

1 **WORKERS' COMPENSATION APPEALS BOARD**
2 **STATE OF CALIFORNIA**

3
4 **KRIS WILSON,**

5 *Applicant,*

6 **vs.**

7 **STATE OF CA CAL FIRE; legally uninsured,**
8 **adjusted by STATE COMPENSATION**
9 **INSURANCE FUND,**

10 *Defendants.*

Case No. ADJ10116932

(San Luis Obispo District Office)

OPINION AND DECISION
AFTER RECONSIDERATION
(En Banc)

11 Reconsideration was granted on March 12, 2018 in order to further study the factual and legal
12 issues in this case.

13 To secure uniformity of decision in the future, the Chair of the Appeals Board, upon a unanimous
14 vote of its members,¹ assigned this case to the Appeals Board as a whole for an en banc decision.² (Lab.
15 Code, § 115.)³

16 On December 28, 2017, a workers' compensation administrative law judge (WCJ) issued a
17 Findings and Award (F&A),⁴ which found, in relevant part, that applicant is entitled to a permanent
18 disability award of 66% as a result of his May 13, 2014 injury. The permanent disability award excluded
19 an impairment rating for applicant's psychiatric injury pursuant to section 4660.1(c). (Lab. Code,
20 § 4660.1(c).)

21 Applicant sought reconsideration of the F&A. Applicant contends that the evidence supports
22 inclusion of an impairment rating for his psychiatric injury because his psychiatric injury was directly

23
24 ¹ Commissioner Katherine Dodd is unavailable and did not participate in this en banc decision.

25 ² En banc decisions of the Appeals Board are binding precedent on all Appeals Board panels and WCJs. (Cal. Code Regs., tit.
26 8, § 10341; *City of Long Beach v. Workers' Comp. Appeals Bd. (Garcia)* (2005) 126 Cal.App.4th 298, 316, fn. 5 [70
Cal.Comp.Cases 109]; *Gee v. Workers' Comp. Appeals Bd.* (2002) 96 Cal.App.4th 1418, 1424, fn. 6 [67 Cal.Comp.Cases
236].) This en banc decision is also adopted as a precedent decision pursuant to Government Code section 11425.60(b).

27 ³ All further statutory references are to the Labor Code unless otherwise stated.

⁴ The F&A is dated December 27, 2017, but was not served until December 28, 2017.

1 caused by events of employment and, therefore, section 4660.1(c) does not apply. Alternatively,
2 applicant contends that he is entitled to an increased impairment rating for his psychiatric injury because
3 the injury resulted from being the victim of a violent act or is catastrophic. (Lab. Code,
4 § 4660.1(c)(2)(A)-(B).)

5 We received an answer from defendant.⁵ The WCJ issued a Report and Recommendation on
6 Petition for Reconsideration (Report) recommending that we deny reconsideration. Applicant submitted
7 a reply to defendant's answer, which we will treat as a supplemental pleading. (See Cal. Code Regs., tit.
8 8, § 10848.) Applicant did not seek approval from the Appeals Board prior to submitting this
9 supplemental pleading as required by WCAB Rule 10848. We will accept and consider this pleading,
10 but advise applicant that failure to seek approval to submit a supplemental pleading may result in its
11 rejection.

12 Based upon our review of the record, applicant's Petition for Reconsideration, defendant's
13 answer, applicant's supplemental pleading, the contents of the WCJ's Report and the relevant statutes
14 and case law, we hold as follows:

15 **Determination of whether an injury is catastrophic under section**
16 **4660.1(c)(2)(B) focuses on the nature of the injury and is a fact-driven**
17 **inquiry.**

18 We will therefore rescind the F&A and substitute a new findings and award to include a finding of fact
19 that applicant sustained a catastrophic injury and may receive an increased impairment rating for his
20 psychiatric injury under section 4660.1(c)(2)(B). The issues of permanent disability and apportionment
21 will be deferred. The matter will be returned to the trial level for further proceedings consistent with this
22 opinion.

23 **FACTUAL BACKGROUND**

24 Applicant claims injury to his lungs, psyche, left eye, head, brain, heart and circulatory system on
25 May 13, 2014 while employed as a firefighter by the Department of Forestry (also known as State of
26

27 ⁵ Defendant initially filed an answer on January 30, 2018 and then filed an amended answer on January 31, 2018.

1 California, Cal Fire). Defendant has accepted liability for injury to the lungs, psyche, left eye, head and
2 brain, but disputes compensability for the heart and circulatory system. Defendant disputes liability for
3 permanent impairment for applicant's psychiatric injury.

4 The parties do not appear to dispute the facts surrounding what occurred on the date of injury.
5 Applicant began his shift and reported to a wildfire in Lompoc. He was assigned to the drainage area
6 where he inhaled fumes and smoke from the fire as he was not wearing a breathing apparatus. Applicant
7 performed this work for several hours until approximately 8:00 a.m. the next day.

8 On May 15, 2014, applicant sought treatment as summarized in the medical reporting:

9 He went to Sierra Vista Hospital in San Luis Obispo and went through the
10 emergency department, where he presented with complaints of rash,
11 shortness of breath, nausea, vomiting, low back pain, neck pain, headache
and dizziness (when standing), crusty bilateral eye discharge, difficulty
speaking, and sore throat with swelling to the left side of his neck.

12 ...

13 His father drove him to Kaiser the following morning with symptoms of
difficulty breathing, blisters on the back of his ears, and ulcers in his throat
14 and mouth. He was put on oxygen and referred to [the Antelope Valley]
Hospital. Mr. Wilson reported that he has no memory of leaving Kaiser,
15 but stated that his father told him that when they attempted to remove him
from the oxygen, he would go into convulsions. He was transported to the
16 Antelope Valley Hospital Emergency Department by ambulance with
labored breathing and fever. He was admitted to ICU and stayed in the
17 hospital for approximately 2 weeks, during which time he was intubated
and put on a mechanical respirator.

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19 (Applicant's Exhibit No. 10, Dr. Walsh's Report, October 24, 2016, pp. 15-
20 16.)

21 A summary of the hospital's progress reports during applicant's extended stay in ICU states, in relevant
22 part: "A couple of days after the patient was admitted he developed significant respiratory symptoms and
23 was eventually intubated." (Applicant's Exhibit No. 12, Report of Dr. Recasens, November 22, 2016,
24 p. 8.) He was placed "on 100% oxygen via non-rebreather mask saturation 85%." (Applicant's Exhibit
25 No. 5, Dr. Ho's Report, July 14, 2016, p. 14.) A consultation was conducted during applicant's
26 hospital stay to evaluate generalized "vigorous tremors" he was having "for a few seconds at a time" that

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1 “stopped for 30 seconds and returned later.” (*Id.* at p. 15.) A May 28, 2014 consultation report during
2 applicant’s hospitalization also noted as follows:

3 The patient initially presented to the emergency room on May 17 after
4 acute onset of nausea, chills and fevers with night sweats. He developed
5 ulcerations of the tongue, mouth and lips. He vomited with high fevers and
6 developed a rash all over his entire body. He had renal failure,
7 transaminitis with interstitial infiltrates and respiratory failure requiring
8 intubation....The patient remains intubated. There is some concern about
9 underlying acute respiratory distress syndrome complicating weaning from
10 the ventilator.

11 (Applicant’s Exhibit No. 1, Report of Dr. Mark Pulera, June 23, 2016, p.
12 20.)

13 Applicant was ultimately extubated on May 29, 2014, approximately two weeks after his admission to
14 the hospital. (Applicant’s Exhibit No. 5, Dr. Ho’s Report, July 14, 2016, p. 16.) He remained in the
15 hospital until his discharge on June 1, 2014 with his condition and treatment summarized upon discharge
16 as follows:

17 The patient came in with shortness of breath and rash in oral mucosa, as
18 well as arms and legs. The patient was fighting a fire before admission for
19 two to three days and noticed increased erythema of the conjunctivi and
20 painful ulcers on the tongue and mouth with blistering. He had fevers to
21 103. He was intubated for respiratory failure and ARDS [acute respiratory
22 distress syndrome]. X-rays showed interstitial infiltrates with abnormal
23 liver function tests and hypoxia.

24 (Applicant’s Exhibit No. 1, Report of Dr. Mark Pulera, June 23, 2016, p.
25 23.)

