

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

JOSE HERNANDEZ, *Applicant*

vs.

**VALLEY TRANSIT AUTHORITY,
permissibly self-insured, adjusted by TRISTAR RISK MANAGEMENT, *Defendants***

**Adjudication Number: ADJ9687495
Oakland District Office**

**OPINION AND DECISION
AFTER RECONSIDERATION**

We granted reconsideration in order to further study the factual and legal issues in this case. This is our Opinion and Decision After Reconsideration.

Applicant seeks reconsideration of the Findings, Award and Order (FA&O) issued by the workers' compensation administrative law judge (WCJ) on August 30, 2021.¹ By the FA&O, the WCJ found in relevant part that applicant sustained injury arising out of and in the course of employment (AOE/COE) to his low back and psyche. The WCJ further found that applicant's injury is not catastrophic pursuant to Labor Code section 4660.1(c)(2)(B). (Lab. Code, § 4660.1(c)(2)(B).)

Applicant contends that his injury is catastrophic and he is consequently entitled to an increased permanent impairment rating for his psychiatric condition.

We received an answer from defendant. The WCJ issued a Report and Recommendation on Petition for 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 amend the FA&O to include a finding of injury AOE/COE to the right hip (Finding of Fact No. 1) and provide for future treatment to this body part (Finding of Fact No. 6; Award C). We otherwise affirm the FA&O for the reasons stated in the WCJ's Report, which we adopt and incorporate as detailed further below.

¹ The FA&O is dated August 23, 2021, but was not served until August 30, 2021.

The parties stipulated at trial to injury AOE/COE to the low back and right hip, as well as injury to the psyche as a compensable consequence. (Minutes of Hearing, June 2, 2021, p. 2.) This stipulation was consistent with the parties' stipulations in the March 15, 2021 Pre-Trial Conference Statement. (Pre-Trial Conference Statement, March 15, 2021, p. 2.) The disputed issues identified at trial did not include injury AOE/COE or future medical treatment to the pled body parts. (*Id.*) Industrial causation for injury to the right hip is also supported by the record including the reporting of the orthopedic agreed medical evaluator (AME), Dr. Joel Renbaum. (Defendant's Exhibit E, AME Report from Dr. Joel Renbaum, February 10, 2017, p. 21.) Although Dr. Renbaum found no permanent impairment to the right hip, applicant did sustain an injury AOE/COE to his right hip as reflected by the parties' stipulation and the record. (See *Escobedo v. Marshalls* (2005) 70 Cal.Comp.Cases 604, 611 (Appeals Board en banc) [causation of injury is distinct from causation of permanent disability].) It is presumed that the lack of finding of injury AOE/COE to the right hip in the FA&O in accordance with the parties' stipulation was an inadvertent omission and will be remedied in the amended decision. (See e.g., *Toccalino v. Workers' Comp. Appeals Bd.* (1982) 128 Cal.App.3d 543, 558 [47 Cal.Comp.Cases 145]; see also Lab. Code, § 5702; *County of Sacramento v. Workers' Comp. Appeals Bd. (Weatherall)* (2000) 77 Cal.App.4th 1114 [65 Cal.Comp.Cases 1].)²

With respect to the issue of whether applicant's injury was catastrophic per section 4660.1(c)(2)(B), we adopt and incorporate the following from the WCJ's Report:

INTRODUCTION

By a timely and verified Petition for Reconsideration, applicant seeks reconsideration of my August 30, 2021 Findings, Award, and Order, wherein I found that applicant's August 19, 2014 injury to his lumbar spine and psyche, while employed as a senior track worker (Occupational Group Number 480) caused permanent disability of 36% (for the lumbar spine only). This decision followed a similar decision of 36% permanent disability for the lumbar spine only (and not the psyche) issued on July 9, 2019. In the 2019 decision, I determined that the psychiatric injury was not the result of a violent act, pursuant to Labor Code section 4660.1(c)(2)(A), but did not address whether the case

