However, Dr. Einbund's deposition testimony was unequivocal that applicant had reached a permanent and stationary plateau as of the time of Dr. Einbund's evaluation in 2014. (Ex. 2, Transcript of the Deposition of Michael Einbund, M.D., at pp. 18:9; 21:22.) While Dr. Einbund's deposition testimony describes the challenges of arriving at a retroactive permanent and stationary date, it does not otherwise invalidate his consistent and considered opinion that applicant was permanent and stationary as of the March 20, 2014 evaluation. *(Ibid.)* Nor does the evidentiary record persuasively describe an earlier date supported by substantial medical evidence.

Based on the foregoing, we conclude that applicant reached a permanent and stationary status as of March 20, 2014.

IV.

We next address the issue of the correct rating schedule. Our January 20, 2023 NIT discussed the reasons why the 2005 PDRS applies to the evaluation of disability herein:

> The WCJ has also previously determined that, "[b]ased on a review of the record, applicant's testimony, the medical opinion of Dr. Nudleman, and Labor Code Sections 4060(d) and 4061, the Court finds that the 1997 rating schedule applies." (March 20, 2018 F&A, Findings of Fact No. 10.) We affirmed this determination in our June 12, 2018 Opinion and Order. (Opinion and Order Granting Petitions for Reconsideration, dated June 12, 2018, at 15:10.)
>
> However, we have revisited this issue pursuant to our grant of reconsideration to study this case, and now conclude that it was error to apply the 1997 PDRS.
>
> Section 4660.1 applies to all injuries occurring on or after January 1, 2013, and requires that applicant's disability be rated under the AMA Guides, 5th Edition. (Lab. Code § 4660.1(b).) Furthermore, in cases involving cumulative trauma injuries, the date of injury pursuant to section 5412 "also sets the date for the measurement of compensation payable, and all other incidents of the [worker's] right[s]." (*Argonaut Mining Co. v. Ind. Acc. Com.* (1951) 104 Cal.App.2d 27, 31 [1951 Cal. App. LEXIS 1564].) Accordingly, section 4660.1(b) applies to these proceedings because the section 5412 date of injury of March 20, 2014 occurred on or after January 1, 2013. (See also, *Azurdia v. Int'l Union of Operating Eng'rs* (August 29, 2016, ADJ81966282016) [2016 Cal. Wrk. Comp. P.D. LEXIS 414] [issues raised under section 4660.1, which applies to injuries occurring on or after 01/01/2013, are moot when section 5412 date of injury is June 2, 2011, thus invoking section 4660, which applies to injuries occurring before 01/01/2013]; *Gaither v. Cal. Res. Corp.* (December 18, 2018, ADJ10098723) [2018 Cal. Wrk. Comp. P.D. LEXIS 626] [section 5412 date of injury occurred after January 1, 2013, requiring use of ratings adjustment factor set forth in section 4660.1(b)].)

Although the date of injury pursuant to section 5412 is dispositive of the issue, we also observe that even if the date of injury had occurred prior to January 1, 2013, section 4660(d) would require that applicant's permanent disability be rated under the AMA Guides, 5th Edition. Section 4660(d) provides:

> (d) The schedule shall promote consistency, uniformity, and objectivity. The schedule and any amendment thereto or revision thereof 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, amendment or revision, as the fact may be. For compensable claims arising before January 1, 2005, the schedule as revised pursuant to changes made in legislation enacted 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.

"The prior rating schedule may only be used to rate permanent disabilities arising from compensable injuries that occurred prior to January 1, 2005, where one of the exceptions described in the third sentence of section 4660(d) has been established. If none of the specified exceptions is established, the revised permanent disability rating schedule applies to injuries occurring before its January 1, 2005 effective date." (*Aldi v. Carr, McClellan, Ingersoll, Thompson & Horn, Republic Indem. Co. of America* (2006) 71 Cal.Comp.Cases 783, 790 [2006 Cal. Wrk. Comp. LEXIS 189] (Appeals Bd. en banc).)

Here, the evidence reflects neither a comprehensive medical-legal report, nor a report by a treating physician indicating the existence of permanent disability prior to January 1, 2005. Additionally, defendant was not required to provide a section 4061 notice to applicant prior to January 1, 2005, as the claim was not filed until 2011. Nor does the record reflect permanently modified work suggesting the existence of permanent disability. Consequently, applicant's disability would be ratable only under the AMA Guides, 5th Edition, even were the date of injury to have occurred prior to January 1, 2013, thus invoking section 4660(d).

