

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 ORDER
DENYING PETITION
FOR RECONSIDERATION
(En Banc)

11 Defendant seeks reconsideration of the Opinion and Decision After Reconsideration (En Banc)
12 (hereinafter "Opinion") issued by the Workers' Compensation Appeals Board on May 10, 2019. By the
13 Opinion, the Appeals Board en banc rescinded the Findings and Award issued by the workers'
14 compensation administrative law judge (WCJ) on December 28, 2017, and substituted a new findings of
15 fact and award. In the substituted findings of fact, the Appeals Board found that applicant sustained a
16 catastrophic injury pursuant to Labor Code section 4660.1(c)(2)(B)¹ and may receive an increased
17 impairment rating for his psychiatric injury. The en banc decision also held that determination of
18 whether an injury is catastrophic under section 4660.1(c)(2)(B) focuses on the nature of the injury and is
19 a fact-driven inquiry. The Opinion outlined five non-exhaustive factors the trier of fact may consider in
20 evaluating whether an injury is catastrophic under section 4660.1(c)(2)(B).

21 In its Petition for Reconsideration, defendant does not dispute that applicant sustained a
22 catastrophic injury pursuant to section 4660.1(c)(2)(B) and may receive an increased impairment rating
23 for his psychiatric injury. However, defendant contends that the phrase "catastrophic injury" in section
24 4660.1(c)(2)(B) refers to the mechanism of injury and the condition immediately after the injury occurs.
25 Defendant also contends that the five factors outlined by the Opinion are not authorized by section
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27 ¹ All further statutory references are to the Labor Code unless otherwise stated.

1 4660.1(c)(2)(B) or legislative history, and that the Appeals Board exceeded its authority by promulgating
2 these five factors.²

3 We received an unverified answer from applicant. Applicant requested approval to file a
4 supplemental answer, which we decline to accept. (Cal. Code Regs., tit. 8, § 10848.)³

5 We have considered the allegations of defendant’s Petition for Reconsideration and applicant’s
6 answer. Based on our review of the record, for the reasons stated in the Opinion, which we adopt and
7 incorporate herein, and discussed below, we will deny reconsideration.⁴

8 DISCUSSION

9 I.

10 Defendant contends that the phrase “catastrophic injury” in section 4660.1(c)(2)(B) refers to the
11 mechanism of injury. We reject this contention pursuant to the analysis of this issue in our prior
12 Opinion. (See *Wilson v. State of CA Cal Fire* (2019) 84 Cal.Comp.Cases 393, 406-407 (Appeals Board
13 en banc).)

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15 ² Section 5900(a) permits “[a]ny person aggrieved directly or indirectly by any final order, decision, or award made and filed
16 by appeals board” to petition the Appeals Board for reconsideration “in respect to any matters determined or covered by the
17 final order, decision, or award.” (Lab. Code, § 5900(a).)

18 Defendant does not dispute in its Petition that applicant sustained a catastrophic injury as a result of his industrial injury and
19 therefore, may receive an increased permanent impairment rating for his psychiatric injury. (Defendant’s Petition for
20 Reconsideration, June 4, 2019, p. 2:4-6.) Consequently, it is uncertain if defendant may be considered an “aggrieved party”
21 by the Opinion since defendant does not contest the disposition reached by the Appeals Board. However, we will address the
22 merits of defendant’s Petition.

23 ³ The California Workers’ Compensation Institute (CWCI) requested to file an amicus curiae brief. However, WCAB Rule
24 10848, which provides that the Appeals Board may consider a supplemental pleading requested or approved by it, applies only
25 to supplemental pleadings filed by a “party.” (Cal Code Regs., tit. 8, § 10848.) Thus, Rule 10848 does not apply to amicus
26 briefs. Furthermore, as stated in *Weiner v. Ralphs Co.* (2009) 74 Cal.Comp.Cases 484, 486, fn. 2 (Appeals Board en banc;
27 emphasis added): “We observe it is not unusual for the Appeals Board to *invite* amicus curiae briefs relating to our en banc
cases. The Appeals Board has periodically done so for over 30 years.” Here, however, the Appeals Board has not invited
amicus briefs and, generally, it does not accept unsolicited amicus briefs. Accordingly, CWCI’s proposed amicus brief is not
accepted for filing or deemed filed.