² A grant of reconsideration has the effect of causing "the whole subject matter [to be] reopened for further consideration and determination" (*Great Western Power Co. v. I.A.C. (Savercool)* (1923) 191 Cal. 724, 729 [10 I.A.C. 322]) and of "[throwing] the entire record open for review." (*State Comp. Ins. Fund v. I.A.C. (George)* (1954) 125 Cal.App.2d 201, 203 [19 Cal.Comp.Cases 98].) Thus, once reconsideration has been granted, the Appeals Board has the full power to make new and different findings on issues presented for determination at the trial level, even with respect to issues not raised in the petition for reconsideration before it.

should have also been decided pursuant to the catastrophic injury exception under Labor Code section 4660.1(c)(2)(B), based upon the Appeals Board's en banc decision in the case of *Wilson v. State of California; Cal Fire* (2019) 84 Cal.Comp.Cases 393 (Appeals Board En Banc). I originally determined that the July 1, 2019 Amended Findings, Award and Order be rescinded, and that the matter be returned to the trial level for further development of the record. This occurred, and the matter was resubmitted on the issues of whether the psychiatric injury was the result of a violent act, and whether the catastrophic injury exception applied.

In my April 6, 2020 decision, I found the injury was not the result of a violent act, and that the catastrophic injury exception did not apply. The record was determined to be insufficient for submission to the WCAB, due to the informal Minutes of Hearing, and the lack of a formal Minutes of Hearing and Summary of Evidence. This was completed by the parties, and the matter was re-submitted. In my August 30, 2021 decision, I again found that the injury was not the result of a violent act pursuant to Labor Code section 4660.1(c)(2)(A), and that his injury is not catastrophic pursuant to Labor Code section. [*sic*] 4660.1(c)(2)(B).

Applicant only contests the catastrophic injury finding, and no longer contends that the injury was the result of a violent act. In its Petition, applicant contends that my analysis of the factors set forth in *Wilson* was flawed, and that his physical injury is catastrophic. Defendant filed an Answer, disputing applicant's contentions.

After my re-review of the record, I remain of the opinion that the medical record does not support applicant's claim that the injury is catastrophic. Accordingly, I recommend that applicant's Petition for Reconsideration be denied.

FACTUAL BACKGROUND

The relevant background is set forth pursuant to pages 1-3 of my August 30, 2021, 2020 [*sic*] Opinion on Decision, as follows:

The facts in this case are not in dispute. Applicant sustained an admitted injury to his lower back and psyche. The parties agree that the permanent disability pursuant to Dr. Joel Renbaum, the orthopedic Agreed Medical Examiner (AME), is 36%. The dispute is over whether the permanent disability to the psyche is payable, due to the allegations that either the injury physical injury was the result of a violent act pursuant to Labor Code section 4660.1(c)(2)(A). [*sic*] or whether the effects of applicant's physical injury are catastrophic, pursuant to Labor Code section 4660.1(c)(2)(B). The case was previously decided regarding whether or not the injury was the result of a violent act, pursuant to Labor Code section 4660.1(c)(2)(A), and I found that the injury was not the result of a violent act. The issue of whether the effects of the injury are

catastrophic was not raised or addressed in relation to the first trial. Applicant filed a Petition for Reconsideration, causing me to vacate my decision to determine whether the effects of applicant's physical injury are catastrophic, such that his psychiatric permanent disability should be awarded pursuant to the Appeals Board's en banc decision in *Wilson v. State of CA Cal Fire* (2019) 84 Cal.Comp.Cases 393 (Appeals Board en banc).

Subsequently, the matter was the subject of an April 6, 2020 decision, wherein I reiterated my prior opinion that the psychiatric injury was not the result of a violent act, and now adding that the injury is not catastrophic, pursuant to Labor Code section 4660.1(c)(2)(B). A timely Petition for Reconsideration was again filed by applicant. Reconsideration was granted, and the matter was returned to the trial level pursuant to the January 7, 2021 Opinion and Decision after Reconsideration, due to the fact that there was no formal Pre-Trial Conference Statement and no Minutes of Hearing and Summary of Evidence in connection with the January 8, 2020 trial. The matter was then re-set for trial on June 2, 2021, at which time the matter was resubmitted with formal Minutes of Hearing and Summary of Evidence, based upon the Pre-Trial Conference Statement prepared by the parties at the March 15, 2021 Mandatory Settlement Conference.

