

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

TEODORO BOLIVAR, *Applicant*

vs.

**EDIBERTO HEREDIA dba HEREDIAS GARDEN SERVICES; UNINSURED
EMPLOYERS BENEFITS TRUST FUND, *Defendants***

**Adjudication Number: ADJ10792307
San Francisco District Office**

**OPINION AND DECISION
AFTER RECONSIDERATION**

We previously granted reconsideration to provide an opportunity to further study the legal and factual issues raised by the Petition for Reconsideration filed by defendant Uninsured Employers Benefits Trust Fund (UEBTF). This is our Opinion and Decision After Reconsideration.

UEBTF seeks reconsideration of the December 23, 2021 Findings of Fact and Award, wherein the workers' compensation administrative law judge (WCJ) found, in pertinent part, that applicant is 70% permanently disabled due to his industrial injury.

UEBTF contends that Labor Code¹ section 4660.1(c), prohibits increasing applicant's permanent disability because of a psychiatric disorder that is a compensable consequence of a physical injury. (§ 4660.1, subd. (c).) UEBTF in essence claims that applicant's permanent disability should be 47% instead of the 70% awarded.

We have received and reviewed an answer from applicant Teodoro Bolivar. The WCJ prepared a Report and Recommendation on Petition for Reconsideration (Report), recommending that the Petition be denied.

We have considered the Petition for Reconsideration, the Answer and the contents of the Report, and we have reviewed the record in this matter. For the reasons discussed below, we affirm the December 23, 2021 Findings of Fact and Award.

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

FACTS

As the WCJ stated,

Teodoro Bolivar [] while employed on 11/3/2016, as a gardener, Occupational Group Number 491, at Hillsborough, California, by Edilberto Heredia, dba Heredias Garden Service, sustained injury arising out of and in the course of employment to his right upper extremity, right hand, right fingers, and psyche.

At the time of the injury, the employer was uninsured. At the time of the injury, the employee's earnings were \$440 per week, warranting indemnity rates of \$293.33 for temporary disability and \$290 for permanent disability.

The primary treating physicians are Tariq Mirza (pain management) and Dr. Allan Kipperman (psych). The PQME in psych is Dr. Firman. The PQME in pain management is Dr. Stoller.

There is a need for future medical treatment for the right upper extremity and psych.

The applicant is determined to be 70% permanently disabled (PTD) due to his industrial injury, which includes a life pension, the specific amounts to be adjusted by the parties with WCAB jurisdiction reserved in the event the parties are not able to resolve the specific amounts themselves. There is no basis for apportionment.

At trial, the parties have stipulated to the following chronology:

DATE	DESCRIPTION OF EVENT
2003	Applicant begins working as a gardener for Defendant, Heredias Garden Services.
11/3/2016	Date of injury - Applicant, 68 years old, was working with a hedge trimmer in Hillsborough, California, when he cut fingers on his right hand, causing partial amputation injury. (See Applicant's Exhibit 2). Applicant is taken for emergency treatment at Mills Peninsula Emergency Room. Applicant is taken off of work on total temporary disability.
3/16/2017	Applicant, through counsel, files Application for Adjudication of claim.

5/19/2017 WCJ Casey issues Order joining Uninsured Employers Benefits Trust Fund as a party.

9/27/2017 Applicant files amended Application alleging injury to psyche.

6/25/2018 Applicant begins psychiatric evaluation with PQME [Panel Qualified Medical Evaluator] Dr. Gregory Firman. (See Defendant's Exhibit A).

10/31/2018 Applicant's temporary disability payments end based on statutory 104 week maximum.

5/2/2019 Applicant is examined a second time by Dr. Gregory Firman and given a 0% whole person impairment for psychiatric disability. (See Defendant's Exhibit B).

11/29/2019 Applicant begins psych treatment with PTP [primary treating physician] Dr. Allan Kipperman. (See Applicant's Exhibit 4).

1/6/2020 Psych PTP, Dr. Allan Kipperman, issues first report which was served/received by UEBTF and has been paid for according to Dr. Kipperman's office. (See Applicant's Exhibit 4).

