Ever since the en banc opinion in ***Aldi v. Carr, McClellan, et al***, (2006) 71 CCC 783 (W/D 71 CCC 1822), it has been clear that the revised permanent disability rating schedule adopted January 1, 2005 applies to injuries sustained prior to January 1, 2005, **UNLESS** the injured worker can establish that one of the **exceptions** set forth in the third sentence of 4660(d) is applicable. This sentence reads: The revised schedule will apply to pre-January 1, 2005 injuries:

"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)

The principles of Aldi were reaffirmed in a published opinion from the Third Appellate District in ***Chang v. WCAB*** (7-24-07) 72 CCC 921.

This third sentence of 4660(d) has fostered much litigation over the last year. Issues included the question whether a "comprehensive medical-legal report" could be any such report or only one which indicates the existence of permanent disability. Another major issue was: what does "is not required to provide the notice required by Section 4061" mean? But perhaps a bigger question was what does “indicating the existence” mean.

DEFINING THE EXCEPTIONS

BAGLIONE / PENDERGRASS

On April 6, 2007, the WCAB issued two en banc (4-3) decisions addressing two questions. In the first of these, ***Baglione v. Hertz*** 72 CCC 444, the question analyzed was what kind of medical report had to be written before 1-1-05. Would “any” comprehensive medical legal report, e.g. L.C. 4060, suffice? The Board found that not just "any" comprehensive medical-legal report before 1-1-05 would suffice to trigger the 1997 Schedule. In the battle over "to comma or not to comma", it was determined that to invoke this exception, the medical-legal report must also "indicate the existence" of permanent disability.

Also on April 6, 2007, the Board issued its decision in ***Pendergrass v Duggan Plumbing*** 72 CCC 456. This case concerned the "notice required by Section 4061". Some had argued that the duty to provide a 4061 notice arose with the first payment of temporary disability indemnity. The argument continued that therefore if TDI was paid before 1-1-05, a 4061 notice was required before 1-1-05, and therefore the 2005 Schedule for Rating Permanent Disability should NOT apply. The majority disagreed. Where payment of temporary disability indemnity starts before 1-1-05 and continues until 1-1-05 or later, there is no requirement to provide a 4061 notice until the last payment of TDI is made, the majority stated:

"...[I]f the **last payment** of temporary disability indemnity was made for any period of temporary disability ending before January 1, 2005, then the 1997 Schedule applies to determine the extent of permanent disability, pursuant to section 4660(d), **because** section 4061 requires the employer to provide the injured worker with a

notice regarding permanent disability "**[t]ogether** with the last payment of temporary disability indemnity ...," (Emphasis added)

The principles of Baglione and Pendergrass have been reaffirmed in two published cases. On May 23, 2007, the decision in ***Costco v. WCAB (Chavez)*** 72 CCC 582 issued from the First DCA. On July 24, 2007, the decision in ***Energetic Painting v. WCAB (Ramirez)*** (7-24-07) 72 CCC 937 issued from the Third DCA. Also see W/D and non-published cases: ***Bryer*** (9-27-07); ***City of Galt (Ramos)*** (9-21-07); ***Lyngso Garden Materials v. WCAB (Ruiz)*** 72 CCC 1097; **Zenith v. WCAB (Watts)** 72 CCC 1135.

A couple of questions not addressed by any of these decisions are:

Does the term "report by a treating physician" include secondary physicians or is it limited to PTP's?

What if payment of TDI begins before 1-1-05, then stops (e.g. return to work) before 1-1-05, then resumes before 1-1-05, and continues until after 1-1-05? Clearly the "last payment" of TDI will be after 1-1-05. However, was not a 4061 notice required at the time of the first stop?

WHAT EXACTLY DOES "INDICATING THE EXISTENCE OF PERMANENT DISABILITY MEAN?

Reminiscent of the competing DCA opinions in *Dykes, Nabors*, and *Welcher* on the *Fuentes* issue of calculating permanent disability after apportionment which led to the Supreme Court decision in *Brodie/Welcher*, there are now competing DCA opinions over the meaning of "indicating the existence"..

In an opinion from the 4th DCA in ***Vera v.WCAB*** 72 CCC 1115, certified for publication on August 30, 2007, the Court stated:

"We next consider the meaning of the statute's statement that the new schedule applies 'when there has been...no report by a treating physician **indicating the existence of permanent disability**' ...
As we will explain, we conclude that the treating physician's report must indicate that the claimant has a ratable disability that has reached a permanent and stationary status, and that in enacting section 4660, subdivision (d) the Legislature was using the term 'permanent disability' as another way of referring to the status of having **ratable** disability that is '**permanent and stationary**'." (emphasis added)

It must be noted that Vera had sustained injury to his neck, back and shoulder on March 14, 2003. The PTP had reported under date of April 26, 2004 that "Mr. Vera does currently have the existence of permanent disability". However, the PTP also opined that the condition was not yet permanent and stationary. His description of work limitations was given on a "preliminary basis". Vera also had had surgery on his shoulder in August 2004. None of this qualified as an indication of the existence of permanent disability. The Vera court clearly concluded that in order to rise to the level of a report "indicating the existence of permanent disability", the report must also state that the medical condition has reached permanent and stationary status.

