CASE LAW UPDATE: WHAT DOES A DOCTOR NEED TO KNOW?

Presented by: Joe Capurro, Esq., President, CAAA
William Armstrong, Esq., Senior Partner, RTGR Law LLP
www.RTGRLAW.com

Psychiatric Injury: Sudden and Extraordinary Event

SCIF vs. WCAB (Guzman) 83 CCC 185 (January 30, 2018)

Jose Guzman was employed for a period less than six months when he sustained injuries. The injuries occurred when a compactor fell on top of him, The issue presented was whether, in asserting a psychiatric claim of injury, Guzman met his burden of proof that the injury was the result of a "sudden and extraordinary employment condition" meeting the mandates for an exception to no compensation for a psychiatric injury when the period of employment was less than 6 months. *Labor Code Section 3208.3(d).*

While Guzman had been successful at the WCAB, he was not at the Court of Appeal. The Court emphasized that Applicant had to prove that his psychiatric injury did not derive from the effects of a routine physical injury and was not the result of the routine type of event that all employees who work

HOLDING: "This court concluded in Matea that "if an employee carries his or her burden of showing by a preponderance of the evidence that the event or occurrence that caused the alleged psychiatric injury was something other than a regular and routine

employment event or condition, that is, that the event was uncommon, unusual, and occurred unexpectedly, the injury may be compensable." (Matea, supra, 144 Cal. App.4th at p.1449, italics added.) In other words, the employee "bears the burden of showing that the alleged psychiatric injury did not 'derive[] from the effects of a []…routine physical injury' [citation], and was not the result of the routine type of stress or employment event that all employees who work for the same employer may experience or expect within the first six months of their employment [citations]."

CATASTROPHIC CLAIMS FOR PSYCHE PD

Kris Wilson v. State of CA Cal Fire - inhaled fumes and smoke for 2 days; 66% PD without psyche but exception of catastrophic injury may apply

Findings -

- En banc notes that “catastrophic” is an adjective, so the focus is on the fact based analysis of the **nature** of injury; rather than the mechanism of injury
- injury is “catastrophic’ depends on the physical injury, and ”the injury must therefore be deemed catastrophic independent of the psychiatric injury”

Factors for Determination of Catastrophic Injury

- Intensity and seriousness of treatment received that was reasonably required
- Ultimate outcome when physical injury is P&S
- Severity of injury and impact on ADLS
- Whether the physical injury is closely analogous to those enumerated in the statute (loss of limb, paralysis, severe burn or severe head injury)
- Whether the physical injury is an incurable and progressive disease
- No set timeframe

Pearson Ford et al. v. WCAB (Hernandez), (2017)

82 Cal. Comp. Cases 1105

Applicant, Leopoldo Hernandez, sustained an accepted injury to his left hand in 2006. A neurologist examined him in November 2008 and opined that he might have CRPS. He later began wearing a sling and telling his doctors that he was completely unable to use his left arm and hand.

In early 2010, Pearson's carrier hired a private investigator who captured video of Hernandez removing his sling after attending doctor's appointments. He was caught on video driving, carrying groceries, and lifting a washing machine. The San Diego County DA's office filed criminal charges in March 2011 on suspicion of committing insurance fraud. Applicant pleaded guilty to one count fraud and to one count of violating Insurance Code Section 1871.4.

In May 2016, a WCJ found that Hernandez suffered a 70% PD and was entitled to a life pension with future medical benefits. Pearson Ford asked the WCAB for reconsideration, but the award was upheld.

The 4th District Court of Appeal acknowledged that Insurance Code Section 1871.4(a)(1) makes it a crime for a person to knowingly make any materially false statements for the purpose of obtaining workers' compensation benefits. Section 1871.5 further provides that any person convicted of violating Section 1871.4 is ineligible to receive or retain any

compensation received as a result of the violation. But, the court said, Section 1871.5 is not “an automatic or broad prohibition on the payment of benefits which were not directly connected to a worker’s fraudulent misrepresentation.

