4660(d), and (c) subverted the California legislative intent expressed by SB 899. In short, the majority of commissioners in *Pendergrass* and *Baglione* have construed LC 4660(d) so as to force as many pre-1/1/05 injuries as possible into the old and invariably more expensive 1997 Permanent Disability Rating Schedule, thereby doubling California's employers' PD exposure in such cases [California Commission on Health & Safety "Permanent Disability Rating Schedule Analysis" (2/23/06)].

Can *Pendergrass* and *Baglione* be successfully challenged? Inasmuch as *Baglione* and *Pendergrass* are *en banc* decisions, they are, for the present time, the "law of the land." This does not mean, however, that they can be expected to withstand challenge. To successfully challenge the logic of *Pendergrass* and *Baglione*, only another WCAB *en banc* decision, a Court of Appeals ruling, the California Supreme Court, or the U.S. Supreme Court will do the trick.

Given the foregoing, does the defense stand a chance... YES!

### The Commissioner Landscape is a Changin'

It is essential to note that *Baglione* and *Pendergrass*, though *en banc* decisions, were decided by only the slightest majority of commissioners. Of the seven commissioners, each decision received three dissenting votes from the same commissioners: Chairman Joseph Miller, James Cuneo, and Frank Brass. The majority, in each case, was made up of Commissioners Rabine, O'Brien, Murray, and Caplane.

Commissioners are appointed by the governor for 6-year terms. While those terms may be extended, that is rarely the case, as was recently learned by Commissioner Rabine. This January Commissioner Rabine received a letter from Governor Schwarzenegger's appointment secretary, Timothy Simon:

*Dear Merle Rabine: This letter is to inform you that your term as a member of the Workers' Compensation Appeals Board has ended and to thank you for your service to the people of California.*

Thus, Governor Schwarzenegger is poised to replace Commissioner Rabine, thereby taking out one of the pivotal *Baglione/Pendergrass* votes with someone more to the governor's office's liking. What are the chances that Commissioner Rabine's replacement will join the dissent (thus making it the majority opinion) in *Baglione/Pendergrass* decisions? One barometer is Chairman Joseph Miller, the governor's only prior appointment. Commissioner Miller, who led the dissent in both *Baglione* and *Pendergrass*, has a distinctively defense orientation, and has been evidenced in a litany of panel and *en banc* decisions. Thus, if the new appointee is anything like Chairman Miller, *Baglione* and *Pendergrass* are "on thin ice".

The WCAB will be facing significant changes over the next year. The following is a list of commissioners whose terms end in 2007 and, thus, who can be expected to be replaced by Governor Schwarzenegger appointees who are more apt to strongly consider the legislative intent underpinnings of SB 899:

- Rabine: gone 1/26/07
- O'Brien: term expires 6/20/07
- Murray: term expires 6/20/07
- Brass: term expires 12/12/07
- Cuneo: term expires 12/12/07

In short, five of the seven commissioners may be Governor Schwarzenegger appointees by the end of '07. These five will work with Commissioner Miller, who was appointed last year. During their tenure together, it is a safe bet that they will interpret SB 899 and its progeny "Arnie's way," with an eye towards ensuring that SB 899 continues to fulfill its mandate: "to provide relief to the State from the effects of the current workers' compensation crisis at the earliest possible time..." (See Section 49, SB 899)

Want to challenge *Baglione/Pendergrass* logic in your particular case? The time for such a challenge couldn't be better!

**Don Barthel** is a Founding Partner of Bradford & Barthel, LLP.

*Subsequent to the writing of this article, Governor Schwarzenegger nominated Alfonso Moresi to the WCAB. Mr. Moresi's 34-year career has focused on the defense of workers' compensation matters, suggesting that his decisions as a Commissioner will likely reflect those of Chairman Miller. Industry experts project that Mr. Moresi will receive Senate confirmation.*

# Office Locations and Venues

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1300 E. Shaw, Suite 171  
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## Redding, CA

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## Sacramento, CA

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## Santa Rosa, CA

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## Tarzana, CA

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## Ventura, CA

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## Walnut Creek, CA

2161 Ygnacio Valley Road, Suite 200  
Walnut Creek, CA 94598  
(925) 937-1252 | (925) 937-1353 fax  
*Primary Venues:*  
Oakland, San Francisco, San Jose

## Bradford & Barthel, LLP, Proudly Announces New Partners

by Mark S. Fletcher, Esq.

Bradford & Barthel, LLP, proudly announces new partners. Congratulations!

*In the Rancho Cucamonga office, Matthew Markham and Ted Schneider. In the Fullerton office, Claudia Peterson. In the Sacramento office, Ralph Davis and Patrick Rose. In the Ventura office, Bill Brown. In the Tarzana office, Daniel Michael Dailey and Susan Marlow. In the San Diego office, Scott Star.*

*Mark S. Fletcher, Esq., is the Managing Partner of Bradford & Barthel, LLP.*

## The 15% Question

by Stephen A. Schwartz, Esq.

I have a clarification to my article in the July/August 2006 issue entitled "To Work or Not to Work: The 15% Solution" (<http://www.bradfordbarthel.com/BLOG/V2N4/15Percent.htm>). A question was posed as to calculation of payments owing under Labor Code Section 4658(d) if the 15% was initiated, but the work provided was ended before all PD payments were made. For example, assume applicant is entitled to \$100/week in PD. When applicant comes back to work, because he/she was provided with work, he/she receives \$85/week, a 15% reduction. After six months, he/she is let go. To what payment rate is applicant entitled?

One interpretation is that the 15% increase applies to the reduced rate after being returned to work. This would result in a 15% increase of \$85.00 per week, or \$12.75 per week, to a total of \$97.75 per week. Unfortunately, this interpretation is faulty and undercut by the California Codes, Title 8, California Code of Regulations Section 10002(d), which states:

*If the employee's regular work, modified work, or alternative work that has been offered by the employer pursuant to paragraph (1) of subsection (b) and has been accepted by the employee is terminated prior to the end of the period for which permanent partial disability benefits are due, the amount of each remaining... payment from the date of the termination shall be paid in accordance with.... 4658(d)(1), as though no decrease in payments had been imposed, and increased by 15 percent.*

Thus, in our example, the applicant receives \$85.00 per week while back on the job, and, once terminated, goes back to \$100.00 per week plus \$15/week, for total of \$115/week.

*Stephen A. Schwartz, Esq., is a partner in Bradford & Barthel's Sacramento office.*