(Notice of Intention to Submit for Decision, January 20, 2023, at p. 24.)

Applicant's Response contends that section 4660.1 is inapplicable to this case because "the date when a cumulative trauma injury 'occurs' is different than the Labor Code 5412 date of injury." (Applicant's Response, at 8:18.) However, as we explain below, the section 5412 date of injury "sets the date for the measurement of compensation payable, and all other incidents of the workman's right." (*Argonaut Mining Co. v. Industrial Acci. Com.* (*Gonzalez*) (1951) 104

Cal.App.2d 27, 31 [1951 Cal. App. LEXIS 1564]; *Chevron U.S.A. v. Workers' Comp. Appeals Bd. (Steele)* (1990) 219 Cal.App.3d 1265, 1269-1271 [55 Cal.Comp.Cases 107] *(Steele)* [concurrence of knowledge and disability sets statutory rate of indemnity benefits].)

And as we noted in our NIT, even if the section 5412 date of injury occurred prior to January 1, 2013, section 4660(d) would still require the application of the 2005 PDRS. Applicant's Response does not contest our analysis under section 4660(d).

Accordingly, we conclude that the date of injury requires the application of the 2005 PDRS pursuant to section 4660.1, and even were this not the case, the 2005 PDRS would still apply under section 4660(d).

V.

Defendant contends that if the date of injury is established as March 20, 2014, the parties should be required to follow the medical-legal procedure as set forth in Labor Code section 4062.2, and that Qualified Medical Evaluators (QMEs) in orthopedics and neurology are required. (Defendant's Response, at 1:26.)

However, in *Tanksley v. City of Sana Ana* (January 25, 2010, ADJ2005173) [2010 Cal. Wrk. Comp. P.D. LEXIS 74],[3] we observed:

> [T]he question of the process that applies to applicant's claim *does not first require a finding of the date of injury*. Instead, for injuries that are claimed to have occurred prior to January 1, 2005, as alleged in this case, section 4062 as it existed before its amendment by SB 899 continues to provide the procedure by which medical-legal reports are to be obtained. (*Nunez v. Workers' Comp. Appeals Bd.* (2006) 136 Cal.App.4th 584 [38 Cal.Rptr.3d 914, 71 Cal.Comp.Cases 161]; *Cortez v. Workers' Comp. Appeals Bd.* (2006) 136 Cal.App.4th 596 [38 Cal.Rptr.3d 922, 71 Cal.Comp.Cases 155]; *Simi v. Sav-Max Foods, Inc.* (2005) 70 Cal.Comp.Cases 217 (Appeals Board en banc); *cf. Ward v. City of Desert Hot Springs* (2006) 71 Cal.Comp.Cases 1313 (significant panel decision), 71 Cal.Comp.Cases 1900 (writ den.).)

[3] Unlike en banc decisions, panel decisions are not binding precedent on other Appeals Board panels and WCJs. (See *Gee v. Workers' Comp. Appeals Bd.* (2002) 96 Cal.App.4th 1418, 1425, fn. 6 [67 Cal.Comp.Cases 236].) However, panel decisions are citable authority and we consider these decisions to the extent that we find their reasoning persuasive, particularly on issues of contemporaneous administrative construction of statutory language. (See *Guitron v. Santa Fe Extruders* (2011) 76 Cal.Comp.Cases 228, 242, fn. 7 (Appeals Board en banc); *Griffith v. Workers' Comp. Appeals Bd.* (1989) 209 Cal.App.3d 1260, 1264, fn. 2 [54 Cal.Comp.Cases 145].) Here, we refer to *Tanksley v. City of Santa Ana* because it considered a similar issue.

(*Id.* at p. *9, italics added.)[4]

Additionally, in our en banc decision in *Simi v. Sav-Max Foods, Inc*. (2005) 70 Cal.Comp.Cases 217 [2005 Cal. Wrk. Comp. P.D. LEXIS 3], we held that because there was no operative law other than former section 4062 to provide a procedure for obtaining AME and QME medical-legal reports for cases involving represented employees who sustained injuries prior to January 1, 2005, "for injuries occurring prior to January 1, 2005, section 4062, as it existed before its amendment by SB 899, continues to provide the procedure by which AME and QME medical-legal reports are obtained in cases involving represented employees." Accordingly, we are not persuaded that the medical-legal procedure as set forth in section 4062.2 is applicable. To the extent that the development of the record is required, the parties should address the issues to the existing reporting physicians, subject to the WCJ's determination of substantiality. (*McDuffie v. Los Angeles County Metropolitan Transit Authority* (2001) 67 Cal.Comp.Cases 138 (Appeals Board en banc) [the preferred procedure is to allow supplementation of the medical record by the physicians who have already reported in the case].)