11/20/2020 Psych PTP, Dr. Allan Kipperman, issues rebuttal medlegal PR4 report providing psychiatric whole person impairment resulting from Applicant's amputation injury. UEBTF contends report was not received until 6/18/2021. (See Applicant's Exhibit 1).

2/12/2021 PQME Dr. Adam Stoller issues final report providing whole person impairment for Applicant's right hand. (See Defendant's Exhibit C).

4/14/2021 Applicant's counsel files DOR for an MSC. No objection to the DOR was filed by Defendant or UEBTF.

6/18/2021 Mandatory Settlement Conference - Matter is set for trial on PD/apportionment issues. No

objection to trial setting by either Defendant. Defendants requested and were provided with a copy of Dr. Kipperman's PR4 report by email. (See Applicant's Exhibits 3 and 5).

11/8/2021 Parties appear for trial. Applicant opposes continuance. Matter is continued over applicant's objection.

(Opinion on Decision, pp. 3-5.)

At trial, the parties stipulated to the rating of applicant's right hand injury as follows:

Right hand (grip/ROM/peripheral nerve) = 27% WPI.

16.05.04.00-27-[1.4]38-491F-38 = 47% permanent disability

(Minutes of Hearing/Summary of Evidence (MOH/SOE) dated December 16, 2021, p. 2:30-36.)

The parties disagree as to the rating of applicant's psychiatric injury. Applicant contends that he suffered a 51 GAF score, which results in a 29% WPI, based on the medical opinion of Allan L. Kipperman, M.D., his primary treating physician. (*Id.* at p. 2:38-43.) This results in a rating string of 14.01.00.00-29-[1.4]41-491D-35 = 44% permanent disability. Combining the 47% orthopedic permanent disability with the 44% psychiatric permanent disability results in 70% permanent disability (47 C 44 = 70%). (*Ibid.*)

UEBTF contends that applicant did not suffer any psychiatric disability based on the PQME report of Gregory Firman, M.D. (*Id.* at pp. 2:45-3:5.) As such, UEBTF contends applicant is 47% permanently disabled based on his orthopedic impairment.

The issues at the December 16, 2021 were as follows:

1. Which report constitutes the more substantial medical evidence and should be relied upon for determination of permanent disability for the psychiatric injury in this case:
 - a. The PQME report of Dr. Firman dated May 2, 2019 (0% psychiatric WPI = 0% psychiatric permanent disability); or
 - b. The primary treating physician report of Dr. Kipperman dated November 20, 2020 (29% psychiatric WPI = 41% psychiatric permanent disability)
2. Attorney's fees for applicant. (MOH/SOE dated December 16, 2021, pp. 4:34-5:14.)

The trial court found that the medical report of Dr. Kipperman was more substantial evidence and awarded applicant 70% permanent disability benefits.

DISCUSSION

UEBTF contends that section 4660.1(c) prohibits increasing applicant's permanent disability because of a psychiatric disorder that is a compensable consequence of a physical injury. (§ 4660.1, subd. (c).) However, as the WCJ points out, this was not an issue raised at trial or in any of UEBTF's pre-trial pleadings. (Report, p. 2; UEBTS Trial Brief dated November 5, 2021.) Due process requires the parties to have notice and a meaningful opportunity to be heard on the issues in disputes. (*See Gilbert v. City of Sunnyvale* (2005) 130 Cal.App.4th 1264, 1279 ["The essence of procedural due process is notice and an opportunity to respond"]; *Rucker v. Workers' Comp. Appeals Bd.* (2000) 82 Cal.App.4th 151, 157-158 [65 Cal.Comp.Cases 805]; *Gangwish v. Workers' Comp. Appeals Bd.* (2001) 89 Cal.App.4th 1284, 1295 [66 Cal. Comp. Cases 584].) A fair hearing includes, but is not limited to, the opportunity to call and cross-examine witnesses; introduce and inspect exhibits; and to offer evidence in rebuttal. (*See Gangwish, supra*, at p. 1295; *Rucker, supra*, at pp. 157-158 citing *Kaiser Co. v. I.A.C. (Baskin)* (1952) 109 Cal.App.2d 54, 58 [17 Cal.Comp.Cases 21]; *Katzin v. Workers' Comp. Appeals Bd.* (1992) 5 Cal.App.4th 703, 710 [57 Cal.Comp.Cases 230].) Therefore, the issue of section 4660.1(c), is not an appropriate issue for reconsideration here.