⁴ This decision is being issued in response to defendant’s challenge to our en banc decision in this matter and is designated as
an en banc decision. (Lab. Code, § 115.) En banc decisions of the Appeals Board are binding precedent on all Appeals Board
panels and WCJs. (Cal. Code Regs., tit. 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). Commissioner Katherine Dodd was unavailable to participate in the prior Opinion issued in this
matter and thus, did not participate in this decision.

1 Defendant also contends that “catastrophic injury” refers to the condition immediately after the
2 injury occurs. This interpretation is not supported by the statute’s language. Section 4660.1(c)(2)(B)
3 contains no temporal restrictions on its application. There is nothing in the statute to indicate that
4 whether an injury is catastrophic must be determined at a specific time, including immediately after the
5 injury occurs.

6 In support of its interpretation, defendant states: “That the Legislature gave examples only of
7 injuries that are immediately catastrophic reveals the intent of the Legislature was to limit ‘catastrophic’
8 to those types of injuries.” (Defendant’s Petition for Reconsideration, June 4, 2019, p. 5:9-11.) This is in
9 reference to the specific injuries identified in section 4660.1(c)(2)(B) as catastrophic: loss of a limb,
10 paralysis, severe burn and a severe head injury.

11 However, the statutorily specified injuries may not occur immediately at the time of an injury.
12 An injured worker could sustain an injury to a limb that does not immediately result in the limb’s
13 amputation (i.e., loss of a limb) until a period of time after the initial injury. An injured worker may not
14 be immediately paralyzed from an industrial injury, but later become so as a result of the injury. The
15 Legislature did not restrict the occurrence of the specified injuries to a specific timeframe and
16 consequently, neither may the Appeals Board.

17 Furthermore, in the Opinion, we acknowledged that “the proscription against an increased rating
18 for psychiatric injuries in section 4660.1(c) does not apply to psychiatric injuries directly caused by
19 events of employment.” (*Wilson, supra*, 84 Cal.Comp.Cases at p. 404.) Accordingly, section
20 “4660.1(c)(1) only bars an increase in the employee’s permanent impairment rating for a psychiatric
21 injury that is a *compensable consequence* of a physical injury occurring on or after
22 January 1, 2013...[unless] the injury falls under one of the statutory exceptions outlined in
23 section 4660.1(c)(2).” (*Id.* at p. 403, emphasis added.) Injurious incidents that *immediately* result in loss

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1 of a limb, paralysis, severe burn or a severe head injury may be the *direct cause* of a psychiatric injury.⁵
2 Specifically, an industrial accident that immediately severs an employee’s limb or paralyzes the
3 employee could directly cause a psychiatric injury rather than resulting in a compensable consequence
4 psychiatric injury. Defendant’s overly restrictive interpretation blurs the distinction between direct and
5 compensable consequence injuries. This interpretation is inconsistent with the statute’s language and the
6 legislative intent to retain compensability for directly caused psychiatric injuries while allowing
7 compensation for certain compensable consequence psychiatric injuries.

8 We therefore reject defendant’s contention that the phrase “catastrophic injury” in section
9 4660.1(c)(2)(B) refers to the mechanism of injury and the condition immediately after the injury occurs.

10 II.

11 Defendant also contends that the factors outlined in the Opinion are not supported by legislative
12 history and the Appeals Board exceeded its authority by outlining factors the trier of fact may consider in
13 evaluating whether an injury is catastrophic under section 4660.1(c)(2)(B).

14 The Labor Code expressly vests the Appeals Board with the “power and jurisdiction to do all
15 things necessary or convenient in the exercise of any power or jurisdiction conferred upon it under [the
16 Labor Code].” (Lab. Code, § 133; see also Lab. Code, §§ 5300, 5301 [the Appeals Board is vested with
17 full power, authority and jurisdiction to try and determine any matter under Division 4 of the Labor
18 Code].) Determination of whether an injury is catastrophic under section 4660.1(c)(2)(B) is therefore
19 within the authority of the Appeals Board. However, as discussed in the Opinion, the statute “does not
20 define a ‘catastrophic injury’ ” and a “review of extrinsic sources did not provide...a clear, useable
21 definition” of the phrase. (*Wilson, supra*, 84 Cal.Comp.Cases at pp. 406, 413.)