The court found that there was substantial medical evidence supporting an award that did not stem from the fraudulent statements, and his credibility had not been so damaged as to make him unbelievable concerning the underlying compensation case. Although Hernandez was

convicted of fraud under Section 1871.4, there was other evidence that was not the result of a violation of Section 1871.4 that supported a claim for benefits, and Section 1871.5 did not preclude recovery of benefits violation. But, the court said, Section 1871.5 is not “an automatic or broad prohibition on the payment of benefits which were not directly connected to a worker’s fraudulent misrepresentation.

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Herrera v. Maple Leaf Foods, 2018 Cal. Wrk. Comp. P.D. LEXIS

Herrera was a baker, who sustained a specific injury in October of 2002 when his right arm became caught in the machine and he jerked it free, lacerating tendons in his right index finger and causing back and shoulder injuries. Upon returning to work, his modified job duties caused additional injuries and aggravated the original injuries. Accordingly, applicant was taken off work on January 2, 2003. As the matter evolved before the WCAB, applications were filed in which it was claimed benefits were owed for both a specific and an cumulative trauma injury.

During the course of proceedings, agreed medical examiners were asked to address the orthopedic internal and psychiatric claims. The orthopedic examiner was able to apportion between the two injuries. Unfortunately, for the defendants in the specific and CT cases, the other two evaluators opined that apportionment for the psych and internal injuries would be speculative and/or inextricably intertwined between the two injuries.

Holding: "The obvious difficulty, though, is that the psychiatric and gastrointestinal disability caused by the specific and cumulative injuries cannot be parceled out because they are inextricably intertwined. Accordingly, this precludes separate awards of permanent disability for each of the two injuries and instead mandates that *all* of the industrially-caused disability (orthopedic, psychiatric, and gastrointestinal) be rated together in a single joint award."

Application: This is a panel decision and not necessarily controlling law. It is a very important decision for many reasons. On the apportionment aspects, the panel concluded that when there are two injuries, with overlapping body parts, for example, back and psyche, and the medical evidence establishes that while the back can be "parceled out" between the two injuries the psyche cannot, the injured worker is entitled to one permanent disability award, ***WITHOUT APPORTIONMENT.*** This is particularly significant for potentially 100% permanent disability cases.

Previously, it was thought that if more than one injury accounted for the permanent disability, getting to 100% was virtually impossible. Now, if the injured worker can place a difficult to apportion body part into play, for instance, the psyche or an internal condition, it would facilitate his or her chances of obtaining one, overall award of PD. However, this panel decision on the lack of ability to apportion would still need to have the overall PD aspects analyzed against the holding in the more recent *Fitzpatrick* decision limitation *Section 4662* relief.

Department of Correction & Rehabilitation v. WCAB (Fitzpatrick) (2018) 83 CCC 1680

Dean Fitzpatrick was a correctional officer who suffered an accepted cumulative trauma injury to his heart and psyche. He was also impacted from Prinzmetal's angina that caused anxiety and depression, according to documents filed with the Court of Appeal.

A panel qualified medical evaluator determined that Fitzpatrick reached maximum medical improvement for his heart condition on Jan. 16, 2016, but his MMI status was disputed for the psychological condition. An AME who

examined Fitzpatrick three times concluded that he had reached maximum medical improvement for the psyche condition on June 13, 2015, and that Fitzpatrick was permanently disabled on "strict psychiatric grounds." The QME assigned a 97% impairment rating for the heart condition. The AME provided a Global Assessment of Functioning score of 45, which translated to an impairment rating of 71%. When the ratings were combined using the CVT approach in the PD rating schedule, Fitzpatrick was left with a 99% permanent disability rating.

Following a trial, a workers' compensation judge found that Fitzpatrick was 100% disabled, relying on *Labor Code Section 4662(b)* rather than applying the PD scheduled rating under Section 4660. The WCAB denied State Fund's petition for reconsideration. State Fund filed for a Writ and the Court of Appeal overturned the WCAB and Judge and the reliance on Section 4662.