26 Applicant returned to work as a firefighter in April 2015. (Applicant’s Exhibit No. 10,
27 Dr. Walsh’s Report, October 24, 2016, p. 16.) However, he “was unable to keep pace with his coworkers
and became concerned about his ability to work as a firefighter. He was again taken off work by
Dr. Vikas and he last worked in mid July 2015.” (*Id.*)

Mark Pulera, M.D. evaluated applicant as the neurological panel qualified medical evaluator
(QME). Applicant reported to Dr. Pulera that he still has shortness of breath, is constantly fatigued and
has persistent chest pain. (Applicant’s Exhibit No. 1, Report of Dr. Mark Pulera, June 23, 2016,

1 pp. 5 and 8.) His fatigue and weakness impairs his ability to walk long distances or run. (*Id.* at p. 10.)
2 The injury reportedly impairs his ability to lift. (*Id.*) Applicant “also complained of impaired memory
3 and cognition since the injury.” (*Id.* at p. 7.) He further reported persistent difficulty with sleep since the
4 injury. (*Id.* at pp. 7-8.)

5 Applicant reported to Dr. Pulera “a new episode of loss of consciousness” a few months before
6 his evaluation. (*Id.* at p. 6.) “He was watching a graphic television show where they were cutting open a
7 man. After viewing this graphic scene, Mr. Wilson blacked out. He noted prior to blacking out, he felt
8 bilateral tingling in his arms.” (*Id.*) Applicant’s wife “noted that his whole body was shaking for
9 perhaps 10 seconds” when he blacked out. (*Id.* at p. 7.) This was the only episode of this nature reported
10 by applicant. (*Id.*)

11 Dr. Pulera diagnosed him with: mild impaired cognition and memory, mild headache, one
12 isolated episode of likely syncope and possible sleep disorder. (*Id.* at p. 40.) These conditions were
13 considered industrially caused due to the work exposure on May 13, 2014. (*Id.* at pp. 40-41.) Applicant
14 was deemed neurologically permanent and stationary as of December 14, 2014. (*Id.* at p. 44.) Dr. Pulera
15 assigned applicant with a whole person impairment (WPI) rating of 5% for mental status impairment and
16 3% pain add-on for his headaches. (*Id.* at p. 42.) No apportionment to non-industrial factors was given.
17 (*Id.* at p. 43.) Dr. Pulera also opined that applicant “cannot return to firefighter duties.” (*Id.* at p. 44.)

18 Paul Grodan, M.D. performed an evaluation of applicant as the cardiopulmonary QME. With
19 respect to applicant’s hospitalization in May 2014, Dr. Grodan noted that the “records [he] reviewed
20 reflect that indeed [applicant] had significant issues requiring even intubation due to respiratory failure.”
21 (Applicant’s Exhibit No. 3, Dr. Grodan’s Report, June 24, 2016, p. 20.) He diagnosed applicant with an
22 episode of “hypersensitivity pneumonitis with respiratory failure generalized papular eruption
23 resolved/pulmonary hypertension;” allergic diathesis, severe; toxic metabolic encephalopathy with
24 cognitive impairment according to Dr. Pulera; and insomnia disorder. (*Id.*) The pulmonary hypertension
25 was assigned a 5% WPI rating. (*Id.* at p. 22.) Dr. Grodan opined that he “agree[s] with the decision to
26 retire Mr. Wilson.” (*Id.* at p. 23.) He subsequently issued a supplemental report wherein he opined that

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1 50% of applicant's pulmonary problem was due to non-industrial allergies and 50% was due to exposure
2 in his employment. (Applicant's Exhibit No. 4, Dr. Grodan's Report, September 18, 2016, p. 5.)

3 Franklin Ho, M.D. also evaluated applicant as the internal medicine QME. His initial diagnoses
4 included, in relevant part: ARDS, possible asthma and chronic insomnia. (Applicant's Exhibit No. 5,
5 Dr. Ho's Report, July 14, 2016, p. 24.) These diagnoses were considered industrially caused. (*Id.* at
6 p. 32.) Dr. Ho described ARDS as "a life-threatening condition involving the lungs that impairs gas
7 exchange." (*Id.* at p. 25.) He further opined that "[s]urvivors [of ARDS] commonly have chronic
8 decrement of lung function and persistent symptoms even five years after the original insult, showing the
9 severe nature of the condition." (*Id.* at p. 28.) Dr. Ho also "agree[d] with his providers that he can no
10 longer fight fires, given his sensitivity to smoke." (*Id.* at p. 33.)

11 Dr. Ho issued a supplemental report wherein he provided pulmonary diagnoses as follows:
12 ARDS-induced neuromuscular respiratory weakness, probable asthma and mild pulmonary hypertension.
13 (Applicant's Exhibit No. 9, Dr. Ho's Report, April 12, 2017, p. 9.) Dr. Ho opined that applicant has
14 asthma within reasonable medical probability. (*Id.* at p. 11.) Applicant's conditions were assigned WPI
15 ratings as follows: 10% for the ARDS-induced neuromuscular respiratory weakness (100% industrial)
16 and 10% for his asthma (80% due to his industrial ARDS and 20% due to non-industrial causes). (*Id.* at
17 pp. 13-14.)

18 Joseph Walsh, Ph.D. evaluated applicant as the psychological QME. Dr. Walsh's October 24,
19 2016 report contains the following history:

20 [Applicant] described feeling emotionally traumatized following his
21 symptoms resulting from the fire and by his near death experience in the
22 hospital following his injury. As reported above, he believes that he has a
23 serious physical injury that may kill him, shorten his life or send him back
24 to the hospital. He has a vivid memory of waking up while he was
intubated at the hospital and this is re-experienced in a recurring nightmare
approximately 2 to 3 times each week.

25 (Applicant's Exhibit No. 10, Dr. Walsh's Report, October 24, 2016, p. 14.)

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1 Applicant also reported to Dr. Walsh the following:

2 He continues to experience sleep difficulty that was not present prior to his
3 injury. He has difficulty initiating and maintaining sleep and is tired and
4 sleepy during the daytime. His memory and concentration is reported is
5 [sic] not as good and he finds that he is easily irritated. As a result, his
6 wife moved to a different room to sleep because of his restless sleep and
7 his occasional snoring.

8 (Id. at p. 16.)

9 In his discussion section, Dr. Walsh opined:

10 Mr. Wilson has developed characteristic symptoms following exposure to
11 an extreme traumatic stressor involving direct personal experience of an
12 event that involved serious injury and threatened death. He is experiencing
13 significant symptoms of anxiety and depression subsequent to work related
14 injuries sustained while fighting a fire with resultant physical injuries,
15 limitations and impairment.

16 (Id. at p. 24.)

17 Dr. Walsh diagnosed applicant with post-traumatic stress disorder (PTSD) and a severe major depressive
18 disorder. (Id. at p. 24.) These conditions were considered predominantly caused by actual events of
19 employment. (Id. at p. 34.)

20 In a subsequent re-evaluation report, Dr. Walsh opined that 100% of applicant's PTSD was "due
21 to the direct effects of the May 13, 2014 injury, an actual event of employment." (Applicant's Exhibit
22 No. 11, Dr. Walsh's Report, April 14, 2017, p. 18.) The depression was "deemed to be 75% related to
23 his untreated PTSD and 25% related to not being able to continue to work as a firefighter/EMT." (Id.)
24 Applicant was deemed "temporarily totally disabled from May 13, 2014 until the present on a
25 psychiatric/psychological basis." (Id. at p. 19.) Dr. Walsh further opined that:

26 ...while the primary injury, a Post-traumatic Stress Disorder, arose out of
27 the effects of and treatment for a compensable physical injury, it is my
opinion that it is not precluded from compensability for disability by Labor
Code Section 4660.1 pursuant to SB863 for dates of injury effective
January 1, 2013; because in my opinion, the industrial psychological injury
represents a **catastrophic injury**.

(Id. at p. 14, emphasis in original.)

