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PSYCH, SEX AND SLEEP in WORKERS' COMPENSATION

PARMA

February, 2018

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**MOTOR VEHICLE ACCIDENT CONSTITUTES "VIOLENT ACT"
SUPPORTING AWARD OF PERMANENT DISABILITY
FOR PSYCHIATRIC INJURY**

MADSEN vs. CAVALETTO RANCHES

(February 22, 2017) ADJ 9914916

Applicant was involved in a motor vehicle accident on May 17, 2013 while employed by defendant as a Truck Driver. The collision resulted in applicant's truck rolling over and pinning him inside the vehicle. He was trapped upside down in the truck for 30 – 45 minutes and had to be extricated using the "jaws of life". As a result, applicant alleged injury to the head, neck, shoulders, nervous system and psyche.

The applicant was evaluated by Qualified Medical Examiners for the physical and psychological issues. The report of the physical injuries rated 39% permanent disability. The psychiatric report rated 35% permanent disability.

At Trial, the issue was whether the applicant's psychiatric impairment was compensable under Labor Code Section 4660.1 (c). That Section states that "...there shall be no increase in impairment ratings for sleep dysfunction, sexual dysfunction, or psychiatric disorder, or any combination thereof, arising out of a compensable physical injury." There is an exception for psychiatric injury resulting from "being a victim of a violent act or direct exposure to a significant violent act" or from "a catastrophic injury".

The Workers Compensation Judge found that Labor Code Section 4660.1 applied and applicant was barred from receiving additional permanent disability for the injury to the psyche. However, he was entitled to an Award of medical treatment for that injury. The Workers' Compensation Judge issued an Award of 39% permanent disability, based solely on the physical injuries.

Applicant filed a Petition for Reconsideration arguing that the injury to the psyche was the direct result of the motor vehicle accident, not as a consequence of the physical injuries. In addition, the psychiatric injury came within the "violent act" exception to Labor Code Section 4660.1.

The WCAB granted the Petition for Reconsideration.

First, the Board noted that Labor Code Section 4660.1(c) does not apply to psychiatric injury directly caused by events of employment. Here, the QME was of the opinion that the applicant suffered from post-traumatic stress disorder caused by the motor vehicle accident itself and not the compensable physical injury.

The Commissioners went on to state that even if Labor Code Section 4660.1(c)

was applicable, the applicant's psychiatric injury resulted from a "violent act". Citing Larson vs. Securitas Security Services, the Commissioners described a violent act as "characterized by either a strong physical force, extreme or intense force or an act that is vehemently or passionately threatening." Here, the circumstances of the accident, including being trapped in the vehicle, requiring the "jaws of life", etc., constituted a violent act.

The Workers Compensation Judge's Award was amended to include permanent disability for the psychiatric injury, combined with the physical injury and resulted in 60% permanent disability.

**AUTOMOBILE ACCIDENT CONSTITUTES A VIOLENT ACT EXCEPTION TO
LABOR CODE SECTION 4660.1(c) BASED ON THE FACTS IN EVIDENCE**

**ALLEN V. CARMAX, TRAVELERS PROPERTY CASUALTY COMPANY OF
AMERICA**

2017 Cal. Wrk. Comp. P.D. Lexis 303

Applicant was working as a satellite service manager for defendant when he was involved in an industrial motor vehicle accident on May 22, 2014. The brakes failed during a test drive of the vehicle, so applicant was forced to swerve into a cement pillar to avoid striking a pedestrian. Applicant sustained injuries to his low back, right shoulder, neck, bilateral knees, and as a compensable consequence thereof, to the psyche.

The psychiatric QME opined that the causation of applicant's psychiatric impairment is apportioned 10% to non-industrial causes, 70% to the residual effects of applicant's industrial orthopedic injuries, and 20% to direct psychiatric injury.

The WCJ found that applicant sustained an industrial injury to his psyche and that the injury constituted a "violent act" pursuant to section 4660.1(c)(2)(A), and awarded permanent disability. That Section states that "...there shall be no increase in impairment ratings for sleep dysfunction, sexual dysfunction, or psychiatric disorder, or any combination thereof, arising out of a compensable physical injury." There is an exception for psychiatric injury resulting from "being a victim of a violent act or direct exposure to a significant violent act" or from "a catastrophic injury".

