



Significant Decision

No. 21-01

June 2, 2021

APPLIED MATERIALS V. WCAB (D.C.)

COURT OF APPEAL DECISION

[H047148] [H047154]

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Court of Appeal, confirming *Fitzpatrick*, rejected the theory that Labor Code §4662(b) provides an “alternative path” to establishing 100% PD -- separate from a scheduled rating or a rebuttal rating under *Ogilvie*. Permanent disability is determined first in accordance with the scheduled rating and the factors enumerated in Labor Code §4660, and the language of §4660 makes this step mandatory.

Significance: Where the QME relies on an incorrect “alternate path” theory as rejected by *Fitzpatrick*, the WCAB’s award of 100 percent PD is not supported by substantial evidence and must be annulled.

Facts: Applicant claimed injury in 2001 (Arrowood), and 2005/2008 (XL Specialty). The 2001 injury was resolved by Stipulations. She filed a timely petition to reopen, alleging worsening of her orthopedic condition. Thereafter, applicant and her PTP engaged in a sexual relationship. As the result of this misconduct, the PTP had his medical license revoked, and applicant was diagnosed by the psychiatric QME with PTSD and GAF of 45. The scheduled rating was 68%-70%. Although applicant had multiple underlying psychiatric factors, the QME found no basis to apportion to these “risk factors” because they were not causing disability at the time of injury. He opined that applicant was unable to work due to the PTSD alone, and thus was 100% permanently totally disabled. The WCJ found joint and several liability for 100% permanent total disability due to PTSD based on the QME report. Pursuant to *Hikida*, he awarded no apportionment because all of applicant’s permanent disability was due solely to the compensable consequence PTSD injury. Each defendant appealed; as part of its grant of writ, the Court of Appeal asked for supplemental briefing on how *Fitzpatrick* impacted the determination of 100% total disability.

Holding: In a massive, 74-page decision covering a multitude of extraneous issues, the Court of Appeal confirmed that the PTSD itself was a compensable consequence injury. However, the Court reversed the WCAB’s finding of 100% PD because it used an invalid “alternate path” theory not sanctioned under *Fitzpatrick*. The Court further instructed the WCAB on remand to consider apportionment under the correct standards.

Discussion: After weeding out the portions of the opinion related to less important issues such as the proper TTD rate, the correct date of injury, and the propriety of the joint and several award, the decision covers at least three critical areas: compensable consequence injuries, alternate paths to 100%, and apportionment.

In the first of these areas, the case represents one of first impression. The Court of Appeal did not seem to struggle with the question of whether the PTP’s misconduct could cause a compensable injury. While the

defendants urged the Court to find that the misconduct had served to break the chain of industrial causation or even that applicant had consented to the relationship, the Court firmly rejected the idea that applicant could consent to a sexual relationship with the physician who controlled her treatment, medication, and disability benefits. Citing *South Coast Framing* (“all that is required is that the employment be one of the contributing causes without which the injury would not have occurred”), the Court concluded that applicant met her burden of demonstrating that the PTSD was a new injury that resulted from treatment for her industrial injuries, and that “her employment was one of the contributing causes without which the sexual exploitation by [the PTP] and her PTSD would not have occurred.” And citing *Western Airlines* (whether assault by third person is AOE/COE depends on whether assault is made by reason of circumstances connected with the employment, or without any relation thereto), the Court held that applicant had presented substantial evidence that her sexual exploitation by the PTP was connected to her employment and that her employment was a contributing cause: she was assaulted by the physician who was treating her industrial injuries; who was a member of her employer’s MPN; and whose treatment was authorized and paid for by Arrowood, subjected to utilization review by the employer, and should have been authorized by XL Specialty to treat her industrial injuries. The Court held that the disability due to the PTP’s sexual exploitation is compensable either as a consequence of the medical treatment provided by the employer or as an employment-related assault by a third party.

But the Court was equally firm in rejecting the WCAB’s finding that applicant had rebutted the scheduled rating. Applicant had taken the all-in position that *Fitzpatrick* was wrongly decided and that language contained in the Introduction to the PDRS (“permanent total disability represents a level of disability at which an employee has sustained a total loss of earning capacity”) resulted in scheduled rating of 100% not subject to modification for FEC, age, or occupation. The Court was not persuaded. Noting that the facts here mirrored those in *Fitzpatrick*, the Court of Appeal reviewed the earlier court’s rationale with approval and likewise rejected the “alternative path” approach that would have allowed a finding of 100% without consideration of the scheduled rating under section 4660 or whether the evidence rebutted the scheduled rating.

We agree with the statutory analysis in *Fitzpatrick*... [¶] Consistent with the plain language of section 4662(b) that nonpresumptive cases of total PD are to be decided “in accordance with the fact,” *Fitzpatrick* holds that the PD is determined first in accordance with the scheduled rating and the factors enumerated in section 4660 and that the language of section 4660 makes this step mandatory. (Citation.) ... The *Fitzpatrick* court also acknowledged that the scheduled rating is rebuttable pursuant to rules developed in the case law, which gives the injured worker “the opportunity to present evidence supporting a 100 percent disability rating when the scheduled rating is less.” (Citation.) Thus, the injured worker may obtain a 100 percent PD award by demonstrating that based on the facts, his or her disability is greater than that reflected in the scheduled rating.

In endorsing the rationale under *Fitzpatrick*, the Court of Appeal specifically considered and rejected the WCAB Panel decision in *Bagobri*, which had held that a 100% award “in accordance with the fact” could be validly based on medical evidence of work restrictions where applicant has lost all future earning capacity.

Importantly, the Court found that applicant’s failure to rebut the scheduled rating was due, in part, to her failure to rebut the FEC component of the scheduled rating in accordance with *LeBoeuf*, because the QME did not opine on her ability to participate in VR, take advantage of training opportunities, or find work. The decision cites WCAB case law that the role of the medical evaluator is to assess work restrictions and

resulting permanent impairment, as well as case law holding that to effectively rebut a scheduled rating pursuant to *LeBoeuf* and *Ogilvie*, “an injured worker must present vocational expert evidence, in addition to medical evidence.” The Court opined that while the QME was able to opine on these matters from a medical or psychiatric standpoint, he was not a vocational expert, he was not qualified to opine on these points from a vocational perspective or opine that she was 100 percent “disabled from working in the open labor market.”

Finally, the Court’s review of the record demonstrated multiple examples of pre-existing, ongoing psychiatric issues that could serve as a basis for apportionment (including, for example, ongoing treatment, depression, suicidal ideation, and a finding that her psychologic impairment left her unable to compete in the open labor market – all prior to the advent of the improper relationship with the PTP). It certainly does appear that the QME’s refusal to apportion to “risk factors” because they were not causing disability at the time of injury was based on an incorrect legal theory. The correct standard is to consider whether those risk factors or other factors are a cause of the permanent disability, and if so, to explain how and why such factors are presently causing disability in the particular injured worker. Noting that the rules for apportionment had changed since the 2004 reforms, the Court provided a reminder of the correct standards for apportionment on remand.

CWCI joined with CalChamber in filing an amicus brief in this case, and sponsored a moot court session for the benefit of the defense attorneys involved in the oral argument proceedings. Although this decision was initially issued as “unpublished,” CWCI sought and obtained an order of publication so that the case – and its unwavering confirmation of *Fitzpatrick* – may now be relied upon as binding precedent in the future.

ESL/