

Dear Subscriber,

BREAKING NEWS:

Permanent Disability Schedule Found to be "arbitrary and capricious" by San Francisco Judge

In a trial *Opinion in Boughner v. Comp USA Inc.*, (SFO 491230) dated May 9, 2007 from Judge Duncan at the San Francisco Workers' Compensation Appeals Board, it was found that the Division of Workers' Compensation failed to base calculations of lost future earnings capacity on empirical evidence, thus violating the provisions of Labor Code Section 4660(b)(2) requiring that "diminished future earning capacity shall be a numeric formula based on empirical data and findings that aggregate the average percentage of long-term loss of income resulting from each type of injury for similarly situated employees."

In so finding, Judge Duncan reasoned that the Division of Workers' Compensation failed to properly consider sufficient wage loss data from any source, including the Rand study, to properly support the Future Earning Capacity Adjustment found in the presumptively correct rating schedule.

It was Judge Duncan's opinion that evidence presented by the applicant, including testimony of the Administrative Director, established that the future earnings capacity adjustment was "arbitrary and capricious" and thus in violation of the Legislature's mandate in Labor Code Section 4660(b)(2).

Based upon this initial finding, the case is now to move forward with supplemental proceedings allowing the applicant to present alternative lost earnings evidence to provide a basis for an ultimate award of permanent disability.

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The Judge further found that as the record was fully developed in the instant case, the case was distinguishable from the WCAB's recent en banc opinion in Costa v. Hardy, where the evidence was not found to overcome the presumptively correct rating schedule.

The case is only at the trial level and thus not binding upon any other Workers' Compensation Appeals Board Judges or Venues. It is expected by industry observers that the matter will be the subject of a Petition for Reconsideration.

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