Defendant sought reconsideration of the Findings and Award, arguing that the award of permanent disability improperly included impairment from the applicant's psychiatric injury, and the mechanism of injury (automobile accident) does not constitute a violent act.

A violent act for the purposes of 4660.1 is characterized by either strong physical force, extreme or intense force, or an act that is vehemently or passionately threatening. Here, the defendant argued that the legislature did not intend for all automobile accidents to fall within this exception, and further, the air bag did not deploy and the applicant did not lose consciousness.

The WCAB agreed that not all automobile accidents will qualify as violent acts, but affirmed the WCJ's determination that this particular accident constituted a violent act, based on the facts in evidence. Primarily, the applicant was traveling at 20 to 30mph without the ability to stop the vehicle, and he felt an immediate intense pain after slamming into the concrete pillar.

The Board would not consider the airbag deployment argument, because there was no evidence explaining why the airbag failed to deploy.

The petition for reconsideration of findings and award was denied as to the issue of violent act exception, and granted for the sole issue of allowing credit for temporary disability overpayments.

**WCAB DEFINES “VIOLENT ACT” UNDER
LABOR CODE §4660.1(c)**

LARSEN vs. SECURITAS SECURITY SERVICES
(2016) 81 Cal. Comp. Cases 770

Applicant was working as a security guard for defendant when she was struck by a car while on patrol walking through a parking lot on February 21, 2013. In addition to physical injuries, applicant alleged injury to the psyche.

The applicant was evaluated by a QME in psychiatry who diagnosed cognitive disorder, post-traumatic stress disorder, and depressive disorder. In her report, the doctor noted that the applicant was struck from behind by the vehicle and hit her head as she fell. The applicant described hitting her head so hard “she thought she was going to die.”

At Trial, the defendant argued that an Award of permanent disability for injury to the psyche was not consistent with Labor Code §4660.1(c) which prohibits an increase in permanent disability for psychiatric disability that arises out of a compensable physical injury, because the applicant’s injury did not arise out of a “violent act.” The Workers’ Compensation Judge disagreed and awarded permanent disability for both the physical and psychiatric injuries.

The defendant filed a Petition for Reconsideration which was denied.

The WCAB panel reviewed the language of Labor Code §4660.1(c) and its reference to a “violent act” within the meaning of Labor Code §3208.3. However, neither Code section defines the term “violent act.”

The panel rejected defendant’s definition as “an act of criminal or quasi-criminal violence that is perpetuated against the applicant.” Instead, it relied on the broader definition from Black’s Law Dictionary: “Of, relating to, or characterized by strong physical force.”

In this case, applicant was struck by a vehicle with sufficient force that she struck her head and lost consciousness. They held that “being hit by a car under these circumstances constitutes a violent act.”

**AMPUTATED FINGERS QUALIFY AS CATASTROPHIC INJURY AND PROPERLY
FUNCTIONING MACHINE QUALIFIES AS VIOLENT MECHANISM OF INJURY
FOR VIOLENT ACT EXCEPTION TO LABOR CODE SECTION 4660.1**

GUERRERO V. RAMCAST STEEL FABRICATION

2017 Cal. Wrk. Comp. P.D. Lexis 285

Applicant worked as a maintenance mechanic responsible for the repair of metal forming equipment by defendant. On January 24, 2013, while repairing a hydraulic press, he lost his balance and his foot hit the pedals activating the machine press, which resulted in the amputation of his long, ring, and small finger of his left hand.

Defendant argued that the applicant should not be compensated for injury to his psyche, because the injury is not catastrophic, and the mechanism of injury here does not fall under the violent act exception to Labor Code Section 4660.1 because there was no malfunction. That Section states that "...there shall be no increase in impairment ratings for sleep dysfunction, sexual dysfunction, or psychiatric disorder, or any combination thereof, arising out of a compensable physical injury." There is an exception for psychiatric injury resulting from "being a victim of a violent act or direct exposure to a significant violent act" or from "a catastrophic injury".

The WCAB disagreed with defendant and denied the petition for reconsideration on this issue. The violent act exception to 4660.1 may include other acts that are characterized by either strong physical force, extreme or intense force, or are vehemently or passionately threatening.

Here, the mechanism of injury (crushed by a punch press) was violent even though the machine was functioning in a normal and anticipated matter. It was the sequence of events that led to the amputation of the applicant's fingers that is the proper focus of the inquiry, not the properly functioning machine.