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23 ⁵ It is emphasized that other injuries not specified in the statute or characterized as catastrophic may directly cause a
24 psychiatric injury. (See e.g., *Madson v. Michael J. Cavaletto Ranches* (February 22, 2017, ADJ9914916) [2017
25 Cal.Wrk.Comp.P.D.LEXIS 95] [applicant’s post-traumatic stress disorder was directly caused by the industrial truck accident
26 when applicant was claustrophobic, was pinned upside down in the cab for 35-40 minutes after the accident and had to be
27 extricated from the vehicle].) 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).)

1 An “administrative agency charged with carrying out a particular statute must adopt some
2 preliminary construction of the statute as a basis upon which to proceed.” (*Bodinson Mfg. Co. v.*
3 *California Employment Com.* (1941) 17 Cal.2d 321, 325.) In the Opinion, we analyzed the statute’s
4 language, its legislative history and intent, “as well as the overall purposes and policies governing the
5 workers’ compensation system” and held that the determination of whether an injury is catastrophic
6 “focuses on the nature of the injury and is a fact-driven inquiry.” (*Wilson, supra*, 84 Cal.Comp.Cases at
7 pp. 408, 395.) To assist the trier of fact in performing this fact-driven inquiry, the Opinion outlined five
8 “factors the trier of fact *may consider* in determining whether an injury may be deemed catastrophic.”
9 (*Id.* at p. 415, emphasis added.)

10 The factors identified in the Opinion were likewise based on our analysis of the statute, its
11 legislative history and intent, and the overall purposes and policies governing the workers’ compensation
12 system. The factors provide an analytical framework to assist the trier of fact in determining whether an
13 injury is catastrophic under section 4660.1(c)(2)(B). The Appeals Board regularly interprets workers’
14 compensation law⁶ and has previously provided similar analytical frameworks. (See *Rolda v. Pitney*
15 *Bowes, Inc.* (2001) 66 Cal.Comp.Cases 241 (Appeals Board en banc) [analysis to determine whether a
16 claimed psychiatric injury is compensable and whether it is barred by the lawful, non-discriminatory
17 good faith personnel action defense in section 3208.3(h)]; *McDuffie v. Los Angeles County Metropolitan*
18 *Transit Authority* (2002) 67 Cal.Comp.Cases 138 (Appeals Board en banc) [outlining preferred
19 procedures for a WCJ to develop a deficient medical record]; *Ramirez v. Drive Financial Services* (2008)
20 73 Cal.Comp.Cases 1324 (Appeals Board en banc) [outlining nine factors relevant to determining an
21 appropriate penalty under section 5814(a)]; *Blackledge v. Bank of America* (2010) 75 Cal.Comp.Cases
22 613 (Appeals Board en banc) [outlining the respective roles of the evaluating physician, the WCJ and the
23 rater in determining whole person impairment under the AMA Guides]; and *Suon v. California Dairies*

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25 ⁶ The Appeals Board “has extensive expertise in interpreting and applying the workers’ compensation scheme.” (*Brodie v.*
26 *Workers’ Comp. Appeals Bd.* (2007) 40 Cal.4th 1313, 1331.) “Interpretation of governing statutes or application of the law to
27 undisputed facts is decided de novo by the reviewing court, even though the WCAB’s interpretation is entitled to great weight
unless clearly erroneous.” (*Zenith Ins. Co. v. Workers’ Comp. Appeals Bd. (Cugini)* (2008) 159 Cal.App.4th 483, 490; see
also *Bodinson, supra*, 17 Cal.2d at p. 325 [“administrative interpretation of a statute will be accorded great respect by the
courts and will be followed if not clearly erroneous”].)

1 (2018) 83 Cal.Comp.Cases 1803 (Appeals Board en banc) [outlining six factors that may be considered
2 by a WCJ in determining the appropriate remedy for a party’s violation of section 4062.3(b)].)

3 Interpretation of the phrase “catastrophic injury” in section 4660.1(c)(2)(B) presented a novel
4 legal issue and the Appeals Board unanimously voted to issue our analysis of this statute in an en banc
5 decision in order to achieve uniformity of decision on future matters regarding this issue pursuant to
6 section 115. (§ 115.) Government Code section 11425.60(b) permits the Appeals Board to “designate as
7 a precedent decision a decision or part of a decision that contains a significant legal or policy
8 determination of general application that is likely to recur.” (Gov. Code, § 11425.60(b).) The section
9 further states that “[d]esignation of a decision or part of a decision as a precedent decision is not
10 rulemaking.” (*Id.*) It is within the purview of the Appeals Board to interpret section 4660.1(c)(2)(B) and
11 analyze how it may be applied.

