



Significant Decision

No. 19-02

July 16, 2019

KRIS WILSON V. STATE OF CA, CAL FIRE / SCIF (WILSON II)

WCAB EN BANC
(ADJ10116932)

FILED: JULY 15, 2019

The Appeals Board confirmed its prior decision and ruled that its provision of an analytical framework to the trier of fact to determine whether an injury is catastrophic is within its authority and was not an improper adoption of a rule or regulation as alleged by defendant.

Significance: On second reconsideration of its prior en banc opinion, the Appeals Board rejected all of the defense contentions and confirmed the prior decision that provided an outline for the determination of whether an injury is catastrophic under Labor Code section 4660.1(c)(2)(B).

Facts: In a prior decision from May 19, 2019, the en banc Appeals Board issued its first binding interpretation of how the exception to the bar against psychiatric compensable consequence injuries should be applied. In that decision, the Board held a fact-driven inquiry was required in every case, and outlined five non-exhaustive factors the trier of fact may consider in evaluating whether an injury is catastrophic under section 4660.1(c)(2)(B). These factors include, but are not limited to, the following:

1. The intensity and seriousness of **treatment** received by the employee that was reasonably required to cure or relieve from the effects of the injury.
2. The ultimate **outcome** when the employee's physical injury is permanent and stationary.
3. The **severity** of the physical injury and its **impact** on the employee's ability to perform activities of daily living.
4. Whether the physical injury is closely **analogous** to one of the injuries specified in the statute: loss of a limb, paralysis, severe burn, or severe head injury.
5. If the physical injury is an **incurable** and **progressive disease**.

Being newly aggrieved, the defense sought second reconsideration by the WCAB. While now conceding that the injured worker in this case had sustained a catastrophic injury and was entitled increased permanent disability for this psychiatric injury, the new appeal made three primary arguments:

1. That the analysis under section 4660.1(c)(2)(B) should focus on the mechanism of the underlying physical injury and the condition in the immediate aftermath, rather than the nature of the injury;
2. That the Board exceeded its jurisdiction by engaging in improper rulemaking when it outlined the factors for consideration; and
3. That Factors 1-3 and 5 are contrary to legislative intent, and would return the system back to the pre-reform era of widespread abuse.

Holding: In this new en banc decision, the Appeals Board firmly rejected each of the defense contentions. First, based on the reasoning from its prior opinion, the Board confirmed that neither the mechanism of

injury nor its immediate aftermath was an appropriate basis to evaluate the catastrophic nature of the physical injury: “An injured worker could sustain an injury to a limb that does not immediately result in the limb’s amputation (i.e., loss of a limb) until a period of time after the initial injury... Injurious incidents that *immediately* result in loss of a limb, paralysis, severe burn or a severe head injury may be the *direct cause* of a psychiatric injury.”

Secondly, because the Appeals Board is vested with the power and jurisdiction to do all things necessary or convenient in the exercise of any power or jurisdiction conferred upon it, there was no improper expansion of jurisdictional powers by the Appeals Board in setting out the “analytical framework” here, much as it has done in prior cases (*e.g.*, *Rolda*, *MacDuffie*, *Ramirez*, *Blackledge*, and most recently *Suon*). Finally, the Board noted that the defense had provided no evidence that a return to pre-reform abuse was imminent or inevitable.

Discussion: In light of the unanimous 6-0 original decision in this case, a successful reconsideration was unlikely. CWCI submitted a proposed amicus brief in hopes of providing some further analytical support (and maybe even persuading 1 or 2 of the Commissioners to change their minds), but this amicus brief was summarily rejected by the Board.

Perhaps the most important language in this new decision relates to the challenge of improper rulemaking. In refuting that challenge, the Appeals Board expanded the mandate from the original decision as follows:

The trier of fact is not required to consider these factors and “may consider other relevant factors regarding the physical injury.” ... Additionally, the Opinion acknowledged that these factors may not be relevant in every case, the employee need not prove all of these factors apply and the factors are “not exhaustive.” ... Outlining five non-exhaustive factors the trier of fact may consider is not an exercise in impermissible rulemaking.

While the original decision had included similar wording, the new language is much more explicit. It may prove useful to applicants’ attorneys seeking to expand the *Wilson* doctrine even beyond the original decision.

It is truly unfortunate that the Appeals Board has chosen to turn a blind eye to the obvious pathways that this case opens for the reintroduction of abusive overreaching and ultimate nullification of the statutory bar against compensable consequence psychiatric claims.

As en banc decisions, both of the *Wilson* cases are binding on all WCJs and all WCAB panels. The defendant has 45 days in which to file a Petition for Writ of Review with the Court of Appeal (no further reconsiderations are available). There, an even more difficult challenge awaits as the defendant must convince the Court of Appeal to overcome the tremendous deference ordinarily afforded to en banc pronouncements from the Appeals Board.

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