EVIDENCE

Applicant's August 19, 2014 injury is described at page 3 of Dr. Renbaum's February 10, 2017 report (Exh. E) as, "[H]e was working on tracks, a train was coming, on trying to get out of the way he slipped on wet tracks and hit his right hip on a railroad tie. He noted increased lower back pain as well as right hip pain." As further detailed by Dr. Renbaum at page 4 of this report, applicant underwent two surgeries. The first was a laminectomy and discectomy in January of 2016, which did not provide any change in his low back pain. He then underwent a two level decompression and fusion in May of 2016, which gave him some improvement in his pain level. He was recommended for physician visits, physical therapy, medications and injections in the future by Dr. Renbaum.

In volume 2 of his deposition (Exh. L) taken on December 12, 2016 (volume 1 occurred prior to his surgeries), applicant testified regarding his daily activities at pages 76-81. He stated that he cannot stand for more than five minutes without becoming aware of searching for a wall or something to lean on. He cannot walk for more than 2-3 minutes. He uses a cane, and also uses a walker if he is going on a longer walk in a park. On the rare occasions when he goes shopping, he uses a cart to lean on. He is able to lift groceries from the shopping cart to his car, but cannot walk while carrying weight. He benefits from utilizing the steam room, sauna and pool at the gym. He considers his upper body to be strong, and can lift 20-30 pounds. When sitting down, he feels "just like everybody else." He can sit for an hour before needing to get up, which he considers to probably be almost a normal amount of time. He confirmed many

of these activities in his third deposition taken on February 27, 2018 (Exh. M), and also added at page 122 that he is able to use the bathroom on his own.

In his March 19, 2018 report (Exh. H), the psychiatric AME, Dr. Joshua Kirz, diagnosed applicant's psychiatric condition as an adjustment disorder with mixed mood (chronic). He further described the causation of the psychiatric injury at page 17 as follows:

Mr. Hernandez sustained a significant work injury on 8-19-14, necessitating two lumbar surgeries, including fusion. He has been unable to work since injury. He continues to struggle with pain and physical limitations. His life as clearly been disrupted by the physical effects of injury, and he has developed some degree of reactive depression.

I recognize that the records were silent as to psychiatric issues, until Dr. Renbaum's recent reference to injury-related depression and anxiety. I think that is because the psychiatric effects were delayed in this case, as the applicant expected a better outcome from his lumbar fusion. As the reality of his situation has set in over the last year or so, his depression has become more pronounced.

With respect to the issue of catastrophic injury, this was set forth at pages 4-6 of my August 30, 2021 decision, as follows:

Catastrophic Injury

With respect to whether the effects of applicant's physical injury are catastrophic, such that his psychiatric permanent disability should be awarded pursuant to the *Wilson, supra*, the Appeals Board stated:

A fact-driven analysis of whether an injury is catastrophic may encounter a range of circumstances beyond the statutorily specified injuries covered by section 4660.1(c)(2)(B). There are factors the trier of fact may consider in determining whether an injury may be deemed catastrophic. These factors include, but are not limited to, the following, as relevant:

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.

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.” This list is also not exhaustive and the trier of fact may consider other relevant factors regarding the physical injury. In determining whether an injury is catastrophic, the trier of fact should be mindful of the legislative intent behind section 4660.1(c). (*Wilson, supra*, at 84 Cal.Comp.Cases at p. 415.)

In the instant case, the first three factors are the only that apply to this matter. First, with respect to the intensity of treatment, applicant underwent two surgeries to his lower back within five months, and had at least some pain relief following the fusion. He will need significant further treatment in the form of physician visits, physical therapy, medications and injections. Applicant also related in volume 3 of his deposition transcript that he may need additional surgery to remove hardware from his spine. This factor weighs the closest to catastrophic among the three applicable categories here.

