WORKERS' COMPENSATION APPEALS BOARD
STATE OF CALIFORNIA

JULIAN SOSA, *Applicant*

vs.

RACE ENGINEERING, INC.; INSURANCE COMPANY OF THE WEST, *Defendants*

Adjudication Number: ADJ11024874
Los Angeles District Office

OPINION AND ORDER DENYING PETITION FOR RECONSIDERATION

Applicant seeks reconsideration of the Findings and Award (F&A) issued by the workers' compensation administrative law judge (WCJ) on March 4, 2022.[1] By the F&A, the WCJ found that applicant sustained injury arising out of and in the course of employment (AOE/COE) to his right hand, psyche and sleep. The injury was found to have caused 10% permanent disability for the right hand only. The WCJ found that applicant's psyche and sleep conditions were a compensable consequence of his right hand injury, and "therefore not allowed to be combined to permanent disability."

Applicant contends that he may receive permanent impairment for his sleep and psychiatric conditions pursuant to the amendment to Labor Code[2] section 4660.1 made in 2019. (Lab. Code, § 4660.1.) Alternatively, applicant contends that his psychiatric disorder was directly caused by the injury and thus, the resulting permanent impairment is compensable. Lastly, applicant argues that his psychiatric disorder was the result of a violent act and qualifies for the exception in section 4660.1(c)(2)(A).

We did not receive an answer from defendant. The WCJ issued a Report and Recommendation on Reconsideration (Report) recommending that we deny reconsideration.

We have considered the allegations of applicant's Petition for Reconsideration and the contents of the WCJ's Report with respect thereto. Based on our review of the record and for the reasons discussed below, we will deny applicant's Petition.

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[1] The F&A was dated February 28, 2022, but was not served until March 4, 2022.
[2] All further statutory references are to the Labor Code unless otherwise stated.

FACTUAL BACKGROUND

Applicant claims injury to the right hand, psyche, internal system, skin, gastrointestinal system and sleep on June 1, 2017. Applicant's injury occurred when he was loading a heavy ice machine that tilted and fell towards him causing him to put up his hand to get out of the way. (Minutes of Hearing and Summary of Evidence, January 12, 2022, pp. 2-4.) Defendant has accepted injury to the right hand, but disputes compensability for the other parts pled. An application for adjudication of claim was filed by applicant's attorney on September 13, 2017.

Nichole McKenzie, Psy.D. initially provided psychological treatment to applicant. She diagnosed him with an adjustment disorder and pain disorder. (Applicant's Exhibit No. 7, Nichole McKenzie, Psy.D. report, July 23, 2018, p. 11.) Regarding causation, Dr. McKenzie opined:

> At this point, the predominance threshold of greater than 50% for current psychiatric claims has been met. The predominant cause of all causes appears to have been the applicant's industrial injury reaching and exceeding the necessary predominance threshold.

(*Id.* at p. 10.)

Seth Hirsch, Ph.D. subsequently provided psychological treatment to applicant. He first evaluated applicant on August 23, 2019. (Applicant's Exhibit No. 2, Seth Hirsch, Ph.D. report, August 23, 2019.) He diagnosed applicant with major depressive disorder, generalized anxiety disorder, simple phobia, posttraumatic stress disorder and insomnia. (*Id.* at p. 2.) There is no discussion of causation for Dr. Hirsch's diagnoses in this report.

Dr. Hirsch issued a permanent and stationary report dated September 28, 2019. (Applicant's Exhibit No. 1, Seth Hirsch, Ph.D. report, September 28, 2019.) His Axis I diagnoses remained the same as from his August 23, 2019 report. (*Id.* at p. 6.) Dr. Hirsch stated: "The applicant has reached the necessary predominance threshold for current stress claims." (*Id.* at p. 5.) There is no other discussion about causation of injury in this report.

Richard Dorsey, M.D. evaluated applicant as the psychiatric qualified medical evaluator (QME). Dr. Dorsey diagnosed applicant with a depressive disorder. (Joint Exhibit No. 4, PQME report of Richard Dorsey, M.D., January 15, 2020, p. 16.) With respect to causation, Dr. Dorsey opined: "Occupational physical injury with pain and disability is the predominant cause." (*Id.* at p. 17.) He provided a GAF score of 58 and apportioned permanent disability as follows:

1. Pain in the right hand contributes 70%.
2. Pain in the left hand contributes 20%.
3. Headaches contribute 10%.

(*Id.*)

Applicant's psychiatric condition was considered to be permanent and stationary. (*Id.* at p. 16.)

Steven Brourman, M.D. acted as the orthopedic panel QME. Dr. Brourman found that applicant sustained injury to his right index and middle fingers. (Joint Exhibit No. 2, PQME report of Steven Brourman, M.D., November 27, 2018, p. 14.) This caused 4% whole person impairment (WPI) to the right hand plus an additional 3% WPI for pain. (*Id.* at pp. 14-15.) There was no apportionment of disability to other factors besides the June 1, 2017 event. (*Id.* at p. 17.)