1 Applicant was assigned a GAF score of 47 with a 36% WPI rating. (*Id.* at p. 20.) Dr. Walsh apportioned
2 90% of his permanent impairment to actual events of employment and 10% to his reaction to not being
3 able to continue to work as a firefighter/EMT. (*Id.*) The QME deferred to the trier of fact if this reaction
4 would also represent an actual event of employment, “in which case there would be 100% apportionment
5 of the cause of the permanent impairment/disability to actual events of his employment.” (*Id.*)

6 Lastly, Marta Recasens, M.D. conducted an evaluation of applicant as the ophthalmological
7 QME. She diagnosed applicant with a cataract in his left eye, refractive error (left eye worse than right
8 eye) and vitreous liquefaction in both eyes. (Applicant’s Exhibit No. 12, Report of Dr. Recasens,
9 November 22, 2016, p. 24.) The cataract and refractive error were considered industrially caused. (*Id.* at
10 p. 25.) Applicant reported that he cannot read anymore and complained of blurred vision and glare in
11 both eyes, as well as reduced depth perception. (*Id.* at p. 23.) In a supplemental report, Dr. Recasens
12 considered the eye conditions to be permanent and stationary and provided 17% WPI for impairment to
13 the visual system and 3% WPI add-on for pain. (Applicant’s Exhibit No. 13, Dr. Recasens’ Report,
14 May 25, 2017, p. 3.) No apportionment was given. (*Id.*)

15 The matter proceeded to trial on several issues on September 27, 2017. (Minutes of Hearing,
16 September 27, 2017.) The parties stipulated to injury to applicant’s lungs, psyche, left eye, head and
17 brain. (*Id.* at p. 1.) The disputed issues included, in relevant part, 104 weeks of temporary disability
18 indemnity, permanent disability, apportionment and the following:

19 In terms of the psychiatric injury, the defendant asserts that under Labor
20 Code Section 4660.1(2)(a)(b) [*sic*] that applicant is not entitled to
21 indemnity and applicant asserts that this is a catastrophic injury and/or
event/act and applicant is entitled to it.

22 (*Id.* at p. 2.)

23 The matter stood submitted and the following was noted on the record:

24 If the court deems it necessary, the matter will be referred to the Disability
25 Evaluation Unit, and if a rating issues, the parties will have the appropriate
26 time to respond or request additional proceedings. If no request for
additional proceedings is forthcoming, the matter will stand resubmitted at
the appropriate legal time.

27 (*Id.* at p. 3.)

1 On October 24, 2017, the WCJ issued rating instructions to the DEU for several body parts. No
2 request for a rating of the psychiatric injury was included with the instructions, nor was there an
3 instruction regarding apportionment. The record does not contain an objection by either party to the
4 rating instructions. The DEU rated applicant's combined permanent disability to be 66%.

5 By the F&A, the WCJ found that applicant sustained 66% permanent disability "amounting to
6 399.25 weeks of permanent disability indemnity payable at the rate [*sic*] of \$115,782.50." (Findings and
7 Award, December 28, 2017, p. 1.) The WCJ also found that applicant did not sustain an injury to his
8 heart. Applicant was awarded additional temporary disability up to the 104 weeks.⁶ In his Opinion of
9 Judge on Decision, the WCJ explained the basis for not including impairment for the psychiatric injury in
10 the permanent disability rating:

11 Under [section 4660.1(c)(2)(B)]⁷ a "catastrophic" [injury] allows
12 compensation in terms of permanent disability. The Legislature includes
13 certain examples which are loss of limb, paralysis, severe burn, or severe
14 head injury.

15 ...

16 The examples in the statute are obviously something that have
17 exceptionally grave consequences that massively affect an individual's
18 ability to live an ordinary life. However, one can say that about many
19 injuries. One can look at the dictionary definitions of catastrophic but
20 obviously a great many injuries have a huge effect on an individual.
21 Ultimately, the undersigned sometimes must look at the words of Justice
22 Stewart and reach the conclusion that Justice Stewart did, certainly on an
23 altogether different subject, "I know it when I see it". It is not the
24 consequences of an injury that are catastrophic but the injury itself.

25 (Opinion of Judge on Decision, December 28, 2017, p. 4.)

26 In his Petition, applicant only challenges the WCJ's conclusion in the F&A that his psychiatric
27 injury is precluded from an increased impairment rating pursuant to section 4660.1(c).

24 ⁶ Section 4656(c)(2) limits aggregate temporary disability payments for a single injury occurring on or after January 1, 2008 to
25 104 compensable weeks within a period of five years from the date of injury unless the injury is one of the injuries or
26 conditions identified in section 4656(c)(3). (Lab. Code, § 4656(c)(2)-(3).) Temporary disability was awarded to applicant
27 based on the psychological QME Dr. Walsh's reporting. (Opinion of Judge on Decision, December 27, 2017, p. 3.) At a
January 10, 2018 hearing subsequent to the F&A, the minutes state in relevant part that "Defendants paid 104 weeks of TD."

⁷ The Opinion of Judge on Decision incorrectly refers to "Labor Code Section 4661(c)(2)(B)," although the WCJ appears to
have intended to cite to section 4660.1(c)(2)(B). (Opinion of Judge on Decision, December 28, 2017, p. 4.)

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- (1) In order to establish that a psychiatric injury is compensable, an employee shall demonstrate by a preponderance of the evidence that actual events of employment were predominant as to all causes combined of the psychiatric injury.
- (2) Notwithstanding paragraph (1), in the case of employees whose injuries resulted from being a victim of a violent act or from direct exposure to a significant violent act, the employee shall be required to demonstrate by a preponderance of the evidence that actual events of employment were a substantial cause of the injury.

(Lab. Code, § 3208.3(b)(1)-(2).)

Section 3208.3 was amended in 1991 to add subdivision (d), which requires that the employee be employed by that employer for at least six months in order to receive compensation for a psychiatric injury, unless the psychiatric injury was caused by a sudden and extraordinary employment condition. (See *Matea v. Workers' Comp. Appeals Bd.* (2006) 144 Cal.App.4th 1435, 1445-1446 [71 Cal.Comp.Cases 1522]; Lab. Code, § 3208.3(d).) The statute was again amended in 1993 to increase the causation threshold from 10 percent to its current form requiring causation attributable to actual events of

1 employment be “predominant as to all causes combined.” (*McCullough, supra*, 96 Cal.App.4th at
2 p. 1243.) “Predominant as to all causes” has been interpreted to mean more than 50 percent.⁸ (*Dept. of*
3 *Corrections v. Workers’ Comp. Appeals Bd. (Garcia)* (1999) 76 Cal.App.4th 810, 816 [64
4 Cal.Comp.Cases 1356].) This causation threshold applies to psychiatric injuries pled as a compensable
5 consequence of a physical injury. (*McCullough, supra*, 96 Cal.App.4th at p. 1249.)

6 In addition to proving injury AOE/COE, the employee has the burden of establishing the
7 approximate percentage of permanent disability directly caused by the industrial injury. (*Escobedo v.*
8 *Marshalls* (2005) 70 Cal.Comp.Cases 604, 612 (Appeals Board en banc).) Section 4660.1 was enacted
9 as part of Senate Bill (SB) 863, which became effective January 1, 2013. (Stats. 2012, ch. 363, § 60.)
10 This statute governs how to determine permanent disability for injuries occurring on or after January 1,
11 2013 and provides as follows, in relevant part:

12 (a) In determining the percentages of permanent partial or permanent total
13 disability, account shall be taken of the nature of the physical injury or
14 disfigurement, the occupation of the injured employee, and his or her age at
the time of injury.

15 (b) For purposes of this section, the “nature of the physical injury or
16 disfigurement” shall incorporate the descriptions and measurements of
17 physical impairments and the corresponding percentages of impairments
18 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.

19 (c) (1) Except as provided in paragraph (2), there shall be no increases in
20 impairment ratings for sleep dysfunction, sexual dysfunction, or psychiatric
21 disorder, or any combination thereof, arising out of a compensable physical
22 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.

23 (2) An increased impairment rating for psychiatric disorder shall not be
24 subject to paragraph (1) if the compensable psychiatric injury resulted from
25 either of the following:

26 ⁸ Unless the injury resulted from being a victim of a violent act or from direct exposure to a significant violent act, in which
27 case the employee must show that actual events of employment were a substantial cause (35 to 40 percent) of the injury.
(Lab. Code, § 3208.3(b)(2)-(3).)

1 (A) Being a victim of a violent act or direct exposure to a significant
2 violent act within the meaning of Section 3208.3.

3 (B) A catastrophic injury, including, but not limited to, loss of a limb,
4 paralysis, severe burn, or severe head injury.

5 (Lab. Code, § 4660.1(a)-(c).)

6 Section 4660.1(c) does not bar an employee from claiming a psychiatric injury or obtaining
7 treatment or temporary disability for a psychiatric disorder that is a compensable consequence of a
8 physical injury occurring on or after January 1, 2013. Additionally, section 4660.1(c) does not apply to
9 psychiatric injuries directly caused by events of employment. Section 4660.1(c)(1) only bars an increase
10 in the employee's permanent impairment rating for a psychiatric injury that is a compensable
11 consequence of a physical injury occurring on or after January 1, 2013. However, the employee may
12 receive an increased impairment rating for a compensable consequence psychiatric injury if the injury
13 falls under one of the statutory exceptions outlined in section 4660.1(c)(2).

