

1 We have received an answer from defendant. We received a Report and Recommendation on
2 Petition for Reconsideration (Report) from the WCJ recommending that we deny reconsideration.

3 We have received a request to consider a supplemental petition filed by applicant on
4 February 2, 2017, which we grant. (Cal. Code Regs., tit. 8, § 10848.)

5 We have considered the allegations of the Petition for Reconsideration, the supplemental petition,
6 the answer, and the contents of the WCJ's Report with respect thereto. Based on our review of the record
7 and for the reasons discussed below, as our Decision After Reconsideration we will rescind the
8 October 13, 2016 F&A and substitute a new Findings and Award, which finds that section 4660.1 does
9 not apply to applicant's injury and award benefits accordingly.

10 **FACTUAL AND PROCEDURAL BACKGROUND**

11 Applicant worked as a truck driver for defendant when he was involved in a motor vehicle
12 accident on May 17, 2013. Applicant sustained an accepted industrial injury to his head, neck, shoulders,
13 and nervous system. However, applicant also alleged injury to psyche. Although multiple issues were
14 raised at trial, the sole issue on reconsideration is whether applicant's psychiatric permanent disability is
15 ratable pursuant to section 4660.1(c).³ Applicant alleges that the motor vehicle accident constituted a
16 "violent act" and thus an exception to the statute. Applicant further alleges that his injury does not arise
17 out of the physical injury, but instead is directly caused by the accident itself and thus, section 4660.1 is
18 not applicable in this case.

19 Applicant was hauling lemons and driving along State Route 46 in Paso Robles when he
20 approached the intersection of Bueno Vista Drive. (Exhibit 10, Traffic Collision Report, May 17, 2013,
21 pp. 5-6.) Another vehicle was turning onto the highway, which had a dedicated merge lane. (*Ibid.*) That
22 vehicle did not use the merge lane, but instead exited directly onto the highway. (*Ibid.*) Applicant
23 swerved to avoid a collision, which resulted in applicant's truck rolling over onto the highway, pinning
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26 ³ Applicant's injury to the cervical spine rated to 39% permanent disability based on a Diagnosis Related Estimate class III
27 and no party has sought reconsideration of the cervical spine rating. The issue of reimbursement for vocational expert costs
was raised by the parties, but not decided by the WCJ. We will defer that issue to the trial level.

1 applicant inside the cab of the vehicle. (*Ibid.*) Applicant hit his head and may have been briefly
2 knocked unconscious. (Exhibit 1, Report of Peter Dell, M.D., August 11, 2015, p. 8.)

3 Applicant is claustrophobic. (Minutes of Hearing and Summary of Evidence (MOH),
4 June 20, 2016, p. 4, lines 4-10.) He was pinned and crushed in the cab upside down for approximately 35
5 to 40 minutes. (*Ibid.*) He could only take shallow breaths. (*Ibid.*) Applicant was afraid that the truck
6 would catch fire because the engine was still running and the truck had two full tanks of fuel. (*Ibid.*)
7 Applicant had to be freed from the wreckage using the "jaws of life". (Exhibit 1, *supra*, at p. 87.)
8 Applicant described the event as "horrific". (MOH, June 20, 2016, p. 4, lines 4-10.)

9 Applicant was evaluated by qualified medical evaluator (QME) Peter Dell, M.D., who issued one
10 report. (Exhibit 1, *supra*.) Dr. Dell reviewed the following history of injury:

11 The ambulance crew arrived at the scene on May 17, 2013 to find the
12 applicant in "FSP" [full spinal precaution] complaining of right leg pain.
13 The applicant was the single occupant/driver of a semi-truck involved in a
14 motor vehicle accident. He was extricated out of the vehicle by "PRFD." It
15 took approximately 10 minutes to extricate him out of the vehicle. Per
16 PRFD, the applicant's chief complaint was right leg pain. The applicant's
17 leg was pinned and freed upon extrication. He recalled the entire incident,
18 and en route, he complained of left upper thigh discomfort, right hip pain,
19 and left thigh pain. He denied shortness of breath, chest pain, back pain,
20 neck pain, nausea/vomiting/diarrhea, or recent illness. His care was
21 transferred to "SVRMC" [Sierra Vista Regional Medical Center] Trauma
22 Team upon arrival at the hospital.

