

**WORKERS' COMPENSATION APPEALS BOARD
STATE OF CALIFORNIA**

RAYMOND HERNANDEZ, *Applicant*

vs.

**SOUTHWEST AIRLINES, INC.; ACE AMERICAN INSURANCE COMPANY,
*adjusted by SEDGWICK, Defendants***

**Adjudication Number: ADJ10431134
Stockton District Office**

**OPINION AND ORDER
DENYING PETITION
FOR RECONSIDERATION**

Applicant seeks reconsideration of the Findings of Fact, Orders and Opinion on Decision (F&O) issued by the workers' compensation administrative law judge (WCJ) on September 11, 2021. By the F&O, the WCJ found in relevant part that applicant is not entitled to permanent disability for his psychiatric injury.

Applicant contends that his injury is catastrophic pursuant to Labor Code¹ section 4660.1(c)(2)(B) and he is therefore entitled to an increased permanent impairment rating for his psychiatric injury.

We received an answer from defendant. The WCJ issued a Report and Recommendation on Reconsideration (Report) recommending that we deny reconsideration.

We have considered the allegations of applicant's Petition for Reconsideration, defendant's answer and the contents of the WCJ's Report with respect thereto. Based on our review of the record and for the reasons discussed below, we will deny applicant's Petition.

FACTUAL BACKGROUND

Applicant claims injury to his right foot and psyche on December 28, 2014 while employed as a flight attendant by Southwest Airlines. Defendant does not dispute injury arising out of and

¹ All further statutory references are to the Labor Code unless otherwise stated.

in the course of employment (AOE/COE) to these body parts. (Minutes of Hearing, August 26, 2021, p. 2.)

The circumstances surrounding applicant's specific injury are not in dispute. Applicant was "entering an aircraft that he was acting as a flight attendant. Mr. Hernandez stated that he misstepped [*sic*] which resulted in a contusion to his right foot against the threshold and the sharp edge of the aircraft. Mr. Hernandez immediately had noticed pain and swelling. Mr. Hernandez was scheduled on a flight and was required to continue working the rest of that day, but on December 30, 2014, he sought medical attention at the occupational health center." (Joint Exhibit No. 6, Report from Dr. Wolff, December 6, 2019, p. 2.) Applicant has undergone two surgeries to his right foot, the first occurring on May 27, 2015 and the second on August 20, 2018. (*Id.* at pp. 3-4.) Other treatment for his foot has included shock wave therapy, physical therapy, orthotics and medications. (*Id.* at pp. 26-27.) Applicant has not returned to work since his injury and has retired from his position with defendant. (*Id.* at p. 21.)

Lesley Wolff, M.D. evaluated applicant as the podiatric qualified medical evaluator (QME). Dr. Wolff assigned a 15% whole person impairment (WPI) rating for applicant's right lower extremity pursuant to *Almaraz/Guzman*.² (Joint Exhibit No. 8, Report from Dr. Wolff, January 21, 2021, p. 4.) The impairment was considered 100% the result of applicant's industrial injury. (Joint Exhibit No. 7, Report from Dr. Wolff, August 14, 2020, p. 19.) Dr. Wolff summarized the impact of the injury on applicant's ability to perform activities of daily living as follows:

Mr. Hernandez stated that he is able to perform personal self-care, including washing, dressing, and using the bathroom, but they are uncomfortable and are done slowly. Mr. Hernandez also stated that he can only lift and carry very light objects. When asked how well he can walk, he says he can only walk a short distance and he utilizes a cane. Mr. Hernandez is only able to participate in extremely light activity for at least 2 minutes and has difficulty climbing 1 flight of stairs but can still perform the activity. When asked if he can sit for any period of time without pain or discomfort, he stated that he can sit without any limitations. Mr. Hernandez felt that he was only able to stand and walk between 30 and 60 minutes at a time before he experiences pain or discomfort, and he has some difficulty but can still perform the activity of reaching and grasping something off a shelf at chest level. When asked how well he could reach and grasp something off a shelf overhead, he stated that he had some difficulty but

² This refers to *Milpitas Unified School Dist. v. Workers' Comp. Appeals Bd. (Almaraz-Guzman III)* (2010) 187 Cal.App.4th 808 [75 Cal.Comp.Cases 837].

was still able to perform this activity. When asked about ability to push or pull even with some pain or discomfort, he said that he can only push or pull light objects. Mr. Hernandez also stated no difficulty when grasping or gripping or holding or manipulating objects with his hands and no difficulty with repetitive motions such as typing on a computer. Relative to forceful activities with his arms or hands, he has some difficulty but still able to perform these activities; and kneeling, bending or squatting, he experienced some difficulty but was still able to perform these activities. Mr. Hernandez did state that he was greatly disturbed and has difficulty with sleeping with 3 to 5 hours of sleeplessness. In regard to sexual function, he felt that there has been a major change because of his injury. In regard to his pain, at the moment, his pain was moderate at this moment of the evaluation. Mr. Hernandez also stated that in regard to his pain most of the time it was fairly severe. Mr. Hernandez felt that he was affected in his ability to travel a lot or most of the time, and his ability to engage in social activities was interfered with due to his pain all of the time. Recreational activity was also interfered with all of the time, and his injury or pain interfered with his concentration and thinking all the time...His pain level on average during the past week was a 7/10 and at its worse was a 10/10.