14 Applicant's injury occurred on May 13, 2014, i.e., after January 1, 2013, the effective date of
15 section 4660.1, and is therefore subject to section 4660.1. Defendant does not dispute that applicant has
16 sustained a psychiatric injury as a compensable consequence of his physical injury. However, the parties
17 dispute whether applicant may receive an increased impairment rating for his psychiatric injury under
18 section 4660.1(c). In order to receive an increased impairment rating for his psychiatric injury, applicant
19 bears the burden of proving his psychiatric injury was directly caused by events of employment, or,
20 alternatively, if the psychiatric injury is a compensable consequence of the physical injury, applicant
21 must show that the psychiatric injury resulted from either: 1) being a victim of a violent act or direct
22 exposure to a significant violent act, or 2) a catastrophic injury.

23 **I. Applicant's Psychiatric Injury Was Not Directly Caused By Events Of Employment.**

24 An injury must be proximately caused by the employment in order to be compensable. (Lab.
25 Code, § 3600(a)(3); see also *Clark, supra*, 61 Cal.4th at pp. 297-298.) Proximate cause in workers'
26 compensation requires the employment be a contributing cause of the injury. (*Clark, supra*, 61 Cal.4th at
27 pp. 297-298 [outlining this standard and analyzing the difference between causation in tort law and

causation in workers' compensation].) 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).) The "first injury need not be the exclusive cause of the second but only a contributing factor to it...So long as the original injury operates even in part as a contributing factor it establishes liability." (*State Compensation Ins. Fund v. Industrial Acc. Com. (Wallin)* (1959) 176 Cal.App.2d 10, 17 [24 Cal.Comp.Cases 302].)⁹ In other words, if the first injury is a contributing cause of the second injury, the second injury is a compensable consequence of the first injury. Whereas the first injury is directly caused by the employment, a compensable consequence injury is indirectly caused by the employment via the first injury.¹⁰

As discussed above, the proscription against an increased rating for psychiatric injuries in section 4660.1(c) does not apply to psychiatric injuries directly caused by events of employment.¹¹ Applicant

⁹ For example, in *Wallin*, a carpenter suffered an industrial injury to his eye when a rusty nail he was driving into the floor flew up and penetrated his eye. The eye injury was directly caused by a workplace accident. More than a year later, the carpenter was sawing lumber at home while still off work for his injury and amputated one of his fingers in part because he had double vision from his industrial eye injury. The finger amputation was a compensable consequence of the carpenter's eye injury because the original eye injury was a contributing cause of the finger injury.

¹⁰ A subsequent injury may also be compensable where the first injury did not contribute to the subsequent injury, but the employment was still a contributing cause of the subsequent injury. (See e.g., *Laines v. Workmen's Comp. Appeals Bd.* (1975) 48 Cal.App.3d 872 [40 Cal.Comp.Cases 365] [injury sustained in an automobile accident while en route to receive medical treatment for an industrial injury was compensable]; *Southern California Rapid Transit Dist., Inc. v. Workers' Comp. Appeals Bd. (Weitzman)* (1979) 23 Cal.3d 158 [44 Cal.Comp.Cases 107] [injury sustained in an automobile accident while returning from delivering to the employer a return to work release for a previous industrial injury was compensable]; *Rodgers v. Workers' Comp. Appeals Bd.* (1985) 168 Cal.App.3d 567 [50 Cal.Comp.Cases 299] [injury sustained while engaged in vocational rehabilitation for an industrial injury was compensable].)

¹¹ See *Madson v. Michael J. Cavaletto Ranches* (February 22, 2017, ADJ9914916) [2017 Cal.Wrk.Comp.P.D.LEXIS 95], [increased permanent impairment rating for psychiatric injury was not barred by section 4660.1(c) where QME opined that applicant's PTSD resulted from the industrial accident itself and not the physical injury]; see also *City of Los Angeles v. Workers' Comp. Appeals Bd. (Montenegro)* (2016) 81 Cal.Comp.Cases 611 (writ den.) [the Appeals Board upheld finding that impairment for sexual dysfunction arising directly from the industrial injury in the form of prostate cancer was not barred by section 4660.1(c)]. Unlike en banc decisions, panel decisions are not binding precedent on other Appeals Board panels and WCJs. (See *Gee, supra*, 96 Cal.App.4th at p. 1424, fn. 6.) However, panel decisions are citable and we consider these decisions to the extent that we find their reasoning 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).) Here, we refer to *Madson* and other panel decisions because they considered a similar issue.

1 contends in his Petition that his psychiatric injury was directly caused by events of employment and,
2 thus, he is entitled to an increased impairment rating for his psychiatric injury.

3 As quoted above, the psychological QME Dr. Walsh's October 24, 2016 report contains the
4 following relevant history:

5 [Applicant] described feeling emotionally traumatized following his
6 symptoms resulting from the fire and by his near death experience in the
7 hospital following his injury. As reported above, he believes that he has a
8 serious physical injury that may kill him, shorten his life or send him back
9 to the hospital. He has a vivid memory of waking up while he was
10 intubated at the hospital and this is re-experienced in a recurring nightmare
11 approximately 2 to 3 times each week.

12 (Applicant's Exhibit No. 10, Dr. Walsh's Report, October 24, 2016, p. 14.)

13 In his discussion section, Dr. Walsh opined:

14 Mr. Wilson has developed characteristic symptoms following exposure to
15 an extreme traumatic stressor involving direct personal experience of an
16 event that involved serious injury and threatened death. He is experiencing
17 significant symptoms of anxiety and depression subsequent to work related
18 injuries sustained while fighting a fire with resultant physical injuries,
19 limitations and impairment.

20 (*Id.* at p. 24.)

21 In his re-evaluation report, Dr. Walsh further opined that "the primary injury, a Post-traumatic Stress
22 Disorder, arose out of the effects of and treatment for a compensable physical injury." (Applicant's
23 Exhibit No. 11, Dr. Walsh's Report, April 14, 2017, p. 14.)

24 The evidence in the record reflects that the psychological QME concluded that applicant's
25 psychiatric conditions were a compensable consequence of applicant's physical injury following
26 exposure to the fire. Applicant's PTSD was attributed to the effects of and treatment for his physical
27 injury, and his depression was deemed 75% related to his untreated PTSD and 25% related to not being
able to continue to work as a firefighter/EMT. (*Id.* at p. 18.) Applicant's fears were reported to be
concentrated on his hospitalization and on potential future medical issues from his physical injury, not
from his exposure to the fire that led to his physical injury.

1 Applicant's psychiatric injury was not directly caused by events of employment, i.e., applicant
2 fighting the wildfire, but rather as a compensable consequence of his physical injury. Consequently,
3 applicant may only receive an increased impairment rating for his psychiatric injury if his injury qualifies
4 for one of the statutory exceptions in section 4660.1(c)(2).

5 **II. Applicant's Injury Did Not Result From Being A Victim Of A Violent Act Or Direct**
6 **Exposure To A Significant Violent Act.**

7 Panel decisions evaluating whether an injury may receive an increased impairment rating under
8 section 4660.1(c)(2)(A) have defined a "violent act" as an act that is characterized by either strong
9 physical force, extreme or intense force, or an act that is vehemently or passionately threatening.¹²

10 The injury in this case occurred after applicant fought a wildfire for several hours during which
11 he was exposed to fumes and smoke from the fire. The prolonged exposure to fumes and smoke resulted
12 in an adverse physical reaction in multiple body parts. The record in this matter does not support a
13 finding that applicant's injury resulted from a violent act as that phrase has been defined.

14 Applicant's injury did not result from being a victim of a violent act or direct exposure to a
15 significant violent act, and he may not receive an increased impairment rating for his psychiatric injury
16 under section 4660.1(c)(2)(A).

17 **III. Interpretation Of Catastrophic Injury Under Section 4660.1(c)(2)(B).**

18 **A. Meaning of "Catastrophic Injury" As Used In The Statute.**

19 Section 4660.1(c)(2)(B) does not define a "catastrophic injury," although the statute specifies that
20 it includes, but is "not limited to" certain injuries: loss of a limb, paralysis, severe burn, or severe head
21 injury.