For the inquiry into catastrophic injury, the court paid particular attention to doctor's reports, course of treatment, surgical interventions and outcomes. Although the code does not give a comprehensive definition of catastrophic injury, it at least includes loss of limb, severe head injury or severe burn. Here, the applicant lost 75% of his hand and his injuries were consistently described as "severe", "mangled", and "miserable".

The Findings and Award was affirmed, and reconsideration granted for the limited purpose of amending the Findings and Award to include the finding that applicant sustained an industrial injury to his psyche.

**APPLICANT'S 2014 CLAIM FOR INJURY TO PSYCHE
NOT BARRED BY LABOR CODE SECTION 4660.1(C)**

**TORRES vs. GREENBRAE MANAGEMENT
(2017) ADJ 90355637**

Applicant was employed by defendant as a Maintenance Worker when he sustained injury to his head, neck, back, ears, psyche and cognitive difficulties on January 8, 2014. The injuries occurred when the applicant fell while trimming a tree. He was wearing a harness and was secured to the tree by a rope. The branch on which the applicant was standing broke and when he fell, he was suspended approximately 20 feet in the air and struck his head against the tree several times as the rope swayed. The applicant's physical injuries rated 57% permanent disability.

Defendant argued that applicant's claim of additional impairment due to the injury to the psyche was barred by Labor Code Section 4660.1(c). Applicant argued that the injury to the psyche was a direct result of his injury, and not a compensable consequence of the physical injuries. He also argued that his injury constituted a "catastrophic injury" which is an exception under Labor Code Section 4660.1(c). In addition, he argued that his injuries fell within the "violent act" exception to Labor Code Section 4660.1(c). Finally, he argued that additional impairment for the injury to the psyche was permitted under an Almaraz/Guzman rating. If the additional impairment was included, the applicant's injuries rated 78% permanent disability.

Following trial, the Workers Compensation Judge found that the applicant did not meet any of the exceptions to Labor Code Section 4660.1. Therefore, applicant was barred from recovering for the additional impairment.

Applicant filed a Petition for Reconsideration.

In granting the applicant's Petition, the Commissioners addressed the claim that applicant's injury to the psyche was directly caused by the events of employment, rather than as a compensable consequence of the physical injuries. They noted that the Agreed Medical Evaluator found that the psychiatric injury was "secondary to the mild traumatic brain injury". However, he also reported that "certain elements of the applicant's psychiatric injury may have been caused by the fall itself, and not flowing from the compensable physical injury." Further, the physician did not delineate what percentage of impairment may have been caused by the direct events of employment and what percentage was caused as a compensable consequence of the physical injury. Therefore, the record on this issue was insufficient to determine if the impairment was a result of a direct injury.

Although the Agreed Medical Evaluator's opinion was not clear, the Commissioners found that the applicant was entitled to the additional impairment because the injury was the result of a "violent act". In reaching that decision, the panel relied on Larson vs. Securitas Security Services and Madsen vs. Canaletto Ranches in which the term "violent act" for purposes of Labor Code Section 4660.1 is defined as "an act that is characterized by either strong physical force, extreme or intense force, or an act that is vehemently or passionately threatening".

They rejected defendant's argument that the use of the word "victim" in Section 4660.1 indicated the legislature's intent that a violent act to be perpetuated by a third party, such as a criminal act.

Having found that the applicant's psychiatric injuries fell within the violent act exception, the Board did not address applicant's additional arguments that the injuries should be considered a "catastrophic injury" or that an Almaraz/Guzman rating would allow for inclusion of the psychiatric impairment.

Based on the above analysis, the Board rescinded the Workers Compensation Judge's award and issued a new award of 78% permanent disability.

**PERMANENT DISABILITY FOR SEXUAL DYSFUNCTION
RESULTING FROM MEDICAL TREATMENT
OF INDUSTRIAL INJURY NOT
BARRED BY LABOR CODE SECTION 4660.1 (C)**

CITY OF LOS ANGELES vs. WCAB (MONTENEGRO)

(2016; Writ Denied) 81 CCC 611

Applicant was employed by the City as a Firefighter for 33 years. He filed an Application for Adjudication of Claim alleging injury in the form of diabetes, hypertension, heart disease, prostate cancer and sexual dysfunction. The treatment for the prostate cancer required surgical removal of the prostate and seminal vesicle.