Nevertheless, for the sake of thoroughness, we examine section 4660.1(c), which provides:

(1) Except as provided in paragraph (2), the impairment ratings for sleep dysfunction, sexual dysfunction, or psychiatric disorder, or any combination thereof, arising out of a compensable physical injury shall not increase. This section does not 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 is not 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.

(§ 4660.1, subd. (c).)

First, the WCJ is correct that section 4660.1(c) applies to a compensable consequence injury and not to a direct injury. (Report, p. 2; *Wilson v. State of CA Cal Fire et al.* (2019) 84 Cal.Comp.Cases 393, 403 [2019 Cal. Wrk. Comp. LEXIS 29] (Appeals Board en banc).) Here, it appears that UEBTF stipulated to a direct psychiatric injury in the Pre-Trial Conference Statement where the parties stipulated that applicant sustained injury arising out of and in the course of employment to “psych.” (Pre-Trial Conference Statement dated June 18, 2021.) Furthermore, Dr. Kipperman seems to allude to both a direct psychiatric injury (what he calls a mental-mental component) and a psychiatric injury as a compensable consequence of applicant’s orthopedic injury (what he calls a physical-mental component), although he does not apportion between the two.

With regard to the physical-mental component of Mr. Bolivar's injury to the psyche, the applicant's temporary psychiatric disability in this case is a compensable consequence of his industrially-based orthopedic problems. When assessing the issue of causation, one needs to focus on what caused disability and the need for medical treatment, assuming that a compensable consequence psychiatric injury is within the provisions of Labor Code 3208.3 (meaning the 51% threshold requirement is applicable). A physical or an orthopedic industrial injury can, of course, be considered an actual event of employment which can then cause a compensable consequence in the form of a psychiatric injury. Accordingly, a temporal relationship (i.e., proximate cause) between an industrial physical injury and emotional and psychological ramifications and sequelae which reach disabling proportions clearly necessitates a determination of compensability under applicable workers' compensation guidelines, unless it can be demonstrated that the applicant's psychiatric disability would be present absent the industrial exposure due predominantly to non-industrial contributory factors. Additionally, even if the industrial exposure merely causes a "lighting up" or an aggravation of preexisting disability, it remains a compensable industrial injury. This is the reasoning that I applied to my analysis of the physical-mental injury to the psyche component of this case.

With regard to the mental-mental component of Mr. Bolivar's claim, he was subjected to a life-threatening industrial accident at his former place of employment. When an employee encounters trauma in the workplace there is necessarily a serious decline in an employee's ability to feel safe and trusting in the workplace. Accordingly, the occurrence of trauma in the workplace

environment oftentimes precipitates problems leading to high states of anxiety, poor productivity levels, and low morale. It is imperative that employees experience their workplace environment as safe in order to participate effectively in their vocational responsibilities and maintain a loyalty towards their employers. Significant emotional and psychological problems often occur when an employee experiences trauma at work.

(Applicant Exhibit 4, Dr. Kipperman's report dated January 6, 2020, pp. 14-15.)

Dr. Firman also appears to classify applicant's psychiatric injury as a direct injury even though Dr. Firman opines that applicant has no psychiatric whole person impairment. (Defendant Exhibit B, Dr. Firman's report dated May 2, 2019, p. 14.) Dr. Firman states, "it is reasonably medically probable that his alleged psychiatric injury involved the 'actual events of employment' and that the causation of the psychiatric's disability is predominantly (>51%) work-related. (*Ibid.*) Therefore, section 4660.1(c) may not limit applicant's direct psychiatric injury.