(Joint Exhibit No. 6, Report from Dr. Wolff, December 6, 2019, p. 22.)

Nina Kapitanski, M.D. evaluated applicant as the psychiatric QME. She diagnosed applicant with a major depressive disorder, alcohol dependence and a pain disorder. (Joint Exhibit No. 11, Report from Nina Kapitanski, October 13, 2020, p. 77.) Dr. Kapitanski opined as follows in relevant part:

In terms of causation, 100% of his psychiatric injury is to his orthopedic pain and physical disabilities presumed secondary to his orthopedic 12/28/2014 industrial injury, which has provided the conduit through which psychiatric symptoms flow and are thus compensable.

(*Id.* at pp. 90-91.)

The “mental disorder” was therefore considered predominantly caused by actual events of employment. (*Id.* at p. 91.) Dr. Kapitanski provided a GAF score of 60, which translates to 15% WPI. (*Id.* at p. 92.) There was no apportionment of the psychiatric permanent disability to other factors besides the specific industrial injury. (*Id.* at p. 93.)

The matter initially proceeded to trial on May 24, 2021 on several issues including whether the psychiatric injury was compensable for purposes of an award of permanent disability. (Minutes of Hearing, May 24, 2021, p. 2.)

The WCJ issued a Findings of Fact, Award and Opinion on Decision on May 26, 2021. Both parties filed petitions for reconsideration of the WCJ's decision. In response, on June 23, 2021, the WCJ issued an Order Rescinding May 26, 2021 Findings of Fact, Award and Opinion on Decision and Notice of Status Conference.

The matter proceeded to trial again on August 26, 2021. The parties stipulated to injury AOE/COE to the right foot and psyche. (Minutes of Hearing, August 26, 2021, p. 2.) The issues in dispute included permanent disability, defendant's objection to permanent disability for the psychiatric injury per section 4660.1 and whether the injury was catastrophic. (*Id.* at p. 3.)

The WCJ issued the resulting F&O on September 11, 2021 as outlined above.

DISCUSSION

The parties do not dispute that applicant sustained an injury AOE/COE to his psyche as a compensable consequence of his physical industrial injury. The stipulation to injury to the psyche is supported by the reporting from the psychiatric QME Dr. Kapitanski. (See also Lab. Code, § 5702.) The sole issue is thus whether applicant's injury is catastrophic, which would entitle him to an increase in his permanent disability rating for his psychiatric condition per section 4660.1(c)(2)(B).

The employee bears the burden of establishing the approximate percentage of permanent disability caused by the industrial injury. (*Escobedo v. Marshalls* (2005) 70 Cal.Comp.Cases 604, 612 (Appeals Board en banc).) Applicant's injury occurred in 2014. Section 4660.1 governs how to determine permanent disability for injuries occurring on or after January 1, 2013 and provides as follows in relevant part:

(c) (1) Except as provided in paragraph (2), there shall be no increases in impairment ratings for sleep dysfunction, sexual dysfunction, or psychiatric disorder, or any combination thereof, arising out of a compensable physical injury. Nothing in this section shall limit the ability of an injured employee to obtain treatment for sleep dysfunction, sexual dysfunction, or psychiatric disorder, if any, that are a consequence of an industrial injury.

(2) An increased impairment rating for psychiatric disorder shall not be subject to paragraph (1) if the compensable psychiatric injury resulted from either of the following:

(A) Being a victim of a violent act or direct exposure to a significant violent act within the meaning of Section 3208.3.

(B) A catastrophic injury, including, but not limited to, loss of a limb, paralysis, severe burn, or severe head injury.

(Lab. Code, § 4660.1(c)(1)-(2).)

As stated in *Wilson v. State of CA Cal Fire* (2019) 84 Cal.Comp.Cases 393 (Appeals Board en banc):

[S]ection 4660.1(c) does not apply to psychiatric injuries directly caused by events of employment. Section 4660.1(c)(1) only bars an increase in the employee’s permanent impairment rating for a psychiatric injury that is a compensable consequence of a physical injury occurring on or after January 1, 2013. However, the employee may receive an increased impairment rating for a compensable consequence psychiatric injury if the injury falls under one of the statutory exceptions outlined in section 4660.1(c)(2).

(*Wilson, supra*, 84 Cal.Comp.Cases at p. 403.)