22 "A fundamental rule of statutory construction is that a court should ascertain the intent of the
23 Legislature so as to effectuate the purpose of the law." (*DuBois v. Workers' Comp. Appeals Bd.* (1993) 5
24 Cal.4th 382, 387 [58 Cal.Comp.Cases 286].) Our first task in construing a statute is to look to the
25

26 ¹² See *Larsen v. Securitas Security Services* (2016) 81 Cal.Comp.Cases 770 [2016 Cal.Wrk.Comp.P.D.LEXIS 237]; see also
27 *Madson, supra*.

1 language of the statute itself. (*Id.*) Words in the statute are given their usual and ordinary meaning.
2 (*Day v. City of Fontana* (2001) 25 Cal.4th 268, 272.) Where the words of a statute are clear and
3 unambiguous, the plain language of the statute governs. (*Id.*; see also *In re Young* (2004) 32 Cal.4th 900,
4 906.)

5 If, however, the statutory terms are ambiguous, then we may resort to
6 extrinsic sources, including the ostensible objects to be achieved and the
7 legislative history. [Citation.] In such circumstances, we select the
8 construction that comports most closely with the apparent intent of the
9 Legislature, with a view to promoting rather than defeating the general
10 purpose of the statute, and avoid an interpretation that would lead to absurd
11 consequences. [Citation.]

12 (*Day, supra*, at p. 272, internal quotation marks omitted.)

13 Evaluation of whether an injury resulted from a “violent act” under section 4660.1(c)(2)(A)
14 focuses on the *mechanism* of injury. This focus on the mechanism of injury comports with the statute’s
15 language, which emphasizes the *event causing the injury*, rather than the injury itself: the statute
16 expressly refers to being a victim of or direct exposure to a violent “act.” The word “injury” is not in this
17 subsection. The focus in evaluating whether an injury qualifies for the exception in section
18 4660.1(c)(2)(A) is therefore on the mechanism of injury, not on the injury itself.

19 Conversely, the statutory language in section 4660.1(c)(2)(B) refers to a “catastrophic injury,”
20 and identifies four examples of injuries that are included. The word “catastrophic” is an adjective. The
21 focus in this subsection is consequently on the *nature* of the injury, rather than on the mechanism of
22 injury. This is illustrated by the specific types of injuries identified in the statute since they all focus on
23 the result of the injury: loss of a limb, paralysis, severe burn and a severe head injury represent particular
24 results from an industrial injury. Moreover, the Court of Appeal has previously specifically referred to
25 this subsection as creating an exception based on the “nature of the injury.” In *Travelers Casualty &*
Surety Co. v. Workers’ Comp. Appeals Bd. (Dreher) (2016) 246 Cal.App.4th 1101 [81 Cal.Comp.Cases
402], the Court of Appeal stated:

26 Had the Legislature intended to include **the nature of the injury** as a
27 factor in the definition of a sudden and extraordinary employment
condition, it knew how to do so. (See *Lockheed Martin Corp. v. Workers’*

1 *Comp. Appeals Bd.* (2002) 96 Cal.App.4th 1237, 1245-1246 [117
2 Cal.Rptr.2d 865] [Legislature undoubtedly knows how to enact an
3 exception]; § 4660.1, subd. (c)(2)(B) [setting forth exception for
4 catastrophic injury].)

5 (*Id.* at p. 1108, emphasis added.)

6 While section 4660.1(c)(2)(B) identifies specific types of injuries that fall within the exception,
7 the statute expressly states “including, *but not limited to*,” which means this list is not exhaustive.
8 (§ 4660.1(c)(2)(B), emphasis added.) In other words, there are other types of injuries, not expressly
9 identified in the statute that may also be considered “catastrophic.”

10 Black’s Law Dictionary does not define “catastrophic.”¹³ The American Heritage Dictionary
11 however, defines “catastrophic” as follows:

- 12 1. Of, relating to, or involving a catastrophe.
- 13 2. Relating to a serious illness or injury that results in a long period of
14 incapacity and often high treatment costs.

15 (American Heritage Dict. (5th ed. 2019)
16 <<https://ahdictionary.com/word/search.html?q=catastrophic>> [as of Feb.
17 15, 2019].)¹⁴

18 The broadness of the dictionary definition “[r]elating to a serious illness or injury” renders it
19 unsuitable for identifying what constitutes a catastrophic injury under section 4660.1(c)(2)(B). A “long
20 period of incapacity” is indefinite as to the actual length of time an employee would have to be
21 incapacitated for an injury to be deemed “catastrophic.” It is also unclear what monetary amount would
22 qualify as “high treatment costs.” While the employee’s period of incapacity and the amount of
23 treatment costs may be relevant in evaluating whether an injury is catastrophic, these factors are not
24 dispositive. Reasonable minds could differ widely on whether an injury is “catastrophic” under the

25 ¹³ Black’s Law Dictionary does however define “catastrophe” as “[a] notable disaster; a more serious calamity than might
26 ordinarily be understood from the term ‘casualty.’ Utter or complete failure.” (Black’s Law Dict. (6th ed. 1990) p. 219, col.
27 2.)

28 ¹⁴ “When attempting to ascertain the ordinary, usual meaning of a word, courts appropriately refer to the dictionary definition
29 of that word.” (*Wasatch Property Management v. Degrate* (2005) 35 Cal.4th 1111, 1121-1122.)

1 dictionary definition. A statute is “ambiguous” if its language is “susceptible of more than one
2 reasonable interpretation.” (*McCullough, supra*, 96 Cal.App.4th at pp. 1241-1242.)

3 **B. The Legislative History And Intent In Enacting Section 4660.1(c).**

4 While the statute’s plain meaning controls its interpretation, “[i]f the statutory language permits
5 more than one reasonable interpretation, courts may consider other aids, such as the statute’s purpose,
6 legislative history, and public policy.” (*Coalition of Concerned Communities, Inc. v. City of Los Angeles*
7 (2004) 34 Cal.4th 733, 737.) “When the statutory language is ambiguous, the court may examine the
8 context in which the language appears, adopting the construction that best harmonizes the statute
9 internally and with related statutes.” (*Pacific Gas & Electric Co. v. County of Stanislaus* (1997) 16
10 Cal.4th 1143, 1152.) The words of a statute “must be construed in context, keeping in mind the nature
11 and obvious purpose of the statute where they appear.” (*DuBois, supra*, 5 Cal.4th at p. 388, quoting
12 *Moyer v. Workmen’s Comp. Appeals Bd.* (1973) 10 Cal.3d 222, 230 [38 Cal.Comp.Cases 652].)

13 Since the phrase “catastrophic injury” is ambiguous as used in section 4660.1(c)(2)(B), we
14 consider extrinsic sources to “select the construction that comports most closely with the apparent intent
15 of the Legislature, with a view to promoting rather than defeating the general purpose of the statute, and
16 avoid an interpretation that would lead to absurd consequences.” (*Day, supra*, 25 Cal.4th at p. 272,
17 quoting *People v. Coronado* (1995) 12 Cal.4th 145, 151.) Our task is to construe the statute in
18 accordance with the statute’s specific intent, as well as the overall purposes and policies governing the
19 workers’ compensation system.

20 We start with the legislative history and intent in enacting section 4660.1(c). Subdivision (c) of
21 section 4660.1 was specifically referred to by the Legislature in enacting SB 863 in finding and declaring
22 as follows:

23 That the current system of determining permanent disability has become
24 excessively litigious, time consuming, procedurally burdensome and
25 unpredictable, and that the provisions of this act will produce the necessary
26 uniformity, consistency, and objectivity of outcomes, in accordance with
27 the constitutional mandate to accomplish substantial justice in all cases
expeditiously, inexpensively, and without encumbrance of any character,
and that **in enacting subdivision (c) of Section 4660.1 of the Labor
Code, the Legislature intends to eliminate questionable claims of
disability when alleged to be caused by a disabling physical injury**

1 **arising out of and in the course of employment while guaranteeing**
2 **medical treatment** as required by Division 4 (commencing with Section
3 3200) of the Labor Code.

4 (Stats. 2012, ch. 363, § 1(b), emphasis added.)

5 The Senate Committee on Labor and Industrial Relations stated the following in its analysis of SB 863:

6 Limits psychological add-ons when calculating a PD rating to cases
7 involving catastrophic injury or that involved a violent workplace incident,
8 but requires all appropriate medical treatment for psychological injuries.

9 (Sen. Com. on Labor and Industrial Relations on Sen. Bill No. 863 (2011-
10 2012 Reg. Sess.) Aug. 31, 2012, p. 5.)