Second, and perhaps more importantly, we conclude that applicant's injuries fall under the two exceptions found in sections 4660.1(c)(2)(A) and (B). Whether a person is a victim of a violent act or is directly exposed to a significant violent act depends on the mechanism of the injury. (*Lopez v. General Wax Co.* (June 19, 2017, ADJ9365173) 2017 Cal. Wrk. Comp. P.D. LEXIS 291. The applicant in *Lopez*, similar to applicant here, sustained an industrial injury when her finger became stuck in a machine and chopped off a piece of her finger resulting in a partial amputation. (*Ibid.*) The panel in *Lopez* concluded that the mechanism of applicant's injury constituted a "violent act" because applicant's injury can be characterized as resulting from extreme or intense force. (*Ibid.*) The *Lopez* panel adopted the definition of "violent act" from *Larsen v. Securitas Security Services* (May 17, 2016, ADJ9034489) 2016 Cal. Wrk. Comp. P.D. LEXI 237 and *Russell Madson v. Michael J. Cavaletto Ranches* (February 22, 2017, ADJ9914916) 2017 Cal. Wrk. Comp. P.D. LEXIS 95, "as an act that is characterized by either strong physical force, extreme or intense force, or an act that is vehemently or passionately threatening."

Here, applicant's right ring and right middle fingers were partially amputated when he fell off a ladder while holding a running hedge trimmer that he pushed away from his face and torso. Similar to the facts in *Lopez*, we conclude that the mechanism of applicant's injury here can be characterized as resulting from extreme or intense force, constituting a "violent act" under the exception found in section 4660.1(c)(2)(A).

The determination of whether an injury is catastrophic for purposes of section 4660.1(c)(2)(B) focuses on the nature of the injury and is a fact-driven inquiry. (*Wilson, supra*, 84 Cal.Comp.Cases at p. 414.) The trier of fact may consider the following factors in determining whether an injury is catastrophic:

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 (footnote omitted).)

“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).” (*Ibid.*)

Here, applicant sustained an injury to his dominant right hand, severing three of his fingers, and requiring the partial amputation of his right ring finger and his right middle finger. (Applicant Exhibit 4, Dr. Kipperman’s report dated January 6, 2020, p. 2.) He continues to experience constant dull pain and is sensitive to touch where the amputations occurred. (*Id.* at p. 3.) He has difficulty reaching, gripping, grasping, holding and manipulating with his hands. (*Id.* at p. 4.) He has difficulty with repetitive motions and forceful activating with his arms and hands. (*Ibid.*) He has difficulties with ADLs in using the bathroom, brushing his teeth, bathing, washing, trimming nails, dressing, combing his hair, eating, drinking, writing, texting, keyboarding, cooking, cleaning, etc. (*Ibid.*) He no longer goes fishing or plays soccer because he needs to protect his hand. (*Id.* at pp. 5-6.) He is no longer able to work and has not worked since the accident. (*Id.* at

pp. 5, 7.) His orthopedic permanent disability for his right hand is 47%. (MOHSOE dated December 16, 2021, p. 2:34.) Furthermore, if the amputation of two fingers is not considered “loss of a limb,” it is closely analogous considering the injury was to applicant’s dominant hand. For these reasons, we conclude that applicant’s hand injury here is catastrophic under the exception found in section 4660.1(c)(2)(B).

In summary, UEBTF failed to raise the issue of section 4660.1(c) at trial and therefore this issue is not a proper issue for reconsideration. Moreover, even if the issue of section 4660.1(c) was a proper issue for reconsideration, section 4660.1(c) does not apply to direct psychiatric injuries and UEBTF stipulated to a direct psychiatric injury and the medical evidence suggests that applicant suffered a direct psychiatric injury in addition to a compensable consequence one. Lastly, applicant met the statutory exceptions found in section 4660.1(c)(2)(A) and (B) because the mechanism of his injury constitutes a “violent act” and the injury to his dominant right hand resulting in the partial amputations of two fingers is catastrophic.

Accordingly, we affirm the December 23, 2021 Findings of Fact and Award.

For the foregoing reasons,

IT IS ORDERED, as the Decision After Reconsideration of the Workers' Compensation Appeals Board, that the December 23, 2021 Findings of Fact and Award is **AFFIRMED**.

WORKERS' COMPENSATION APPEALS BOARD

/s/ KATHERINE WILLIAMS DODD, COMMISSIONER

I CONCUR,

/s/ KATHERINE A. ZALEWSKI, CHAIR

/s/ JOSÉ H. RAZO, COMMISSIONER



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

MAY 16, 2022

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

**TEODORO BOLIVAR
NADEEM MAKADA
OFFICE OF THE DIRECTOR LEGAL, OAKLAND**

LSM/pc

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

CS