Labor Code Section 4662 reads as follows:

(a) Any of the following permanent disabilities shall be conclusively presumed to be total in character:

(1) Loss of both eyes or the sight thereof.
(2) loss of both hands or the use thereof.
(3) An injury resulting in a practically total paralysis.
(4) An injury to the brain resulting in permanent mental incapacity.

(b) In all other cases, permanent total disability shall be determined in accordance with the fact.

The pivotal issue in Fitzpatrick is Section 4662(b) and whether it provided a separate pathway to a PTD determination, separate and distinct from the Section 4660 (and, seemingly, Section 4660.1 for injuries on and after 1/1/13) procedures for rating PD.

CONCLUSIONS: Section 4662(b) does not provide a separate pathway for a PTD assessment by the WCAB. Rather that Section provides that all PD is rated under Sections 4660 and 4660.1 unless the condition involves one specifically noted in Section 4662(a). Allowing a process other than this returns the rating process to the place it was before 1/1/2004 and ignores the subsequent amendments which clearly emphasize the need for "consistency, uniformity, and objectivity."

Hikida v Workers' Comp. Appeals Bd., (2017) 12 Cal. App. 5th 1249

Hikida was a long-term employee who incurred several industrially related injuries and conditions including cervical spine, thoracic spine, upper extremities, carpal tunnel syndrome, psyche, fingers, elbows, headaches, memory loss, sleep disorder and deconditioning. In May of 2010, Hikida stopped working and had carpal tunnel surgery. Due to a bad surgical outcome, she developed chronic regional pain syndrome (CRPS). The CRPS resulted in debilitating pain in the upper extremities associated with severely impaired ability to function. Following the CPRS condition (and others) becoming permanent and stationary in May of 2013, Hikida never returned to employment.

One of the reporting physicians was an AME in Orthopedics. The AME concluded that, with respect to the applicant's carpal tunnel syndrome, the causation of the permanent disability was 90% industrial and 10% nonindustrial. However, he also found applicant's residual permanent disability was due entirely to the effects of the CRPS which developed as a result of the failed carpal tunnel surgery. As to the WPI and PD impact of the CRPS, the AME concluded that the disability was permanent and total.

HOLDING: In framing the issue as "…whether an employer is responsible for both the medical treatment and disability arising directly from unsuccessful medical intervention, without apportionment," the Court concluded in the affirmative. The employer is fully responsible, without apportionment, for both the TD and PD flowing from the consequences of medical treatment provided, unsuccessfully, for a work related injury. In the opinion, it is important to note it does not address *Labor Code*

Section 4664(a) which mandates that an employer "shall be liable" only for the "percentage of permanent disability directly caused by the injury arising out of and occurring in the course of employment."

Impact: Hikida is an essential element of nearly every recent CAAA program. It presents very complicated medical and legal issues. Those handling issues falling within the Hikida framework would be well advised to be fully conversant with *South Coast Framing, King vs Comp. Partners* and, now, *Fitzpatrick*.

GAULT V. AMERICANA VACATION CLUBS, INC., (2018) 2018 CAL. WRK. COMP. P.D. LEXIS 476

The issue presented was unique: ***Can WCAB decisions relating to its ability to retain jurisdiction to award permanent disability in progressive, insidious disease situations, such as asbestos, be extended to physical injuries***. Unfortunately for the employer community, the WCAB in a NPD concluded some physical and orthopedic conditions can be classified as “insidious” so that jurisdiction can be retained to award PD as it may increase over time, even beyond five years from the date of injury.

Gault sustained an injury to the knee, which was then complicated by an infectious process. The QME eventually declared the situation to be MMI, but noted worsening could occur in the future because of the impact of the knee infection. The defendant appealed an award of 31%, with one argument being the condition was not yet MMI for rating. On Appeal, the trial Judge recommended Reconsideration be granted, that the condition be considered an insidious disease, and that an interim PD award be entered, but subject to the WCAB retaining jurisdiction beyond five years to award further PD over time.

