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WCAB analysis may invite a wave of new litigation

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The Workers' Compensation Appeals Board for the first time interpreted a word in the California Labor Code, and its analysis may have a significant financial impact on the California workers' compensation system. In *Wilson v. State of California Department of Forestry and Fire Protection*, the WCAB held in an en banc decision that multiple factors, some of which are entirely subjective, must be considered by a court making the determination whether an injury is catastrophic and therefore qualifies for an award of permanent disability. *Wilson v. State of CA Fire*, 84 Cal.Comp. ___, (WCAB, May 10, 2019)(en banc).

Wilson suffered industrial injury while fighting a wildfire in May 2014. He claimed that the injuries impaired multiple body systems and that he suffered severe psychological injuries from the physical trauma and the required treatment he endured. He was examined by medical legal evaluators in several specialties to determine the permanent disability for which he would receive compensation. The psychiatric examiner diagnosed Wilson with psychiatric disorders, "post-traumatic stress disorder (PTSD) and a severe major depressive episode." About these impairments the doctor concluded that the "PTSD was 'due to the direct effects of the May 13, 2014 injury, an actual event of employment.'" After trial it was held that Wilson suffered inter alia a



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post-traumatic stress disorder as a consequence of his industrial physical injury, but not directly from the injurious events of his employment. Further, the judge held that the injury was not catastrophic as that word is used in Section 4660.1(c)(2)(B).

"One can look at the dictionary definitions of catastrophic but obviously a great many injuries have a huge effect on an individual. Ultimately, the undersigned sometimes must look at the words of Justice Stewart and reach the conclusion that Justice Stewart did, certainly on an altogether different subject, 'I know it when I see it'."

The Workers' Compensation Appeals Board disagreed with the trial judge and found that Wilson sustained a catastrophic physical injury and pursuant to Section 4660.1(c)(2) (B) was therefore entitled to receive permanent disability benefits for his psychi-

atric injury. The board's analysis of Section 4660.1(c) was the first published interpretation of that code section.

As part of Senate Bill 863 which enacted Section 4660.1(c) in 2012, the Legislature included a statement of its intention to limit additional impairment for "questionable claims of disability alleged to be caused by a disabling physical injury." The legislation precluded awards of permanent disability for sleep dysfunction, sexual dysfunction, or a psychiatric disorder arising out of a compensable physical injury. The Legislature, however, provided two exceptions to the bar to benefits in Section 4660.1(c), allowing an award for impairment if the compensable psychiatric injury results from being a victim of or suffering "direct exposure to a violent act" or results from a "catastrophic injury." The section does not define "catastrophic

injury," but provides these examples to guide an interpretation: "loss of a limb, paralysis, severe burn, or severe head injury."

As "catastrophic injury" is not defined in Section 4660.1(c)(2)(B) beyond these examples, the WCAB searched for a suitable definition both within the California Labor Code and in a variety of non-workers' compensation decisions and statutes. Additionally, the board looked to the statutory construct of the section, noting that the examples of catastrophic injury set forth in Section 4660.1 (c)(2)(B) focus on the nature of the act. Describing its analytical effort, the board writes that the statute's language implies that to qualify for permanent disability benefits the psychiatric injury must "result from" the catastrophic injury. However, the board also notes the Legislature's express intention to limit questionable psychiatric claims. Further, it acknowledges the legislative concern with excessive litigation arising out of unpredictability and the legislature's goal of providing "uniformity, consistency, and objectivity of outcomes."

Asserting that it is providing a method for interpreting the subsection that is consistent with these principles, the board enumerates five factors to be used to determine whether an injury is catastrophic, while allowing that the list is not exhaustive and that other factors may be relevant. The enumerated factors include: "1. The intensity and seriousness of treatment received by the employee that was reasonably re-

quired 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."

Utilizing the first three of these factors, the WCAB then determined that Wilson's injury resulted in a catastrophic injury. The board described his injury as life threatening and its initial treatment as serious, discussing his medically induced coma and both his renal and respiratory failures.

The board opined that Wilson's inability to continue to work as a firefighter and his ongoing complaints and their effect on activities of daily living also supported the catastrophic classification.

While the board's identified factors for interpreting the subsection provide a roadmap for determining whether an injury is catastrophic, they also invite a surge of new litigation. Every seriously injured worker may be compelled to draw parallels between their own injuries and the board's broad measures. It is reasonably foreseeable that the subjective terms of the enumerated factors, and the departure from objectively identifiable medical conditions or measurable deficits, means that many more injuries will be tested before the board to determine if they can be made to



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fit into this newly broadened exception. We anticipate that future appeals courts will be asked to

determine if the board's analysis strays too far toward a statutory embodiment of "I know it when I see it."