11 Other committee analyses of SB 863 contain nearly identical language. (See e.g., Assem. Com. on
12 Insurance, Rep. on Sen. Bill No. 863 (2011-2012 Reg. Sess.) Aug. 31, 2012, p. 3.) In a Senate Rules
13 Committee Analysis, it was further stated:

14 The bill specifically limits some of the “add-ons” that can be established by
15 individualized proof – sleep disorders, sex disorders, and to a limited
16 extent, psychological disorders – because these add-ons have greatly
17 expanded in recent years, largely as a result of the inappropriately low
18 permanent disability ratings that followed from the 2004 reforms. Since
19 benefit levels are being substantially increased by the bill, many believe
20 that these add-ons, which generate substantial litigation expense, are no
21 longer needed.

22 (Sen. Rules Com., Off. of Sen. Floor Analyses on Sen. Bill No. 863 (2011-
23 2012 Reg. Sess.) Aug. 31, 2012, pp. 15-16.)

24 Review of this history reflects that the legislative purpose in enacting section 4660.1(c) was to
25 limit additional impairment for psychiatric injuries for “questionable claims of disability” and to reduce
26 the amount of litigation around permanent disability ratings.¹⁵ By carving out two exceptions to the
27

24 ¹⁵ The progression of changes to section 3208.3 also reflects a persistent legislative concern with limiting questionable claims
25 of psychiatric injury. (See *Hansen, supra*, 18 Cal.App.4th at p. 1184 [the “Legislature’s expressed intent in enacting Labor
26 Code section 3208.3 was to establish a new and higher threshold of compensability for psychiatric injury...[and the] apparent
27 purpose in enacting subdivision (d) of section 3208.3 was to limit questionable claims for psychiatric injuries resulting from
 routine stress during the first six months of employment”]; *Garcia, supra*, 76 Cal.App.4th at p. 816 [the increase in the
 causation threshold from 10 percent to predominant as to all causes was intended to limit liability for psychiatric injury
 claims]; *Wal-Mart v. Workers’ Comp. Appeals Bd. (Garcia)* (2003) 112 Cal.App.4th 1435, 1439, fn. 4 [68 Cal.Comp.Cases

proscription against increased impairment ratings for psychiatric injuries, the Legislature indicated that certain mechanisms and types of injury warrant permitting additional impairment under specific circumstances.

C. Other Statutory Definitions Of “Catastrophic Injury” In California Law.

Although the legislative history reveals the intent of section 4660.1(c), it gives no insight as to how the Legislature defined “catastrophic injury.” We therefore consider other statutes that utilize the same wording and define this phrase.

There are two other code sections in the California statutes that define “catastrophic injury.” First, Education Code section 44043.5(a)(1):

“Catastrophic illness” or “Injury” means an illness or injury that is expected to incapacitate the employee for an extended period of time, or that incapacitates a member of the employee’s family which incapacity requires the employee to take time off from work for an extended period of time to care for that family member, and taking extended time off work creates a financial hardship for the employee because he or she has exhausted all of his or her sick leave and other paid time off.

(Ed. Code, § 44043.5(a)(1).)

This code section refers to the catastrophic leave program permitting an employee of a school district or county office to donate eligible leave credits to another employee when that employee or a member of that employee’s family suffers from a “catastrophic illness or injury.”

Separately, Government Code section 19991.13(b)(1) provides as follows:

Catastrophic illness or injury means an illness or injury that is expected to incapacitate the employee and that creates a financial hardship because the employee has exhausted all of his or her sick leave and other paid time off. Catastrophic illness or injury may also include an incapacitated family member if this results in the employee being required to take time off from work for an extended period of time to care for the family member and the employee has exhausted all of his or her sick leave and other paid time off.

(Gov. Code, § 19991.13(b)(1).)

1575] [section 3208.3 “imposes restrictions on claims for injury to the psyche that are filed after the employee is fired or laid off (§ 3208.3, subd. (e)) and prohibits compensation for injury caused by a ‘lawful, nondiscriminatory, good faith personnel action’ “].)

1 This code section permits certain government employees to transfer eligible leave credits to another
2 employee and is substantially similar to Education Code section 44043.5(a)(1) in its reference to an
3 injury “that is expected to incapacitate the employee.”

4 As with the “violent act” definition in Business and Professions Code section 7500.1(aa)
5 discussed in *Larsen*, these other code sections appear to have broadly defined “catastrophic injury” for
6 the statutes’ individual purposes. (See *Larsen, supra*, 81 Cal.Comp.Cases at p. 774, fn. 2.) When a word
7 is used in a particular sense in one part of a statute, it is presumed to have the same meaning if it appears
8 in another part of the same statute. (*Delaney v. Baker* (1999) 20 Cal.4th 23, 41, quoting *People v. Dillon*
9 (1983) 34 Cal.3d 441, 468.) However, this presumption “does not apply when the same or a similar
10 phrase appears in different statutory schemes with distinct designs and objectives. Establishing
11 terminological uniformity throughout our codified law is less important than discerning the intent of the
12 Legislature so as to effectuate the purpose of each individual statute.” (*Delaney, supra*, at p. 42, internal
13 quotation marks omitted, citing *Phelps v. Stostad* (1997) 16 Cal.4th 23, 32.)

14 Adoption of either of these statutory definitions would not adequately serve the specific
15 legislative purpose of section 4660.1(c). As discussed above, the legislative history of SB 863 indicates
16 that the statute was intended to limit an increased impairment rating for compensable consequence
17 psychiatric injuries to certain mechanisms and types of injury. A broad definition of a “catastrophic
18 injury” as an injury that “is expected to incapacitate the employee for an extended period of time” or as
19 an injury that “is expected to incapacitate the employee and that creates a financial hardship” would not
20 serve the legislative purpose of section 4660.1(c).

21 In conclusion, we decline to adopt the definition of “catastrophic injury” contained in the
22 Education Code or Government Code for purposes of section 4660.1(c)(2)(B).

23 **D. Whether An Injury Is Catastrophic Is Not Measured By The Injury’s Impact On The**
24 **Employee’s Earning Capacity Or A Minimum Level Of Permanent Disability.**

25 Other jurisdictions have defined “catastrophic injury” as a specific impact on the employee’s
26 earning capacity or level of permanent disability.¹⁶ It is assumed that if the California Legislature wished
27

¹⁶ For example, federal law contains the following definition for federal public safety officers: “‘catastrophic injury’ means an

1 to define “catastrophic injury” as an injury causing a specific impact to the employee’s earning capacity,
2 as some other jurisdictions have done, the Legislature would have explicitly done so. Since the
3 Legislature did not do so, it is presumed that the Legislature did not intend to permit an increased
4 impairment rating for a psychiatric injury only in cases where the employee suffers a specific impact to
5 his or her earning capacity as a result of the injury.¹⁷

6
7 injury, the direct and proximate consequences of which permanently prevent an individual from performing any gainful
8 work.” (34 U.S.C. § 10284(1).) Separately, for members of the uniformed services, federal law contains this definition:

9 ...the term “catastrophic injury or illness” means a permanent, severely disabling injury,
10 disorder, or illness that the Secretary concerned determines compromises the ability of the
11 afflicted person to carry out the activities of daily living to such a degree that the person
12 requires--

- 13 (1) personal or mechanical assistance to leave home or bed; or
- 14 (2) constant supervision to avoid physical harm to self or others.

15 (37 U.S.C. § 439(g).)

16 The Supreme Court of Illinois found the phrase “catastrophic injury” to be ambiguous as used in its statutory scheme. (See
17 *Krohe v. City of Bloomington* (2003) 204 Ill.2d 392, 395 [analyzing a statute that required payment of health insurance
18 premiums by the employer if a firefighter suffered a catastrophic injury].) The Court ultimately defined the phrase as “an
19 injury resulting in a line-of-duty disability” pursuant to the statute’s legislative history. (*Id.* at pp. 398-400.) A line-of-duty
20 disability is paid to Illinois firefighters if “as the result of sickness, accident or injury incurred in or resulting from the
21 performance of an act of duty or from the cumulative effects of acts of duty, [are] found to be physically or mentally
22 permanently disabled for service in the fire department.” (*Id.* at p. 394, fn. 1, quoting 40 ILCS 5/4-110; see also *Bremer v.*
23 *City of Rockford* (2016) 2016 IL 119889.)

