

APPLICANT FAILS TO PROVE CATASTROPHIC INJURY FOR PSYCHE IMPAIRMENT & FAILS TO PROVE 100% PERMANENT DISABILITY

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In *Schaan v. Jerry Thompson & Sons; Liberty Mutual*, applicant painter claimed a cumulative trauma injury to his shoulders, as well as GERD, psyche, sleep, sexual dysfunction, hypertension and digestive system. The PMR PQME assigned permanent work restrictions for the shoulders and assigned 21% WPI for the right shoulder and 26% WPI for the left shoulder (which included 3% add-on for pain).

The internal medicine PQME assigned 6% WPI for GERD, with 90% apportionment to the injury, 3% WPI for sleep disorder and 3% WPI for sexual dysfunction. The PQME did not provide permanent work restrictions.

The psyche PQME diagnosed applicant with major depressive disorder, found predominant cause to the CT injury, attributed the depression to pain from the orthopedic injury and assigned 18% WPI, with 95% apportionment to the injury. The PQME did not provide permanent work restrictions.

Applicant's vocational expert opined applicant was unable to compete in the open labor market due to the effects of the orthopedic and psyche impairments. In addition, applicant's bowel accidents due to his GERD and his daily use of opiate medication would interfere with his ability to work. The expert also opined applicant was not amenable to vocational rehabilitation. Therefore, applicant had 100% diminished future earnings capacity.

Based on applicant's vocational factors and the permanent work restrictions, defendant's vocational expert opined applicant's diminished future earnings capacity was 54% for direct job placement options.

The case proceeded to trial on the issues of (1) body parts (psyche, sleep, sexual dysfunction, hypertension and digestive system), (2) applicant's claim of 100% permanent disability and (3) whether applicant was entitled to permanent disability for psyche, sleep or sexual dysfunction.

At trial, applicant testified he had four surgeries to the left shoulder and three surgeries to the right shoulder. He also discussed his ADLs limitations, such as escalating pain levels, mood and concentration affect, inability to paint, difficulty washing dishes and inability to wipe himself after a bowel movement. However, he recently planted 100 bulbs in his yard and was also able to travel.

The Judge issued a decision finding 74% permanent disability without disability for psyche because applicant did not meet his burden in proving he sustained a catastrophic injury.

Applicant filed a Petition for Reconsideration arguing he was 100% permanently disabled and that his injury was catastrophic, thereby entitling him to the psyche impairment. The WCAB denied applicant's Reconsideration and affirmed the Judge's decision.

Pursuant to Labor Code section 4660.1(c)(1) and (c)(2)(B), impairments for sleep dysfunction, sexual dysfunction or psyche arising out of a compensable physical injury are prohibited, unless the compensable psyche injury resulted from a catastrophic injury, including, but not limited to, loss of a limb, paralysis, severe burn or severe head injury.

In the 2019 en banc *Wilson* decision, the WCAB determined that whether an injury is catastrophic “focuses on the nature of the injury” and is “a fact-driven inquiry.” Whether an injury qualifies as catastrophic is a factual/legal issue for the Judge to decide. The “inquiry into whether an injury is catastrophic is limited to looking solely at the physical injury, without consideration for the psyche injury in evaluating the nature of the injury.” *Wilson* outlined the following factors for Judges to consider when determining if an injury is catastrophic:

1. The intensity and seriousness of medical treatment received which 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 ADLs
4. Whether the physical injury is closely analogous to one of the injuries specified in the statute: loss of limb, paralysis, severe burn or severe head injury
5. If the physical injury is an incurable and progressive disease

Even though applicant has had multiple shoulder surgeries, the intensity and seriousness of his medical treatment is not analogous to the “serious and life threatening” medical treatment in *Wilson*. In addition, applicant’s injury has not resulted in permanent impairment to multiple body parts as in *Wilson*. The medical records and applicant’s testimony do show the impact of his physical injury has been “fairly severe” on his sleep and sexual functioning, but he remains capable in most other ADLs. He is able to communicate, do self-care and personal hygiene and travel. Furthermore, his injury is not closely analogous to one of the statutorily specified injuries and it is not an incurable and progressive disease. Therefore, the WCAB agreed with the Judge that applicant did not sustain a catastrophic injury, and therefore, was not entitled to an increase in permanent impairment for psyche.

Regarding applicant’s contention he is 100% permanently disabled, the WCAB agreed with the Judge in that the medical evidence and vocational evidence does not show applicant is 100% disabled. The PMR PQME never opined applicant is totally precluded from working due to his orthopedic injury and none of the reporting physicians concluded applicant is completely unable to return to work due to his injury. Furthermore, applicant’s vocational expert’s opinion was partially based on the impermissible factor of applicant’s limited education, and the expert created work restrictions for applicant’s GERD and opiate use which were not provided by the PQMEs.

The Judge declined to rely on either vocational expert report since both expert’s considered applicant’s psyche issues in determining his amenability to vocational rehabilitation. The WCAB agreed with the Judge that the psyche impairment was improperly considered by the vocational experts.

Lastly, applicant’s vocational expert report was not provided to the PMR PQME or other medical experts. Therefore, there is no medical evidence in the record addressing applicant’s vocational expert’s conclusion that applicant is not amenable to vocational rehabilitation and is permanently totally disabled.