VI.

Defendant contends that "[w]hen an employee sustains cumulative trauma injury or occupational disease, the disability schedule and indemnity rates for workers' compensation benefits is determined by the date upon which the employee first suffered compensable disability, not based on the [date of injury] as defined by section 5412." (Defense Response at 3:16; Defendant's Petition for Reconsideration, dated May 16, 2019, at 10:25.)

In support of this contention, defendant cites to *Argonaut Mining Co. v. Industrial Acci. Com.* (*Gonzalez*) (1951) 104 Cal.App. 2d 27 [1951 Cal. App. LEXIS 1564] (*Gonzalez*). (Petition, at 11:2.) Therein, applicant filed an application on December 22, 1948, alleging occupational silicosis from 1923 to 1928. The Industrial Accident Commission (IAC) found applicant sustained compensable injury consisting of silicosis which caused his death on April 9, 1949, and awarded

[4] The WCJ in *Tanksley* observed that at the inception of a cumulative trauma claim, the pleaded date of injury is, at most, a choice made by experienced counsel. (*Tanksley v. City of Sana Ana (January 25, 2010, ADJ2005173) [2010 Cal. Wrk. Comp. P.D. LEXIS 74] at p. *6].* In such cases, "the statutory scheme should not be interpreted so that either side is arbitrarily deprived of the right to medical evaluation or reporting," pending a determination of the section 5412 date of injury. (*Nunez v. Workers' Comp. Appeals Bd.* (2006) 136 Cal.App.4th 584, 592 [71 Cal.Comp.Cases 161].) It is for this reason that a formal adjudication of the date of injury in a cumulative trauma claim is not a prerequisite to obtaining medical-legal reporting responsive to the claimed injuries.

benefits based on 1948 indemnity rates, not 1928 rates. The employer sought appellate review, and the Court of Appeal framed the dispute as follows: "Petitioner asserts that the date of injury for the purposes of fixing the amount of compensation to be awarded is the last date that the workman was exposed to the silica dust as an employee of petitioner or the date of Gonzalez's employment by petitioner. The commission asserts that in the case of an occupational disease industrial injury does not occur until disability results." (*Gonzalez, supra*, at p. 30.) Quoting the entirety of section 5412, the Court of Appeal observed that the section fell within the time limitations set forth in Division 4, part 4, chapter 2, which deals with time limitations for initiating proceedings. "This would seem to lend support to petitioner's contention that section 5412 of the Labor Code deals with the date of injury in cases of occupational diseases only for the purpose of computing the statute of limitations in such cases." However, the Court then observed that the position of the IAC was "just as logical," and that "[r]egardless of the date of exposure to disease, the claimant has no cause of action and no rights accrue to him until that point in time when the cumulative effects of his disease result in a compensable disability." (*Id*. at p. 31.) The Court concluded:

> It would seem logical that even if the *Marsh* case and the subsequent changes in the code sections are held to set the "date of injury" in cases of occupational disease only for the purpose of relieving a sufferer from occupational disease from the operation of the statutes of limitation, a necessary corollary would be that it *also sets the date for the measurement of compensation payable, and all other incidents of the workman's right*. Until the disability there is no compensable injury. When the disease results in disability there then comes into existence for the first time a right in the petitioner to seek compensation. When the right comes into existence certain rates are applicable. It would seem that these are the rates by which compensation should be payable.
>
> (*Ibid.,* italics added.)

Thus, *Gonzalez* makes clear that the date of injury pursuant to section 5412 "sets the date for the measurement of compensation payable." (*Ibid.*) We observe that in *Gonzalez*, as of the time of the filing of the application in 1948, applicant had sustained disability and had knowledge of the industrial nature of his injury, and the IAC thus concluded that applicant's date of injury to be November 23, 1948, and awarded benefits at the rates in effect for 1948. (*Id*. at p. 28.) Accordingly, applicant's date of injury under section 5412 set the "measurement of compensation payable." (*Id*. at p. 31.)