24 Two states have defined catastrophic injury by specifically identifying the types of injuries that qualify with an additional
25 subsection to include other injuries that render the employee permanently totally disabled. For example, North Dakota’s
26 workers’ compensation statutes state:

27 Catastrophic injury includes:

- 28 (1) Paraplegia; quadriplegia; severe closed head injury; total blindness in both eyes;
29 or amputation of an arm proximal to the wrist or a leg proximal to the ankle, caused
30 by the compensable injury, which renders an employee permanently and totally
31 disabled without further vocational retraining assistance; or
- 32 (2) Those employees the organization so designates, in its sole discretion, provided
33 that the organization finds the employee to be permanently and totally disabled
34 without further vocational retraining assistance.

35 (N.D. Cent. Code, § 65-05.1-06.1(2)(c).)

36 Georgia has a similar scheme in its workers’ compensation system. (See O.C.G.A. § 34-9-200.1(g) [definition of catastrophic
37 injury identifies several specific types of injuries and then includes “[a]ny other injury of a nature and severity that prevents
the employee from being able to perform his or her prior work and any work available in substantial numbers within the
national economy for which such employee is otherwise qualified”].)

¹⁷ It is noted moreover that in determining permanent disability for injuries occurring on or after January 1, 2013, section
4660.1(a) does not require “consideration being given to an employee’s diminished future earning capacity” as required by
section 4660 for injuries occurring before January 1, 2013. (Lab. Code, § 4660(a).)

1 Additionally, in interpreting a statute, we seek to “avoid an interpretation that would lead to
2 absurd consequences.” (*Day, supra*, 25 Cal.4th at p. 272.) Some jurisdictions define “catastrophic
3 injury” as permanent total disability or a total loss of earning capacity. The 2005 Schedule for Rating
4 Permanent Disabilities states that “[p]ermanent total disability represents a level of disability at which an
5 employee has sustained a total loss of earning capacity.” (2005 Permanent Disability Revised Schedule
6 (2005 PDRS), pp. 1-2 to 1-3.)¹⁸ A permanent disability rating from a single injury cannot exceed 100%.
7 (See Lab. Code, § 4664(c)(2).) A definition of catastrophic injury that required the employee to prove
8 the injury caused permanent total disability by showing a total loss of earning capacity would render an
9 increased impairment rating for a psychiatric injury superfluous. If an employee is already permanently
10 totally disabled from a physical injury, attempting to obtain an increased rating for a psychiatric injury
11 under section 4660.1(c)(2)(B) is a fruitless endeavor. (See Civ. Code, § 3532 “[t]he law neither does
12 nor requires idle acts”.)

13 Section 4660.1(c)(2)(B) does not state a minimum level of permanent disability at which an
14 employee may be deemed to have sustained a catastrophic injury. As noted above, the Legislature knows
15 how to create an exception. (See *Dreher, supra*, 246 Cal.App.4th at p. 1108, citing *McCullough, supra*,
16 96 Cal.App.4th at pp. 1245-1246.) In creating the exception to section 4660.1(c)(1) for a catastrophic
17 injury, the Legislature could have defined the phrase as an injury resulting in a minimum level of
18 permanent disability. Since the Legislature chose not to do so, we may not define catastrophic injury as
19 an injury causing a minimum level of permanent disability.¹⁹ We are prohibited from adding provisions
20 to section 4660.1(c)(2)(B). (See *Adoption of Kelsey S.* (1992) 1 Cal.4th 816, 827 [courts may not add
21

22 ¹⁸ Permanent disability for injuries occurring on or after January 1, 2013 must be rated using the 2005 PDRS until the
23 schedule for age and occupational modifiers is amended pursuant to section 4660.1(d). (Lab. Code, § 4660.1(d).)

24 ¹⁹ Additionally, the specified injuries in section 4660.1(c)(2)(B) may result in a range of permanent disability ratings. For
25 example, a lower extremity amputation above the knee (i.e., loss of a limb) may have a 40% WPI rating pursuant to the AMA
26 Guides. (American Medical Association Guides to the Evaluation of Permanent Impairment (5th ed. 2001) (AMA Guides),
27 Table 17-32, p. 545.) Before accounting for occupation and age, a 40% WPI rating multiplied by the statutory adjustment
factor of 1.4 adjusts to 56% permanent disability. (§ 4660.1(b).) Alternatively, an upper extremity amputation at the shoulder
level may have a 60% WPI rating pursuant to the AMA Guides. (AMA Guides, *supra*, at Table 16-4, p. 440.) Before
accounting for occupation and age, a 60% WPI rating multiplied by 1.4 adjusts to 84% permanent disability. The range of
possible ratings for one of the statutorily specified injuries suggests the Legislature did not intend to fix determination of a
“catastrophic injury” to a particular level of permanent disability.

provisions to a statute].)

Therefore, we also decline to measure whether an injury is catastrophic based on the injury's impact to the employee's earning capacity or a minimum level of permanent disability.

IV. Determination Of Whether An Injury Is A "Catastrophic Injury" Under Section 4660.1(c)(2)(B) Focuses On The Nature Of The Injury And Is A Fact-Driven Inquiry.

Our review of extrinsic sources did not provide us with a clear, useable definition of "catastrophic injury" for purposes of interpreting section 4660.1(c)(2)(B). However, based on our analysis, we conclude that the statutory language of section 4660.1(c)(2)(B) focuses on the *nature of the injury*, as reflected in the statutory examples included in the section by the Legislature. The nature of the injury will vary with the individual circumstances of each case. Thus, determination of whether an injury is catastrophic under section 4660.1(c)(2)(B) will be a fact-driven inquiry.

Section 4660.1(c)(2) permits an increased impairment rating "if the compensable psychiatric injury *resulted from*" a catastrophic injury. (§ 4660.1(c)(2), emphasis added.) If the psychiatric injury is a compensable consequence of the physical injury, the statute's language reflects that the psychiatric injury must *result from* a catastrophic injury in order for the employee to receive an increased rating for the psychiatric injury. This indicates that the inquiry into whether an injury is catastrophic is limited to looking solely at the *physical* injury, without consideration for the psychiatric injury in evaluating the nature of the injury. The injury must therefore be deemed catastrophic independent of the psychiatric injury.

Although the focus in determining whether an injury is catastrophic is on the physical injury, the employee must prove the psychiatric injury was predominantly caused by actual events of employment in order to receive an increased impairment rating under section 4660.1(c)(2)(B). Determination of causation of a psychiatric injury requires competent medical evidence. (*Rolda v. Pitney Bowes, Inc.* (2001) 66 Cal.Comp.Cases 241, 245 (Appeals Board en banc).) The causation threshold for a psychiatric

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1 injury is predominant as to all causes combined. (*Id.*; § 3208.3(b)(1).)²⁰ The evaluating physicians must
2 render an opinion as to whether the psychiatric injury was predominantly caused by actual events of
3 employment. The physicians must further specify if the psychiatric injury is directly caused by events of
4 employment or if the psychiatric injury is a compensable consequence of the physical injury. (See
5 *McCullough, supra*, 96 Cal.App.4th at p. 1249 [the precipitating physical injury constitutes an actual
6 event of employment for purposes of a compensable consequence psychiatric injury].)

7 The nature of the injury sustained is a question of fact for the WCJ. (*Western Growers Ins. Co. v.*
8 *Workers' Comp. Appeals Bd. (Austin)* (1993) 16 Cal.App.4th 227, 234 [58 Cal.Comp.Cases 323].)
9 Whether an injury is “catastrophic” under section 4660.1(c)(2)(B) is therefore a factual/legal issue for the
10 WCJ to determine. The WCJ, after considering all the medical evidence, and other documentary and
11 testimonial evidence of record, must determine whether the injury is “catastrophic” under section
12 4660.1(c)(2)(B).

13 A fact-driven analysis of whether an injury is catastrophic may encounter a range of
14 circumstances beyond the statutorily specified injuries covered by section 4660.1(c)(2)(B). There are
15 factors the trier of fact may consider in determining whether an injury may be deemed catastrophic.
16 These factors include, but are not limited to, the following, as relevant:

- 17 1. The intensity and seriousness of treatment received by the employee that was reasonably required
18 to cure or relieve from the effects of the injury.
- 19 2. The ultimate outcome when the employee’s physical injury is permanent and stationary.
- 20 3. The severity of the physical injury and its impact on the employee’s ability to perform activities
21 of daily living (ADLs).²¹

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23 ²⁰ As discussed above, section 3208.3(b)(2) provides that actual events of employment must be a “substantial cause of the
24 injury” if the injury “resulted from being a victim of a violent act or from direct exposure to a significant violent act.”
25 Substantial cause is defined as “at least 35 to 40 percent of the causation from all sources combined.” (§ 3208.3(b)(3).) If an
26 employee shows that section 3208.3(b)(2) applies to his or her compensable consequence psychiatric injury, then presumably
the injury would also qualify for an increased permanent impairment rating under section 4660.1(c)(2)(A). If an employee
already qualifies for an increased rating under section 4660.1(c)(2)(A), determination of whether the injury is “catastrophic”
under section 4660.1(c)(2)(B) is moot.