12 Defendant implies that the Opinion’s inclusion of the five factors was an improper adoption of a
13 rule or regulation. The Appeals Board may not adopt a rule or regulation without giving notice and
14 holding public hearings as required by section 5307.4. (Lab. Code, § 5307.4; see also Lab. Code,
15 § 5307(b).) In *Rea v. Workers’ Comp. Appeals Bd. (Milbauer)* (2005) 127 Cal.App.4th 625 [70
16 Cal.Comp.Cases 312], the Appeals Board improperly adopted new procedures regarding appearances and
17 discovery by the Uninsured Employers Benefits Trust Fund (UEBTF) in violation of sections 5307 and
18 5307.4. However, the Opinion issued in this matter does not adopt new rules or regulations. As
19 discussed above, the factors outlined in the Opinion properly provide the trier of fact with an analytical
20 framework to assist in determining whether an injury is catastrophic under section 4660.1(c)(2)(B). The
21 trier of fact is not required to consider these factors and “may consider other relevant factors regarding
22 the physical injury.” (*Wilson, supra*, 84 Cal.Comp.Cases at p. 415.) Additionally, the Opinion
23 acknowledged that these factors may not be relevant in every case, the employee need not prove all of
24 these factors apply and the factors are “not exhaustive.” (*Id.*) Outlining five non-exhaustive factors the
25 trier of fact may consider is not an exercise in impermissible rulemaking.

26 Defendant further contends that factors 1 through 3 and 5 in the Opinion “are contrary to the
27 legislative intent behind SB 863 and will tend to return the system to pre-863 days when these add-ons

1 *'have greatly expanded.'* ” (Defendant’s Petition for Reconsideration, June 4, 2019, p. 6:23-26, italics in
2 original.) Defendant does not explain why factors 1 through 3 and 5 will expand application of section
3 4660.1(c)(2)(B) and we discern no basis to anticipate this outcome. The Opinion expressly noted that
4 “the trier of fact should be mindful of the legislative intent behind section 4660.1(c)” in determining
5 whether an injury is catastrophic. (*Wilson, supra*, 84 Cal.Comp.Cases at p. 415.)⁷

6 Defendant cited to an article from Prop 23 Advisors in support of its Petition. This article is not
7 part of the evidentiary record and defendant did not request judicial notice of this article. (See Evid.
8 Code, § 452.) Defendant is admonished that citing to documents that are not part of the record in a
9 petition for reconsideration without seeking judicial notice of those documents may subject it to
10 sanctions. (Lab. Code, § 5813; Cal. Code Regs., tit. 8, §§ 10561(b)(4), 10842(b).) This is particularly
11 improper where, as here, the cited article is only accessible to subscribers, which prevents the Appeals
12 Board from accessing and responding to its contents if we were to consider it.

13 In conclusion, we will deny defendant’s Petition for Reconsideration.

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26 ⁷ Defendant contends that the fourth factor outlined in the Opinion, whether the physical injury is closely analogous to one of
27 the injuries specified in the statute, should remain in place, but separately contends that the Appeals Board exceeded its
authority in promulgating the five factors. (Defendant’s Petition for Reconsideration, June 4, 2019, pp. 7-8.) These
simultaneous legal positions are incongruous.

1 For the foregoing reasons,

2 **IT IS ORDERED** that defendant's Petition for Reconsideration of the Opinion and Decision
3 After Reconsideration (En Banc) issued by the Workers' Compensation Appeals Board on May 10, 2019
4 is **DENIED**.

5 **WORKERS' COMPENSATION APPEALS BOARD (EN BANC)**

6 /s/ Katherine A. Zalewski
7 *KATHERINE A. ZALEWSKI, Chair*

8 /s/ Deidra E. Lowe
9 *DEIDRA E. LOWE, Commissioner*

10 /s/ Marguerite Sweeney
11 *MARGUERITE SWEENEY, Commissioner*

12 /s/ José H. Razo
13 *JOSÉ H. RAZO, Commissioner*

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

16 /s/ Craig Snellings
17 *CRAIG SNELLINGS, Commissioner*

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20 **DATED AND FILED AT SAN FRANCISCO, CALIFORNIA**

21 **07/15/2019**

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

24 **LAW OFFICE OF JOHN SPATAFORE**
25 **KRIS WILSON**
26 **STATE COMPENSATION INSURANCE FUND**

27 **AI/abs**