**THE “CATASTROPHIC INJURY” EXCEPTION AND THE RETURN OF COMPENSABLE CONSEQUENCE PSYCHE CLAIMS**

 5/20/19- Rommel Rosales – Senior Associate MSKW LLP

For injuries on or after January 1, 2013, *Labor Code* §4660.1(c)(1) provides that “[e]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.”  Since the Legislature’s enactment of *Labor Code* §4660.1(c)(1), we have certainly seen a reduction in the number of compensable consequence psyche claims.  However, with the recent en banc decision by the Workers’ Compensation Appeals Board (WCAB) on the “catastrophic injury” exception in *Wilson v. State of California Department of Forestry and Fire Protection*, there may be a concern that the shift is to allow for compensable consequence psyche claims to be liberally re-pursued.

An **exception to the rule** that limits the increase of permanent impairment in compensable psyche injuries arising from physical injuries is laid out in *Labor Code* §4660.1(c)(2).  Specifically, even if a psychiatric impairment flows from a physical injury, under *Labor Code* §4660.1(c)(2), an increased impairment rating for a psychiatric disorder shall not be subject to paragraph (1) if the compensable psychiatric injury resulted from either:

1. being a **victim of a violent act** or being directly exposed to a significant violent act within the meaning of *Labor Code* §3208.3; or
2. a **catastrophic injury**, including, but not limited to, loss of limb, paralysis, severe burn, or severe head injury.

               **CATASTROPHIC INJURY EXCEPTION**

The “catastrophic injury” exception is not clearly defined within the statute and there has not been much by way of case law on the interpretation and application of *Labor Code* §4660.1(c)(2) as to what constitutes a catastrophic injury.  However, the WCAB has now issued a noteworthy en banc decision in *Wilson* that provides an answer as to how it will define a catastrophic injury.

In Wilson, the injured worker was a firefighter who suffered injury to his lungs, psych, eye, head, brain, heart, and circulatory system as a result of smoke inhalation during wildfire firefighting.  Applicant was evaluated by multiple PQMEs, including a psychological PQME.  The psychological PQME diagnosed Applicant with a psychiatric disorder, noting the trauma surrounding Applicant’s extensive hospital treatment following the injury.  Despite Applicant’s psyche injury being accepted, the trial judge found Applicant was barred from obtaining a rating for any psyche PD under *Labor Code* §4660.1(c)(1).  Since Applicant’s psychiatric disorder was not directly caused by the injury and was not the result of a “violent act,” the issue was whether Applicant’s injury fell within the “catastrophic injury” exception under *Labor Code* §4660.1(c)(2).

The WCAB indicated that a determination as to whether an injury is catastrophic under *Labor Code* §4660.1(c)(2)(B) will be a fact-driven inquiry, which means this will ultimately be left to the workers’ compensation judge to decide.  The WCAB emphasized that the trier-of-fact must look solely at the physical injury without consideration of the psychiatric injury in evaluating the nature of the injury.

1. **FACTORS TO CONSIDER**

Of importance, the WCAB provided a list of factors that may be relevant in making the determination as to whether an injury is catastrophic.  **The WCAB specifies that the** injured worker need not prove all of the factors to prove a “catastrophic injury.”  It should be noted that this list of factors is not exhaustive, and the trier-of-fact may consider other relevant factors relating to the physical injury.  These factors are as follows:

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;

1. The **ultimate outcome when the employee’s physical injury is permanent and stationary**;

1. The **severity of the physical injury and its impact on the employee’s ability to perform activities of daily living** (ADLs);

1. 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

1. If the physical injury is an **incurable and progressive disease**.

In Wilson, the WCAB utilized the above-mentioned factors and performed a **fact-driven analysis** to determine whether Applicant’s injury is considered “catastrophic” under *Labor Code* §4660.1(c)(2).  The WCAB highlighted Applicant’s extensive treatment following the **injury to be serious and life-threatening as it involved hospitalization, a medically induced coma, and renal and respiratory failure**.  The injury left Applicant with significant medical problems that has substantially impacted his ability to perform ADLs, as well as unable to continue working as a firefighter.  The WCAB ultimately found Applicant’s injury to be catastrophic and that Applicant is entitled to an increased impairment rating for psyche PD.