Then, in an opinion from the 2nd DCA in ***Genlyte Group v. WCAB (Zavala)***, 73 CCC ***, certified for publication on January 3, 2008, that Court stated:

"[T]he *Vera* court's conclusion miss[es] the mark. ... The language of the statute is not limited to what the Vera court properly describes as the typical final or permanent and stationary report....

[I]n an appropriate case a physician is not precluded from reporting that permanent disability exists prior to the time the injured worker (sic) has reached permanent and stationary status or the extent of ratable permanent disability is known...."

The Court went on to cite several circumstances where the existence of permanent disability may be indicated before the injured worker's condition becomes permanent and stationary. These included cases of insidious and progressive occupational disease, or severe burns or loss of sight or limbs, or where the injured worker becomes entitled to vocational rehabilitation.

Several decisions since January 2008 have favored the ***Genlyte*** rationale over ***Vera*** while none have favored ***Vera*** over ***Genlyte***. See ***Tenet v. WCAB (Reddick)*** 73 CCC 329 (in 10-04, QME advised: P&S if no surgery; expected PD if surgery done); ***Virginia Surety v. WCAB (Wragg)*** 73 CCC 75 (In 12-04, PTP advised: Wragg "will be left with some measure of permanent residual disability and limited functional capacity resulting from said industrial injury.); ***Zenith v. WCAB (Cugini)*** 73 CCC 81 (On remand to WCAB, instruction to follow Genlyte rationale). There were also numerous Board Panel decisions following ***Genltye***.

Prior to *Genlyte*, there were there were a variety of Board Panel decisions and Writ Denied cases with similar views as to the meaning of "indicating the existence of permanent disability". The following is a sampling of these and related earlier decisions. In a W/D of 6-14-07 in ***Xerox v. WCAB (Blair)*** (6-14-07) 72 CCC 1044, where there had also been a 4061 notice issued before 1-1-05, the WCJ found that a PR-2 reporting loss of cervical motion after surgery was "an indication" of the existence of permanent disability. Also, presumed medical-QIW status [L.C. 4636(c)] was another "indication". As for QIW status, see also Panel Decisions in ***Compton*** (8-14-06); ***Mancinas*** (3-8-06); and ***Camacho*** (11-20-05). In ***Zurich v. WCAB. (Nunes)*** (W/D 3-1-07) 72 CCC 368, the WCJ had used the 2005 Rating Schedule. On reconsideration, the WCAB determined that a medical report of 9-27-04 showing that the IW had a herniated disc, footdrop, used a cane, and needed surgery constituted an "indication" of the existence of PD, and therefore the 1997 schedule should apply.

What about a surgery already done prior to 1-1-05? In ***Owens*** (2007)(W/D) 72 CCC 148 and in ***Helm*** (2007)(W/D) 72 CCC 962, carpal tunnel surgery done in 2003 did not "indicate" PD, but in **Conroy** (BPD 10-13-06), the Board held that virtual ACL reconstruction surgery itself (done 10-21-04) was an indication of the existence of PD, in part, because there was some indication in the AMA Guides that such a procedure would probably result in ratable permanent disability. And in ***Santa Rosa School District v. WCAB (Hagle)*** (W/D 8-29-07) a total hip replacement done in 5-04 (which would yield a WPI of 15-30 under the AMA Guides) was determined a sufficient "indication" of the existence of permanent disability to apply the 1997 schedule even though the condition had not become P&S before 1-1-05. Also, in ***City of Vacaville v. WCAB (Lee)*** (W/D) 71 CCC 1853, when the PTP reported on 12-30-04 that indeed the IW would have permanent disability, but his condition would not become P&S for 2-4 months, the Board found this report to be an "indication", and the 1997 schedule applicable. On the other hand, in ***SCIF v. WCAB (Echeverria)*** 72 CCC 33, the Court of Appeal found the WCAB decision to apply the 1997 schedule not supported by substantial evidence where the PTP signed a statement prepared by the IW's attorney on 12-15-04, to wit: "I believe permanent disability is within reasonable medical probability emanating from this injury." Similary, in ***HSR, Inc. v. WCAB (Mariscal)*** (non-published 9-24-07), the Sixth DCA found a "check the box" report before 1-1-05 inadequate to establish an "indication".

It seems that now with competing authorities on the meaning of “indicating the existence”, the Supreme Court will have to provide the final definition of “indicating the existence”. In the meantime, it appears that the WCAB commisssioners and various DCA's prefer the ***Genlyte*** approach.