Therefore, in order to receive an increased impairment rating for his psychiatric injury, applicant “bears the burden of proving his psychiatric injury was directly caused by events of employment, or, alternatively, if the psychiatric injury is a compensable consequence of the physical injury, applicant must show that the psychiatric injury resulted from either: 1) being a victim of a violent act or direct exposure to a significant violent act, or 2) a catastrophic injury.” (*Id.*)

Applicant’s psychiatric injury was deemed a compensable consequence of the physical injury by the psychiatric QME Dr. Napitanski. He consequently must show that his injury qualifies for one of the statutory exceptions in section 4660.1(c)(2) in order to receive an increased impairment rating for his psychiatric condition.³

In *Wilson*, the Appeals Board determined that whether an injury is catastrophic “focuses on the *nature of the injury*” and is “a fact-driven inquiry.” (*Wilson, supra*, 84 Cal.Comp.Cases at p. 414, emphasis in original.) “Whether an injury is ‘catastrophic’ under section 4660.1(c)(2)(B) is therefore a factual/legal issue for the WCJ to determine.” (*Id.*) The “inquiry into whether an injury is catastrophic is limited to looking solely at the *physical* injury, without consideration for the psychiatric injury in evaluating the nature of the injury.” (*Id.*) The *Wilson* decision outlined the following (non-exhaustive) factors for the trier of fact to consider in determining whether an injury may be deemed catastrophic:

³ Applicant has not alleged that his injury resulted from being a victim of a violent act or direct exposure to a significant violent act per section 4660.1(c)(2)(A) and we thus do not consider whether he qualifies for the statutory exception provided in that subsection.

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 (ADLs).
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.

(*Id.* at p. 415.)

Applicant has undergone extensive treatment, including two surgeries, for his right foot. However, the intensity and seriousness of applicant's treatment is not akin to the "serious and life-threatening" treatment that Mr. Wilson underwent. (*Id.*) Additionally, applicant's sole permanent physical impairment is to his right lower extremity, whereas Mr. Wilson ultimately had permanent impairment to multiple body parts as a result of his industrial injury. (*Id.* at p. 416.) The record further reflects a mild to moderate impact from the physical injury to applicant's ability to perform ADLs.⁴ Applicant's injury is not closely analogous to one of the statutorily specified injuries and cannot plausibly be characterized as an incurable and progressive disease.

Applicant contends that the types of injuries specifically identified in section 4660.1(c)(2)(B) (loss of a limb, paralysis, severe burn, and severe head injury) provides "an ambiguous interpretation...[that] catastrophic injuries are the types of injuries that cause loss of job with one's employer." (Applicant's Petition for Reconsideration, October 8, 2021, p. 4.) He argues that since he lost his job as a result of his injury, his injury should be deemed catastrophic based on the legislative intent of Senate Bill 863 to substantially increase the amount of permanent disability benefits. (*Id.* at pp. 4-7.)

This contention is without support in the statutory language or its legislative history. If the Legislature wished to define a catastrophic injury as an injury that precludes a return to the

⁴ Activities of daily living include: 1) self-care, personal hygiene, 2) communication, 3) physical activity, 4) sensory function, 5) nonspecialized hand activities, 6) travel, 7) sexual function, and 8) sleep. (American Medical Association Guides to the Evaluation of Permanent Impairment (5th ed. 2001) (AMA Guides), Table 1-2, p. 4.)

employee's pre-injury employment it could have done so.⁵ The *Wilson* decision also expressly rejected the notion that whether an injury is catastrophic is measured by the injury's impact on the employee's earning capacity or a minimum level of permanent disability, which is essentially what applicant is advocating for in his Petition. (*Wilson, supra*, 84 Cal.Comp.Cases at pp. 411-413.)

Applicant's injury is not the type of injury for which the Legislature sought to allow an increased impairment rating for a psychiatric condition. Therefore, we agree with the WCJ's conclusion that applicant did not sustain a catastrophic injury and may not receive an increased impairment rating for his psyche.

In conclusion, we will deny reconsideration.

⁵ The statute defines these four types of injuries as catastrophic. Applicant essentially concludes that *every* employee who sustains one of the statutorily specified injuries will be unable to return to their pre-injury employment. This conclusion is offered without evidence supporting it and appears presumptuous.

For the foregoing reasons,

IT IS ORDERED that applicant's Petition for Reconsideration of the Findings of Fact, Orders and Opinion on Decision issued by the WCJ on September 11, 2021 is **DENIED**.

WORKERS' COMPENSATION APPEALS BOARD

/s/ JOSÉ H. RAZO, COMMISSIONER

I CONCUR,

/s/ KATHERINE A. ZALEWSKI, CHAIR

/s/ DEIDRA E. LOWE, COMMISSIONER



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

December 1, 2021

SERVICE MADE ON THE ABOVE DATE ON THE PERSONS LISTED BELOW AT THEIR ADDRESSES SHOWN ON THE CURRENT OFFICIAL ADDRESS RECORD.

**LAW OFFICES OF WILLIAM MORRIS
RAYMOND HERNANDEZ
WAI & CONNOR**

AI/pc

I certify that I affixed the official seal of the Workers' Compensation Appeals Board to this original decision on this date. *abs*