

HOW SMOKE INHALATION BECAME A CATASTROPHIC INJURY: *Wilson* Opens the Floodgates for Compensable Consequence Psych Impairment Claims

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In what appears to be the continuation of an ongoing trend to expand situations in which an applicant can once again receive compensable consequence psychological impairment, the WCAB issued an *en banc* opinion in the matter of *Kris Wilson v. State of CA Cal Fire*, ADJ10116932. This is a significant decision and binding on all WCJs.

Prior opinions by the WCAB have addressed the “violent act” exception of Labor Code 4660.1(c)(2)(A). The WCAB has determined a violent act only requires acts characterized by either strong physical force, extreme or intense force, or an act that is vehemently or passionately threatening (*Larsen v. Securitas Security Services*, 2016 Cal. Wrk. Comp. P.D. LEXIS 237). Criminal or quasi-criminal conduct is not needed. Violent acts include incidents such as being struck by a car in a parking lot (*Larsen*), falling from a tree and striking one’s head multiple times (*Greenbrae Management v. WCAB (Torres)* (2017) 82 Cal. Comp. Cases 1494), and being pinned in a truck after a roll over (*Madson v. Cavaletto Ranches*, 2017 Cal. Wrk. Comp. P.D. LEXIS 95).

In *Wilson*, the WCAB addressed the “catastrophic injury” exception in Labor Code 4660.1(c)(2)(B). This section of the Labor Code allows for psychiatric impairment alleged as a compensable consequence to a physical injury in cases of a “catastrophic injury, including, but not limited to, loss of a limb, paralysis, severe burn, or severe head injury.” The ultimate holding in *Wilson* is that whether an injury is catastrophic is a fact-driven question that focuses on the **nature of the injury**.

Wilson suffered undisputed injuries to his lungs, psyche, eye, head, and brain following smoke and fume inhalation while fighting a fire. He was hospitalized for two weeks. During the hospitalization, he was intubated due to respiratory failure. He also suffered renal failure. After being released from the hospital, he attempted to return to his employment but was eventually permanently taken off work.

As a result of the injury, he suffered, among other things, ongoing shortness of breath, sleep difficulties, impaired cognition and memory, headaches, and impaired vision. He claimed

emotional trauma from the incident and had vivid memories and recurring nightmares of waking up while intubated at the hospital. He was diagnosed with PTSD and severe major depressive disorder. The QME opined the psych injury represented a catastrophic injury.

At trial, the WCJ issued a Findings & Award (“F&A”) determining the injury did not rise to the level of a catastrophic injury and not awarding additional psych impairment. The WCJ noted the examples in LC 4660.1(c)(2)(B) and opined the determination of catastrophic was with the injury itself, not with the consequences of the injury.

On Reconsideration, the WCAB rescinded the F&A. The WCAB drew a distinction between the violent act exception, which focuses on the mechanism of injury (i.e. events causing the injury), and the catastrophic injury exception, which focuses on the nature of injury (i.e. results of the injury). In support of this, the WCAB alluded to the fact that the examples contained in LC 4660.1(c)(2)(B) all identified **results** from an industrial injury. They also referenced a prior Court of Appeals opinion that suggested the catastrophic injury exception dealt with the nature of injury (*Travelers v. WCAB (Dreher)* (2016) 246 Cal.App.4th 1101).

The WCAB determined a finding of catastrophic injury is limited to the *physical* injury, and is a question of fact. Factors to consider include, but are not limited to:

- 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; and
- 5) If the physical injury is an incurable and progressive disease.

The WCAB noted that it is not necessary for all five factors to be met and even stated this was not an exhaustive list of factors to consider. In concluding Applicant suffered a catastrophic injury, the WCAB highlighted the hospitalization and medically induced coma, residual impact on ADLs, and inability to return to work as a firefighter. As a result, they found an increased impairment rating for psychiatric injury was appropriate.

This is certainly a curious decision. While there is no doubt the applicant suffered an intense, albeit short, period of hospitalization following the incident, there do not appear to be resulting injuries that rise to the level to a loss of limb, paralysis, severe burn, or severe head injury. Nor is there any indication that the residual effects of the injury were so severe to prevent the applicant from functioning or working in a capacity other than a firefighter.

The WCAB did not give any guidance as to which of the five enumerated factors are most important, or provide a threshold of how many factors need to be met before an injury rises to the level of “catastrophic.” Their opinion certainly suggests it is NOT a necessary factor to have

an injury closely analogous to a loss of a limb, paralysis, severe burn, or severe head injury. The ultimate holding that this is a question of fact gives broad discretion to the WCJ (and also the WCAB on appeal) to decide whether an injury is catastrophic.

We can certainly expect applicant attorneys to test the limits of this new decision. Defendants need to be prepared to deal with an increase in claims for alleged catastrophic injuries and compensable consequence psych impairment.

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