The matter proceeded to trial on September 16, 2021 and January 12, 2022. The issues at trial included parts of the body injured for psyche, internal, skin, gastrointestinal and sleep, permanent disability, and "Whether psyche PD is a compensable consequence of the right hand and not allowed to be combined to permanent disability." (Minutes of Hearing, September 16, 2021, pp. 2-3.)

The WCJ issued the resulting F&A as outlined above.

DISCUSSION

I.

The employee bears the burden of establishing the approximate percentage of permanent disability caused by the industrial injury. (*Escobedo v. Marshalls* (2005) 70 Cal.Comp.Cases 604, 612 (Appeals Board en banc).) Applicant's injury occurred in 2017 and therefore his permanent disability must be determined pursuant to section 4660.1, which applies to injuries on or after January 1, 2013.

Section 4660.1 was originally enacted as part of Senate Bill (SB) 863 and became effective on January 1, 2013. (Stats. 2012, ch. 363, § 60.) The original language of section 4660.1(c)(1) was:

> Except as provided in paragraph (2), **there shall be no increases in impairment ratings for sleep dysfunction, sexual dysfunction, or psychiatric disorder, or any combination thereof, arising out of a compensable physical injury**. Nothing in this section shall 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.
>
> (Former Lab. Code, § 4660.1(c)(1), amended by Stats. 2019, ch. 497, § 189, eff. Jan. 1, 2020, emphasis added.)

On May 10, 2019, the Appeals Board issued an en banc decision analyzing the statute in its original language and concluding in relevant part:

> Section 4660.1(c) does not bar an employee from claiming a psychiatric injury or obtaining treatment or temporary disability for a psychiatric disorder that is a compensable consequence of a physical injury occurring on or after January 1, 2013. Additionally, section 4660.1(c) does not apply to psychiatric injuries directly caused by events of employment. Section 4660.1(c)(1) only bars an increase in the employee's permanent impairment rating for a psychiatric injury that is a compensable consequence of a physical injury occurring on or after January 1, 2013. However, the employee may receive an increased impairment rating for a compensable consequence psychiatric injury if the injury falls under one of the statutory exceptions outlined in section 4660.1(c)(2).
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> (*Wilson v. State of CA Cal Fire* (2019) 84 Cal.Comp.Cases 393, 403 (Appeals Board en banc).)

Section 4660.1 was amended effective January 1, 2020 as part of Assembly Bill (AB) 991. The amended statute reads as follows in relevant part:

> This section applies to injuries occurring on or after January 1, 2013.
>
> (a) In determining the percentages of permanent partial or permanent total disability, account shall be taken of the nature of the physical injury or disfigurement, the occupation of the injured employee, and the employee's age at the time of injury.
>
> (b) For purposes of this section, the "nature of the physical injury or disfigurement" shall incorporate the descriptions and measurements of physical impairments and the corresponding percentages of impairments published in the American Medical Association (AMA) Guides to the Evaluation of Permanent Impairment (5th Edition) with the employee's whole person impairment, as provided in the Guides, **multiplied by an adjustment factor of 1.4.**
>
> (c)
> (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.
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> (Lab. Code, § 4660.1(a)-(c), emphasis added.)[3]

Applicant contends that the 2019 amendment to the language in section 4660.1(c)(1) that the impairment rating for sleep dysfunction, sexual dysfunction, or psychiatric disorder "shall not increase" was intended to preclude application of the 1.4 adjustment in section 4660.1(b), but otherwise provide compensability for permanent impairment resulting from these conditions. Applicant further contends that since this statutory amendment was made subsequent to *Wilson*, the Legislature intended to change the statute in response to how it was interpreted by the Appeals Board in the en banc decision.

AB 991 is referred to in the Legislative Counsel's digest as "Maintenance of the codes." (Legis. Counsel's Dig., Assem. Bill No. 991 (2019-2020 Reg. Sess.).) The digest states the following for AB 991:

> Existing law directs the Legislative Counsel to advise the Legislature from time to time as to legislation necessary to maintain the codes.
>
> This bill would make nonsubstantive changes in various provisions of law to effectuate the recommendations made by the Legislative Counsel to the Legislature.
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> (*Id.*)

[3] Although applicant's claim was pending prior to the amendment to section 4660.1, the current version applies to his claim. (See Lab. Code, § 4660.1 ["[t]his section applies to injuries occurring on or after January 1, 2013"]; see also *Abney v. Aera Energy* (2004) 69 Cal.Comp.Cases 1552, 1558 (Appeals Board en banc) ["It is well settled that where a right or a right of action depending solely on statute is altered or repealed by the Legislature, in the absence of contrary intent, e.g., a savings clause, the new statute is applied even where the matter was pending prior to the enactment of the new statute."].)

