



Significant Decision

No. 19-01

May 13, 2019

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

WCAB EN BANC
(ADJ10116932)

FILED: MAY 10, 2019

Determination of whether an injury is catastrophic under Labor Code section 4660.1(c)(2)(B) focuses on the nature of the injury and is a fact-driven inquiry.

Significance: In its first effort to define “catastrophic” for purposes of applying an exception to the bar against psychiatric compensable consequence claims, the Appeals Board has issued an en banc decision outlining the required analytical framework for application of the “catastrophic injury ” exception.

Facts: A 28-year-old firefighter sustained significant injuries to his lungs, eyes, arms, and legs on 5/13/2014 while fighting a wildfire without wearing breathing apparatus. After initial treatment in the ICU with prolonged intubation, he developed ulcerations of his tongue, mouth, and lips; fever; rash; tremors; elevated liver enzymes; renal failure; respiratory failure; and acute respiratory distress. He attempted to return to work in 2015, but ultimately was not able to continue. His evaluating physicians noted constant fatigue, impaired memory and cognition, sleep problems, and blurred vision. For his psychiatric injury, applicant was evaluated by Dr. Walsh, who noted feelings of emotional trauma, recurrent nightmares related to the hospitalization, as well as anxiety due to functional limitations. The psychiatrist diagnosed PTSD with severe major depressive disorder. The WCJ awarded 66% permanent disability but excluded any rating for the claim of psychiatric injury pursuant to §4660.1(c). Applicant filed for Reconsideration, contending that his psychiatric injury was a direct injury and §4660.1(c) did not apply; alternatively, applicant claimed that he met the criteria for an exception to the bar against compensable consequence psychiatric injuries because he had sustained either a violent injury or a catastrophic injury.

Holding: In an en banc opinion binding on all WCJs and future WCAB panels, the Appeals Board has determined that the exception for catastrophic injury does not permit consideration of economic impact of the injury, but rather requires a fact-specific inquiry into the nature of the underlying physical injury. The Board provides a list of broadly defined factors to be considered.

Discussion: Ever since §4660.1 was enacted to bar any increase in the PD rating for psychiatric injury that is a compensable consequence of a physical injury occurring on or after 1/1/2013, practitioners have debated how the “violent act” or “catastrophic injury” exceptions should be applied. While the Appeals Board has provided its interpretation of the “violent act” exception, it had not previously addressed the “catastrophic injury” exception. The 30-page decision is remarkable for the length it goes into what the exception *is not*, spending only a few pages at the end on the actual take-away guidance for what the exception actually *is*.

The Board first dispenses with applicant's claim that he sustained a direct psychiatric injury, finding instead that the psychiatric claim here was a direct and natural consequence of the physical injuries sustained. Next, the Board confirms that applicant's exposure to fumes and smoke from the fire does not qualify as a "violent act" under *Larsen*. Turning finally to "catastrophic," the Board first explains that while the "violent act" exception focuses on the *mechanism* of injury (*i.e.*, the event causing the injury rather than the injury itself), the exception for "catastrophic injury" under §4660.1(c)(2)(B) focuses on the *nature* of the injury, which is a fact-specific inquiry.

In its efforts to further define the exception, the Board quotes heavily from the legislative intent — to wit: elimination of questionable claims of psychiatric disability. But the Board also opined that "the Legislature indicated that certain mechanisms and types of injury warrant permitting additional impairment under specific circumstances." In trying to interpret the scope of the exceptions to the bar against psychiatric add-ons, the Board rejects simple reliance on the dictionary definition as well as the "broad" interpretations of the same language in other California statutes or even non-California statutes. Likewise, the Board expressly refuses to consider the impact on applicant's earning capacity or to assign a requisite minimum level of disability.

The Board concludes that the "nature of injury" analysis of whether an injury is catastrophic is limited to looking solely at the physical injury, without consideration for the psychiatric injury. "The injury must therefore be deemed catastrophic independent of the psychiatric injury." Having determined that the required "nature of injury" analysis is fact-driven, the Board provides some factors for the WCJ to consider in determining whether an injury may be deemed catastrophic. 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**.

The Board specifically cautions that not all of these factors may be relevant in every case and the employee need not prove all of these factors apply in order to prove a catastrophic injury. Applying these factors to the firefighter's injury at issue, the Board quickly concludes that he has sustained a catastrophic injury and is entitled to an increased impairment rating for the psychiatric injury. The case was remanded for further proceedings.

In summary, by grounding its analysis in terms of legislative intent and by rejecting many previously proposed analytical methodologies, the Appeals Board seemed poised to provide a fairly conservative application of the exception. But with the decision's overly-expansive and non-inclusive listing of factors such as "ultimate outcome" and "impact on ADLs," it seems likely that many injured workers will be able to meet the exception for "catastrophic injury" and thus obtain additional benefits — in obvious contradiction to the stated legislative intent to "establish a new and higher threshold of compensability for psychiatric injuries."

ESL/