Regarding the second *Wilson* factor (the ultimate outcome of the physical injury), applicant’s outcome is somewhat poor, and there are factors which weight [*sic*] both for and against a catastrophic condition. He was placed in Category IV (with Category V being the most severe) at Table 15-3 of the AMA Guides for his lumbar spine injury. He uses a cane regularly, and sometimes uses a walker. On the other hand, Dr. Renbaum did not specifically recommend the use of a cane or a walker. He also did not place applicant in the highest level of Table 15-3, and did not provide an analogous *Almaraz/Guzman* rating over and above the strict AMA Guides level of impairment.

Regarding the third factor applicable here, the deposition testimony of applicant establishes that the majority of his physical difficulties relate to his ambulation. He is, however, still able to walk on his own for short distances, albeit with difficulty. He is able to use the bathroom on his own, and can lift 20-30 pounds, sit for over an hour, and feels like everybody else when he is sitting down or stationary. There is no indication that he is unable to groom himself or take care of his general personal needs. Overall, the third factor shows that the physical injury has a significant, but not catastrophic, impact on applicant’s ability to perform ADL’s.

Taken together, and in light of the legislative intent behind Labor Code section 4660.1(c) as summarized by the Appeals Board in *Wilson, supra*, I find that the application of these three factors dictate that the effects of applicant’s physical injury are not catastrophic, pursuant to *Wilson* and Labor Code section

4660.1(c)(2)(B). Therefore, his psychiatric impairment is not considered when determining his overall level of permanent disability from this injury, pursuant to Labor Code section 4660.1(c)(2)(B). For the reasons set forth above, his overall level of permanent disability is 36%.

After review of the Petition, I am not persuaded that applicant's injury was catastrophic. In addition to the rationale set forth in my Opinion on Decision, I also point out that, when analyzing the effects of applicant's significant physical injury, I relied upon the opinion of the AME, Dr. Renbaum. Although applicant uses a cane, and sometimes a walker, Dr. Renbaum did not state that applicant is in need of either of these assistive devices. Furthermore, at page 6 of his October 18, 2017 report, Dr. Renbaum did not find the need to increase applicant's level of permanent disability beyond the DRE Category IV of the AMA Guides, pursuant to *Almaraz v. Environmental Recovery Services/Guzman v. Milpitas Unified School District (Almaraz/Guzman)* (2009) 74 Cal.Comp.Cases 1084. These two factors also weigh against the effects of the physical injury being catastrophic. Additionally, although applicant contends that I should have considered factors other than the five factors set forth in *Wilson, supra*, applicant provided no further factors to consider. This is certainly a close case, but nothing contained in applicant's Petition causes any change in my analysis.

(Report, October 15, 2021, pp. 1-7.)

Therefore, we will amend the FA&O to include a finding of injury AOE/COE and future treatment for the right hip. We otherwise affirm the FA&O.

For the foregoing reasons,

IT IS ORDERED as the Decision After Reconsideration of the Workers' Compensation Appeals Board that the Findings, Award and Order issued by the WCJ on August 30, 2021 is **AFFIRMED** except that it is **AMENDED** as follows:

FINDINGS OF FACT

1. Jose Hernandez, while employed on August 19, 2014 as a senior track worker (Occupational Group 480), in San Jose, California, by Santa Clara VTA (permissibly self-insured and administered by Tristar Risk Management), sustained injury arising out of and in the course of employment to his lumbar spine, right hip and psyche.

* * *

6. Applicant is entitled to further medical treatment to his lumbar spine, right hip and psyche.

* * *

AWARD

* * *

C) Further medical treatment to cure or relieve from the effects of the injury to his lumbar spine, right hip and psyche.

WORKERS' COMPENSATION APPEALS BOARD

/s/ CRAIG SNELLINGS, COMMISSIONER

I CONCUR,

/s/ MARGUERITE SWEENEY, COMMISSIONER

/s/ JOSÉ H. RAZO, COMMISSIONER



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

DECEMBER 3, 2021

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

**EMPLOYMENT DEVELOPMENT DEPARTMENT
FROST LAW
JOSE HERNANDEZ
WITKOP LAW**

AI/pc

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