As applicant argues, the Legislature is presumed to be aware of prior judicial construction of a statute when making amendments. (*Palos Verdes Faculty Assn. v. Palos Verdes Peninsula Unified Sch. Dist.* (1978) 21 Cal.3d 650, 659.) It may thus be presumed that the Legislature was aware of the May 10, 2019 *Wilson* en banc decision when it amended section 4660.1(c)(1) as part of AB 991.

The Legislative Counsel's digest for AB 991 expressly states that these statutory amendments were "nonsubstantive changes" based on its recommendations to the Legislature "to maintain the codes." Government Code section 10242 provides for the Legislative Counsel to maintain the codes as follows:

> The Legislative Counsel shall advise the Legislature from time to time as to legislation necessary **to maintain the codes** and legislation necessary to codify such statutes as are enacted from time to time subsequent to the enactment of the codes. **Such recommendations shall include such restatement without substantive change as will best serve clearly and correctly to express the existing provisions of the law.**
>
> (Gov. Code, § 10242, emphasis added.)

Amendments to maintain the codes based on recommendations from the Legislative Counsel are specifically intended to restate existing law without substantive changes.

The statutory interpretation advocated by applicant would mark a substantive change in how permanent impairment is treated for sleep dysfunction, sexual dysfunction, or psychiatric disorders for injuries subject to section 4660.1. This construction contradicts both the digest's express characterization of the statutory amendments as "nonsubstantive" and the lack of any legislative history in AB 991 indicating that the Legislature intended to permit compensability for permanent impairment for these conditions, but without application of the 1.4 adjustment. Applicant's interpretation also conflicts with the Legislature's intent in enacting section 4660.1(c) as outlined in *Wilson*. (See *Wilson*, *supra*, 84 Cal.Comp.Cases at pp. 408-409 [the Legislature's intent in enacting SB 863 was to limit "add-ons" for sleep disorders, sexual disorders and, to a limited extent, for psychological disorders].) In the absence of legislative history indicating that the 2019 amendment to section 4660.1(c)(1) was more than a nonsubstantive change or intended to reinstate compensability for permanent impairment for these conditions, applicant's contentions regarding the statutory amendment are unpersuasive.

II.

In *Wilson*, the Appeals Board opined that in order to receive an increased impairment rating for a psychiatric injury, the employee "bears the burden of proving [the] psychiatric injury was directly caused by events of employment, or, alternatively, if the psychiatric injury is a compensable consequence of the physical injury, applicant must show that the psychiatric injury resulted from either: 1) being a victim of a violent act or direct exposure to a significant violent act, or 2) a catastrophic injury." (*Wilson*, *supra*, 84 Cal.Comp.Cases at p. 403.) The decision further clarified that causation of an injury may be either direct or a compensable consequence of an injury:

> Causation of an injury may be either direct or as a compensable consequence of a prior injury. More precisely, an injury may be directly caused by the employment. Alternatively, a subsequent injury is a compensable consequence of the first injury where it "is not a new and independent injury but rather the direct and natural consequence of the" first injury. (*Carter v. County of Los Angeles* (1986) 51 Cal.Comp.Cases 255, 258 (Appeals Board en banc).)
>
> (*Id.*)

Due to this distinction between direct and compensable consequence psychiatric injuries, the *Wilson* decision held that:

> The evaluating physicians must render an opinion as to whether the psychiatric injury was predominantly caused by actual events of employment. The physicians must further specify if the psychiatric injury is directly caused by events of employment or if the psychiatric injury is a compensable consequence of the physical injury.
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> (*Id.* at p. 414.)

Applicant contends that his psychiatric condition was directly caused by the injurious event. Although both applicant's treating physicians found his psychiatric conditions to be predominantly caused by his industrial injury, neither opined that these conditions were directly caused by the June 1, 2017 event. The psychiatric QME Dr. Dorsey opined with respect to causation: "Occupational physical injury with pain and disability is the predominant cause." Dr. Dorsey conducted a comprehensive evaluation including taking a complete history from applicant and review of his medical records. He explained the rationale for his conclusions to a reasonable medical probability. (*Escobedo*, *supra*, 70 Cal.Comp.Cases at p. 621 ["a medical opinion must be

framed in terms of reasonable medical probability, it must not be speculative, it must be based on pertinent facts and on an adequate examination and history, and it must set forth reasoning in support of its conclusions"].) Dr. Dorsey's reporting supports the WCJ's finding that applicant's psychiatric condition was a compensable consequence of his physical injury, not directly caused by the June 1, 2017 incident.

