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COURT OF APPEAL AWARDS A SOLID WIN TO DEFENDANTS ON TOTAL DISABILITY CASES!

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On September 25, 2018, in a case certified for publication, the Third District Court of Appeal in *Dept. of Corrections and Rehabilitation & SCIF v. WCAB (Fitzpatrick)* found no basis for concluding that Labor Code §4662(b) provides a second independent path to permanent total disability "in accordance with the fact." This is a solid statutory win for defendants.

In this new case, the Court took on the WCAB's liberal interpretation of §4662(b) and the phrase "in accordance with the fact." That phrase has haunted defendants since the WCAB's reliance on it in *Coca-Cola v. WCAB (Jaramillo)* (2012) 77 CCC 445 (writ denied). The *Fitzpatrick* Court effectively annulled that decision interpreting both §4660 and §4662(b), as separate ways to rate PD. This decision applies to all injuries subject to the 2005 rating schedule and not necessarily to injuries on or after January 1, 2013, to which §4660.1 applies.

In *Jaramillo*, the WCAB denied reconsideration and upheld a finding of a trial judge that the applicant was permanently totally disabled because, under §4662(b) permanent total disability may be separately and subjectively determined "in accordance with the fact," distinguishing that section from §4660 which provides the process and method to determine the percentages of permanent partial and permanent total disability. Contrary to the statute, the WCAB specifically held that the constraints of §4660(b)(1) and (2) do not apply to determining permanent total disability; only permanent partial disability. This effectively indicated to the workers' compensation industry that where the disability rating is high enough but not yet 100%, a judge may find total disability, provided there is additional evidence to support it (i.e., offhanded commentary by a physician about vocational effects of disabilities, or testimony by the applicant about impairment, etc.).

However, in *Fitzpatrick*, the Court specifically held that findings of permanent total disability are indeed subject to the requirements of §4660(b)(1) and (2), except for those conditions presumed to be totally disabling as enumerated in §4662(a). Fitzpatrick sustained injury to his heart which resulted in an adjusted rating of 97% PD. He also sustained a psyche injury which rated to an adjusted 71% PD. The combined values chart yielded a rating of 99% PD. The trial judge ignored the 99% rating and instead found permanent total disability "in accordance with the fact." The judge relied in large part on the remarks of Dr. Lieberman who opined that the possibility of the injured worker returning to work was remote and contingent on a successful heart transplant. He made such a statement without reference to any vocational evidence and despite the fact that his rating was only a 40% Whole Person Impairment (WPI). The trial judge did not mention nor discuss the combined values rating in the award. He simply disregarded the scheduled rating and the reports by the vocational rehabilitation expert. On reconsideration, the WCAB adopted the report by the trial judge and affirmed the decision relying on its panel decision in *Jaramillo*.

The Court of Appeal took a closer look at the statutes and observed that the phrase "in accordance with the fact" in §4662(b) is merely an indication that this refers to those injuries which are not presumed permanently totally disabling as listed in subsection (a). All injuries not mentioned in §4662(a) will be determined based on their facts, but those facts must be in accord with §4660 as the only statute that addresses how that determination shall be made. In support of its observation, the Court pointed to §4452.5(a), which defines permanent total disability and permanent partial disability. Section 4660 simply prescribes the method for determining the percentage of permanent disability. Permanent total disability (100%) is a percentage of permanent disability and the method for determining it through §4660 is mandatory.

The Court conceded that rebuttal of the schedule is difficult (*Ogilvie v. WCAB* (2011) 197 Cal.App.4th 1262), and declined to allow an award on a basis which avoids the statutorily mandated process. Further, an injured worker can achieve a rating of 100% permanent disability under the schedule using the combined values chart, pointing out that there are 50 such points on the chart included in the rating schedule.

At oral argument, the Board tried to downplay its assertion that §4662(b) was an independent way to get to 100% by arguing that adding the ratings as done in *Athens Administrators v. Kite* (2013) 78 CCC 213, was "in accordance with the fact." The Court rejected this argument and said it was a new theory which was not presented before and was not going to be considered. Though the last word has not been heard on this issue, the *Fitzpatrick* Court's rationale should allow defendants to argue that ratings are determined by strict adherence to the process in §4660 which provides in pertinent part that the ratings are to be combined. There is no provision in that section recognizing adding of ratings.

We expect that the holding in *Fitzpatrick* will work to check the impulses of trial judges to "round-up" ratings to 100% without substantial justification and based on their own subjective perceptions. By this decision, the Court made it clear that to find permanent total disability, the applicant must either suffer an injury under §4662(a), rebut the schedule as outlined in *Ogilvie*, or simply reach 100% scheduled rating by the process provided in §4660, including use of the combined values chart.

Since §4660.1 mentions §4662 as a basis for finding permanent total disability, while §4660 makes no mention of §4662, doubtless applicants' attorneys will argue that *Fitzpatrick* does not apply to injuries on or after January 1, 2013. However, there is a solid rationale here to argue that the same analysis holds for injuries after that date. There will be more battles in this ongoing war.

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