The prostate cancer was evaluated by an Agreed Medical Evaluator who determined that applicant's prostate cancer was industrially related and that the applicant's sexual dysfunction was caused by the removal of the prostate.

The case was tried on the sole issue of whether permanent disability for the sexual dysfunction was barred by Labor Code Section 4660.1 (c)(1). That Section prohibits an increase in impairment rating for sleep dysfunction, sexual dysfunction and/or psychiatric disorders arising out of a compensable physical injury. The parties agreed that the applicant's injuries would rate 78% permanent disability if the sexual dysfunction was included and 74% without. The Workers Compensation Judge awarded 78% permanent disability.

Defendant filed a Petition for Reconsideration, relying on Labor Code Section 4660.1 (c)(1). The Petition was denied.

The Board agreed with the Workers Compensation Judge that the applicant's sexual dysfunction was due to nerve damage caused by removal of the prostate gland and seminal vesicles. The surgery, in turn, was a direct result of the industrial prostate cancer. Therefore, the additional permanent disability was not barred by Labor Code Section 4660.1 (c) (1).

The defendant filed a Petition for Writ of Review which was summarily denied on July 1, 2016.

**APPLICANT RETAINS RIGHT TO OBTAIN MEDICAL TREATMENT FOR
COMPENSABLE CONSEQUENCE PSYCHIATRIC INJURY UNDER LABOR CODE
SECTION 4660.1**

HERNANDEZ V. FREMONT BANK

2015 Cal. Wrk. Comp. P.D. Lexis 470

Applicant worked as a bank teller for defendant, when she sustained an injury to her knee on October 10, 2014. She filed an application alleging injury to her knee, and then another alleging a cumulative trauma injury to her left leg and foot. Both applications were later amended to include injury to psyche, stomach, and internal organs.

The Medical Unit issued a panel in the field of pain medicine. Defendant canceled the QME evaluation, and later agreed to an orthopedic AME. The applicant petitioned for assignment of an additional panel in psychiatry, which was granted by the WCJ.

Defendant filed a timely Petition for Removal, arguing that they would suffer irreparable harm or significant prejudice from the Judge's Order to the Medical Unit to issue an additional QME panel in the field of psychiatry. Defendant relied on Labor Code Section 4660.1(c)(1). That section prohibits an increase in impairment rating for sleep dysfunction, sexual dysfunction and/or psychiatric disorders arising out of a compensable physical injury.

The WCAB denied Defendant's petition for removal, and relied on the second sentence of 4660.1(c)(1), which states, "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." Although compensation for a permanent psychiatric impairment was not available to the applicant, she could not be deprived of her potential right to medical care or temporary disability indemnity on a psychiatric basis. The appropriate procedure to resolve dispute over industrial causation of psychiatric injury is to utilize a QME or AME.

**LC 4660.1 DOES NOT PRECLUDE AN EMPLOYEE FROM COLLECTING
TEMPORARY DISABILITY BENEFITS FROM AN ADD-ON PSYCHIATRIC INJURY**

LOPEZ V. GENERAL WAX CO., INC.

2017 Cal. Wrk. Comp. P.D. Lexis 291

Applicant worked as a candle maker for defendant for approximately 14 years. She sustained an admitted industrial injury on February 28, 2014, when her right index finger became stuck in a machine and resulted in the partial amputation of the finger. Applicant also suffered compensable injuries to her psyche, gastrointestinal system, and hypertension.

The psychiatric AME diagnosed the applicant with a major depressive disorder and post-traumatic stress disorder. The AME opined that the cause of the applicant's psychological injury was a combination of both the direct trauma and the chronic pain that later developed.

Applicant argued that her psychiatric permanent disability is compensable under Labor Code Section 4660.1(c) because the mechanism of injury constituted a violent act. Case law defines violent act as an "act that is characterized by either strong physical force, extreme or intense force, or an act that is vehemently or passionately threatening."

The WCAB agreed with the applicant, and found that the mechanism of injury constituted a violent act. But even if the mechanism of injury had not been found to qualify as a violent act, the Board pointed out that Section 4660.1 does not preclude the collection of temporary disability benefits. Even if the applicant's injury had not constituted an exception, any temporary disability would be compensable.



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