There is no evidence in the record that applicant's sleep condition was the direct result of the injury. There is no exception in section 4660.1(c) permitting permanent impairment for a sleep condition that is a compensable consequence of an injury. Consequently, the WCJ correctly did not provide permanent impairment for applicant's sleep condition.

III.

Applicant contends in the alternative that his injury resulted from being a victim of a violent act, and thus, he qualifies for an increased impairment rating for the psychiatric condition per section 4660.1(c)(2)(A). In *Wilson*, the Appeals Board stated that panel decisions "have defined a 'violent act' [under section 4660.1(c)(2)(A)] as an act that is characterized by either strong physical force, extreme or intense force, or an act that is vehemently or passionately threatening." (*Wilson*, *supra*, 84 Cal.Comp.Cases at p. 405, citing *Larsen v. Securitas Security Services* (2016) 81 Cal.Comp.Cases 770 [2016 Cal. Wrk. Comp. P.D. LEXIS 237][4].) The *Wilson* decision outlined how to evaluate whether an injury qualifies for the "violent act" exception:

> Evaluation of whether an injury resulted from a "violent act" under section 4660.1(c)(2)(A) focuses on the *mechanism* of injury. This focus on the mechanism of injury comports with the statute's language, which emphasizes the *event causing the injury*, rather than the injury itself: the statute expressly refers to being a victim of or direct exposure to a violent "act." The word "injury" is not in this subsection. The focus in evaluating whether an injury qualifies for the exception in section 4660.1(c)(2)(A) is therefore on the mechanism of injury, not on the injury itself.
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> (*Wilson*, *supra*, 84 Cal.Comp.Cases at p. 406, emphasis in original.)

[4] Unlike en banc decisions, panel decisions are not binding precedent on other Appeals Board panels and WCJs. (See *Gee v. Workers' Comp. Appeals Bd.* (2002) 96 Cal.App.4th 1418, 1425, fn. 6 [67 Cal.Comp.Cases 236].) However, panel decisions are citable authority and may be considered to the extent their reasoning is persuasive, particularly on issues of contemporaneous administrative construction of statutory language. (See *Guitron v. Santa Fe Extruders* (2011) 76 Cal.Comp.Cases 228, 242, fn. 7 (Appeals Board en banc); *Griffith v. Workers' Comp. Appeals Bd.* (1989) 209 Cal.App.3d 1260, 1264, fn. 2 [54 Cal.Comp.Cases 145].)

Previous panels have found an injury resulted from a violent act under the following circumstances: a security guard struck by a car while walking on patrol (*Larsen*, *supra*), a landscaper falling from a tree hitting his head multiple times and losing consciousness (*Greenbrae Mgmt. v. Workers' Comp. Appeals Bd.* (*Torres*) (2017) 82 Cal.Comp.Cases 1494 (writ den.)), and a truck driver being pinned and crushed in his vehicle for approximately 35-40 minutes with a fractured neck (*Madson v. Michael J. Cavaletto Ranches* (February 22, 2017, ADJ9914916) [2017 Cal. Wrk. Comp. P.D. LEXIS 95]).

Applicant's injury occurred when he tried to stop an ice machine from falling. The force of this incident cannot be characterized as either extreme or intense, such as being struck by a car, falling from a tree and being struck in the head multiple times or being pinned and crushed in a truck for 35-40 minutes after rolling the truck. (See e.g., *Garcia v. Harvest Church* (November 9, 2018, ADJ10544189) [2018 Cal. Wrk. Comp. P.D. LEXIS 530] [injury did not result from a violent act when a gate fell crushing applicant's foot while he was opening it and he was able to drive himself to receive medical treatment]; *Ugalde v. Rockwell Drywall, Inc.* (June 14, 2019, ADJ9474687) [2019 Cal. Wrk. Comp. P.D. LEXIS 213] [taper who fell while working on 2½-foot stilts and lost consciousness did not sustain an injury as a result of a violent act].) The incident in this case also cannot plausibly be characterized as vehemently or passionately threatening. We consequently agree with the WCJ's conclusion that applicant did not meet his burden of proving that his injury qualified for the statutory exception and his permanent disability rating may not be increased utilizing section 4660.1(c)(2)(A).

In conclusion, we will deny applicant's Petition.

For the foregoing reasons,

IT IS ORDERED that applicant's Petition for Reconsideration of the Findings and Award issued by the WCJ on March 4, 2022 is **DENIED**.

WORKERS' COMPENSATION APPEALS BOARD

/s/ MARGUERITE SWEENEY, COMMISSIONER

I CONCUR,

/s/ CRAIG SNELLINGS, COMMISSIONER

/s/ KATHERINE A. ZALEWSKI, CHAIR

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

May 23, 2022

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

DIETZ GILMOR & CHAZEN
JULIAN SOSA
MOORE & ASSOCIATES

AI/*pc*

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