27 ²¹ Activities of daily living include: 1) self-care, personal hygiene, 2) communication, 3) physical activity, 4) sensory function,
5) nonspecialized hand activities, 6) travel, 7) sexual function, and 8) sleep. (AMA Guides, *supra*, at Table 1-2, p. 4.)

1 4. Whether the physical injury is closely analogous to one of the injuries specified in the statute: loss
2 of a limb, paralysis, severe burn, or severe head injury.

3 5. If the physical injury is an incurable and progressive disease.

4 Not all of these factors may be relevant in every case and the employee need not prove all of
5 these factors apply in order to prove a “catastrophic injury.” This list is also not exhaustive and the trier
6 of fact may consider other relevant factors regarding the physical injury. In determining whether an
7 injury is catastrophic, the trier of fact should be mindful of the legislative intent behind section 4660.1(c).

8 **V. Applicant’s Injury Was “Catastrophic” Under Section 4660.1(c)(2)(B) And He May Receive**
9 **An Increased Impairment Rating For His Psychiatric Injury.**

10 We now apply the above analysis to the instant matter. As previously discussed, applicant has
11 sustained his burden of proving that his psychiatric injury was predominantly caused by his physical
12 injury pursuant to the psychological QME Dr. Walsh’s reporting.²² For the reasons discussed below, we
13 conclude that applicant’s injury was catastrophic and he may receive an increased rating for his
14 psychiatric injury under section 4660.1(c)(2)(B).

15 The evidence in the record reflects that the initial treatment for applicant’s industrial injury was
16 serious and life-threatening. Applicant presented to the hospital with multiple symptoms in several body
17 parts including fever, nausea, vomiting, a full-body rash, bilateral eye discharge, difficulty breathing, as
18 well as ulcers on his mouth and throat. He was placed in a medically-induced coma and suffered both
19 renal and respiratory failure. During his hospitalization, he also suffered from tremors. Applicant was
20 intubated, placed on oxygen for an extended period and remained in the hospital for approximately two
21 weeks before being discharged.

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27 ²² Causation for the psychiatric injury is not in dispute since defendant stipulated to injury to applicant’s psyche at trial.
(Minutes of Hearing, September 27, 2017, p. 1.)

1 The physical injury caused permanent impairment to multiple body parts pursuant to the medical-
2 legal reporting. The DEU calculated the following permanent disability ratings based on the QMEs'
3 reports: 10% for pulmonary hypertension,²³ 18% for asthma,²⁴ 18% for pulmonary-induced respiratory
4 neuromuscular weakness, 33% for the left eye, 6% for headaches and 10% for mental status. Applicant's
5 physical injury alone was found to have caused a combined permanent disability rating of 66%.

6 The medical reporting shows that applicant continues to suffer from the effects of his injury and
7 that it substantially impacts his ability to perform ADLs.²⁵ The medical-legal evaluators consistently
8 reported complaints of persistent fatigue, shortness of breath, weakness, inability to lift and difficulty
9 walking long distances or running. He was diagnosed with impaired cognition and memory, as well as
10 continued difficulty with sleep. The injury also impaired his vision.

11 Applicant attempted to return to work, but was unable to perform his job duties as a firefighter.
12 Three of the medical-legal evaluators concluded that applicant is unable to return to his work as a
13 firefighter because of his industrial injury. The injury has essentially been career-ending for applicant
14 who was only 28 years old at the time of his injury.

15 The evidence therefore supports that the intensive treatment and the lasting impact of the injury
16 on applicant have resulted in a catastrophic injury. Applicant's injury is not the type of questionable
17 claim of disability that the Legislature sought to preclude from an increased impairment rating.
18 Consequently, applicant may receive an increased impairment rating for his psychiatric injury under
19 section 4660.1(c)(2)(B).

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24 ²³ In his Opinion of Judge on Decision and rating instructions, the WCJ does not explain why he did not apply the
apportionment of 50% to non-industrial allergies found by Dr. Grodan for applicant's hypertension.

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26 ²⁴ Again, the Opinion of Judge on Decision and rating instructions do not explain why the WCJ did not apply the
apportionment of 20% due to non-industrial causes found by Dr. Ho for applicant's asthma.

27 ²⁵ We did not consider applicant's reported psychiatric symptoms or how those symptoms impact his ability to perform ADLs
in our analysis.

1 In conclusion, we hold that determination of whether an injury is catastrophic under section
2 4660.1(c)(2)(B) focuses on the nature of the injury and is a fact-driven inquiry. We will rescind the F&A
3 and substitute a new F&A to include a finding of fact that applicant sustained a catastrophic injury and
4 may receive an increased impairment rating for his psychiatric injury. The issues of permanent disability
5 and apportionment will be deferred. The matter will be returned to the trial level for further proceedings
6 consistent with this opinion.²⁶

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25 ²⁶ The substituted F&A will include a finding of injury AOE/COE to the body parts stipulated to have sustained injury and
26 pursuant to the medical-legal reporting in evidence since there was not a specific finding of injury AOE/COE in the original
27 F&A. We will not retain the finding of no injury AOE/COE to the heart since this was not one of the disputed issues
identified to be adjudicated at trial. We make no comment on the issue of injury AOE/COE to the heart and will defer this
issue.

1 For the foregoing reasons,

2 **IT IS ORDERED** as the Decision After Reconsideration of the Workers' Compensation Appeals
3 Board that the Findings and Award issued by the WCJ on December 28, 2017 is **RESCINDED** in its
4 entirety and the following is **SUBSTITUTED** in its place:

5 **FINDINGS OF FACT**

- 6 1. Applicant, Kris Wilson, while employed on May 13, 2014, as a
7 firefighter (Group 490) by the Department of Forestry, sustained injury
8 arising out of and in the course of employment to his lungs, psyche, left
9 eye, head, and brain.
- 10 2. The issue of injury arising out of and in the course of employment to
11 the heart is deferred.
- 12 3. Applicant sustained a catastrophic injury pursuant to section
13 4660.1(c)(2)(B) and may receive an increased impairment rating for his
14 psychiatric injury.
- 15 4. Applicant is entitled to up to the 104 weeks of temporary disability
16 indemnity. Defendant is entitled to credit for any periods of temporary
17 disability previously paid.
- 18 5. Applicant is in need of further medical treatment to cure or relieve from
19 the effects of the injury.
- 20 6. The issues of permanent disability and apportionment, and attorney's
21 fees thereon are deferred.
- 22 7. Applicant's attorney is entitled to fees of 15% of any additional
23 temporary disability owing to applicant.
- 24 8. The issue of the lien of the Employment Development Department is
25 deferred.

26 **AWARD**

27 **AWARD IS MADE** in favor of KRIS WILSON, against CAL FIRE SAN
LUIS OBISPO as follows:

- a. Temporary disability in accordance with number 4 above.
- b. Future medical treatment in accordance with number 5 above.
- c. Attorney's fees in accordance with number 7 above.

IT IS FURTHER ORDERED as the Decision After Reconsideration of the Workers' Compensation Appeals Board that the matter is **RETURNED** to the trial level for further proceedings consistent with this opinion.

WORKERS' COMPENSATION APPEALS BOARD (EN BANC)

/s/ Katherine A. Zalewski
KATHERINE A. ZALEWSKI, Chair

/s/ Deidra E. Lowe
DEIDRA E. LOWE, Commissioner

/s/ Marguerite Sweeney
MARGUERITE SWEENEY, Commissioner

/s/ José H. Razo
JOSÉ H. RAZO, Commissioner

/s/ Juan Pedro Gaffney R.
JUAN PEDRO GAFFNEY R, Commissioner

/s/ Craig Snellings
CRAIG SNELLINGS, Commissioner

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

05/10/2019

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

LAW OFFICE OF JOHN SPATAFORE
KRIS WILSON
STATE COMPENSATION INSURANCE FUND

AI/abs