The WCAB analyzed the situation in light of asbestos rulings and the Judges recommendations and issued findings the condition was insidious, awarding PD of 3% and reserving jurisdiction on future PD as it may evolve. The WCAB adopted an insidious disease definition from the dictionary to be one which “is increasing in extent or severity.” Here, the QME noted the likelihood (“near medical certainty”) the conditions would progress over time due to the antibiotic therapy mandated by the knee infection. Future compensable consequences could include seizure disorders, liver toxicity and others.

City of Petaluma v. W.C.A.B (Lindh), (2018) 83 CCC 1869

Lindh, while working as a law enforcement officer, incurred a number of blows to the left side of his head during a canine training course. After the training, he experienced severe headaches which persisted for a number of days. Approximately one month later, while off-duty, Lindh had a sudden loss of vision in his left eye. Initial evaluations by two physicians did not associate the vision loss with the blows to the head. Following filing of the WCAB application, a QME reported that the blood circulation to the left eye was defective.

The QME concluded that, absent the work-related injury, Lindh “most likely would have retained a lot of his vision in that eye,” although he could not “guess” how much. The QME agreed it was possible not vision loss could have ever occurred, but also agreed that even without the blows to the head, Lindh could have lost vision due to his underlying condition. The QME also reported that Lindh likely would not have suffered any vision loss from the blows if he had not had the underlying condition of vascular spasticity, a rare medical condition.

After considerable questioning in reports and deposition, the QME finally apportioned 85 percent of the permanent disability to the underlying asymptomatic condition (as of the date of injury) and 15 percent to his industrial injury.

Both the Trial Judge and WCAB rejected the apportionment and awarded a 40% permanent disability, essentially concluding the QME apportioned to causation rather that permanent disability.

On Appeal, the attorney for Lindh argued that since the condition was asymptomatic and may never have resulted in vision loss, absent the blows to the head, apportionment could not be found,

The Court of Appeal rejected that argument and concluded:

"More importantly, the post-amendment cases do not require medical evidence that an asymptomatic preexisting condition, in and of itself, would eventually have become symptomatic. Rather, what is required is substantial

medical evidence that the asymptomatic condition or pathology was a contributing cause of the disability.

(See Brodie, supra, 40 Cal.4th at p. 1328 [“the new approach to apportionment is to look at the current disability and parcel out its causative sources – nonindustrial, prior industrial, current industrial – and decide the amount directly caused by the current industrial source.”]

Under the current law, the salient question is whether the disability resulted from both nonindustrial and industrial causes, and if so, apportionment is required. (See Brodie, supra, 40 Cal.4th at p. 1328; Jackson, supra, 11 Cal.App.5th at pp. 116-117; Acme Steel, supra, 218 Cal.App.4th at p. 1142.) Whether or not an asymptomatic preexisting condition that contributed to the disability would, alone, have inevitably become manifest and resulted in disability, is immaterial."

PDRS CVC VS ADDITION OF DISABILITY

Kite vs. WCAB - forklift driver who injured both of his hips and underwent surgery to have hips replaced

Findings:

- The CVC method of combining disabilities remains the preferred method, since it's presumed correct
- possibility of rebuttal and use of the CVC in favor of the "addition method, of disability since the medical evidence supported Kite's "synergistic effect analysis."
- For it to be substantial medical evidence, the evaluator's discussion needs to closely resemble the "synergistic effect analysis"

Factors for Determination of Synergistic Effects of Injury

Synergistic effect - person who is able to compensate through the opposite appendage for an injury to one limb is to some extent less disabled or impaired than someone who cannot so compensate

- In Sweetman - did not overlap; thus could be added bc psyche and upper extremity impairments do not overlap; therefore should be added
- Generally, requires substantial medical evidence to rebut PDRS and show why addition is more accurate