The factors listed above by the WCAB in *Wilson* provide a **relatively broad framework** for a **trier-of-fact to work with and determine** what constitutes a “catastrophic injury” in any given case.  There are many questions that arise including how much weight a judge will give to any factor and what other factors a judge will consider in making their decision.  We will undoubtedly see an increase in litigation of permanent disability under *Labor Code* §4660.1(c)(2) arising from compensable physical injuries within the “catastrophic injury” exception.

1. **STRATEGIC APPLICATION – COMBATING COMPENSABLE CONSEQUENCE CATASTROPHIC INJURIES**

In taking a closer look at the analytical framework provided by *Wilson*, it is our belief that the WCAB has made it clear that the injury will need to be **very serious** to rise to the level of catastrophic.  Viewed through the right lens, *Wilson* has made it **even more stringent** to prove the facts necessary to overcome this exception.

If an Applicant attorney attempts to utilize *Wilson*, we as your defense attorneys will task ourselves with looking at Applicant’s claim from a comprehensive and fact-driven viewpoint to aggressively combat any characterization of the injury as catastrophic.  Make sure your attorney considers the following factors when defending against a potential “catastrophic injury” case:

1. **Severity of the Injury**

Applicant attorneys will likely attempt to argue that since the injured worker in *Wilson* sustained injuries to his lungs, psyche, eye, head, brain, heart, and circulatory system, an Applicant’s injury should be considered catastrophic if he/she sustained injury to multiple body parts.  To combat this, we will look to the severity of the injury itself to determine whether it has caused **permanent and life changing damage** to the injured worker.

If Applicant **can** **work, engage in daily living activities, and does not suffer from any serious medical issues**, it would be our contention that Applicant’s injury does not fall within the catastrophic injury exception.  This is where taking a fact intensive deposition of the Applicant, obtaining witness testimony, obtaining sub rosa/surveillance of the Applicant, and conducting a comprehensive and detailed review of Applicant’s medical reporting will play a significant role.

1. **Nature of Medical Treatment**

Applicant attorneys will attempt to utilize the fact that the injured worker in *Wilson* was hospitalized as a slippery slope for the catastrophic injury exception to apply.  However, hospitalization in and of itself does not trigger application of the catastrophic injury exception.  It should be noted that the injured worker in *Wilson* was hospitalized for more than two weeks, was intubated at times, placed on a mechanical respirator, placed in a medically induced coma, and suffered both renal and respiratory failure.

From a defense standpoint, we will look to the **nature of the medical treatment** provided to Applicant as a result of the injury by considering the following:

1. **Need for an ambulance** at the time of the injury;
2. **Whether Applicant was hospitalized**;
3. **Length of Applicant’s hospitalization**;
4. **Intensity of medical treatment** provided; and
5. Any **serious medical complications sustained** while undergoing treatment.

**CONCLUSION**

Although we may see an increase in the litigation of compensable consequence catastrophic injury cases, it will be very rare and difficult for an Applicant attorney to use the facts of *Wilson* for the catastrophic injury exception to apply.  We will continue to aggressively combat any potential catastrophic injury case by conducting a comprehensive and fact-driven analysis of Applicant’s claim from start to finish.

###### ***Written by Senior Associate, MSKW LLP, Rommel J. Rosales.***

*Rommel brings with him several years of workers’ compensation defense experience to the MSKW family.  Since 2014, Rommel has been aggressively handling the defense of workers’ compensation claims on behalf of insurance companies, third-party administrators, self-insureds, and employers.  Rommel has been successful in all stages of the defense of workers’ compensation claims.  One of Rommel’s proudest achievements was obtaining a take nothing at an AOE/COE Trial, saving his client from paying any expenses for continued discovery and litigation.  Rommel prides himself on providing effective, thorough, and timely communications, information, legal advice, and analysis to his clients.*

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