23 The applicant was unable to accept transport and/or treatment. Thus, the
24 ambulance crew, Mr. Tucker, signed this report on behalf of the applicant
25 who was physically incapable to do so.

26 (*Id.* at p. 6.)

27 Upon arrival at the hospital CT scans noted a fracture of applicant's neck. (*Id.* at p. 8.)

28 The applicant was transported by ambulance to the hospital and
29 admitted for three days due to his injuries. He said he did not think he
30 was that hurt at first, until he learned that he had fractured his C2
31 vertebrae and could have died if the break had gone any further. He
32 received treatment for his injury, including 20 to 50 sessions of physical
33 therapy and surgery for his right shoulder in February 2015. He
34 reported that the treatment he received was helpful.

35 (*Id.* at pp. 87-88.)

36 Applicant has not worked since his injury. (*Id.* at p. 86.) With regard to applicant's reports of
37 psychological complaints:

1 The applicant reported that he developed emotional symptoms shortly
2 after his injury. He said his symptoms were at their worst right after his
3 injury occurred, but have improved over time. He rated his symptoms
4 after his injury at 9-10/10, in which 10 represents severe symptoms. He
5 rated his symptoms currently a 5- 6/10 and said he has felt much better
6 since receiving EMDR treatment for the trauma he experienced.

7 (*Id.* at pp. 88.)

8 Dr. Dell diagnosed applicant as having post-traumatic stress disorder as a direct result of the
9 accident, which threatened applicant with death or serious injury. (*Id.* at p. 112.) Dr. Dell assigned
10 applicant a GAF score of 58 and determined that 95% of applicant's psychological impairment was
11 caused by "the motor vehicle accident of May 17, 2013" and assigned 5% to outside stressors.

12 The vast majority of the applicant's psychiatric injury and development
13 of emotional symptoms was caused by the accident that occurred while
14 he was performing his job duties on May 17, 2013. As a result of that
15 very serious accident, he developed symptoms of PTSD that have led to
16 him feeling afraid to drive a truck and to experience considerable
17 hypervigilance when he is driving in general. He is rightfully afraid of
18 re-injuring his cervical spine which could result in paralysis.

19 (*Id.* at p. 114.)

20 The WCJ did not award applicant psychiatric disability, opining on the definition of "violent act"
21 as follows:

22 In the undersigned's opinion as unfortunate as the applicant's vehicle
23 accident was, the undersigned believes that the better and more reasonable
24 interpretation of the statute is that there has to be at least some volitional
25 act set in force by a human being with at least if not intent something more
26 than mere negligence to bring the violent act exception into play. There is
27 no evidence of that and accordingly, applicant is not entitled to receive
permanent disability indemnity for his psychiatric claim.

(Opinion on Decision, October 13, 2016, p. 4.)

DISCUSSION

I.

SECTION 4660.1(c) DOES NOT APPLY TO PSYCHOLOGICAL INJURIES DIRECTLY CAUSED BY EVENTS OF EMPLOYMENT

Applicant's injury occurred in 2013, which is subject to section 4660.1(c) and limits the
compensability of permanent disability resulting from certain injuries as follows:

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

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

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

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

10 Here, the parties stipulated that applicant sustained an industrial injury to his psyche; however,
11 they disputed whether the impairment caused by applicant's psychiatric disorder was compensable
12 pursuant to section 4660.1(c).

13 Section 4660.1(c) does not preclude increases in impairment ratings when the psyche injury arises
14 directly from the events of employment. (See *City of Los Angeles v. Workers' Comp. Appeals Bd.*
15 (*Montenegro*) (2016), 81 Cal.Comp.Cases 611 (writ den.) [holding that impairment caused by sexual
16 dysfunction arising directly from the industrial injury is not precluded under section 4660.1(c)].⁴

17 Applicant suffered a psychiatric disorder in the form of post-traumatic stress disorder. The QME
18 clearly opined that the traumatic stress that resulted in applicant's psychiatric disorder was the industrial
19 accident itself and not the compensable physical injury. Thus, the preclusion of psychiatric impairment
20 under section 4660.1(c) does not apply to applicant's injury.

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24 ⁴ Unlike en banc decisions, panel decisions are not binding precedent on other Appeals Board panels and WCJs. (See *Gee v.*
25 *Workers' Comp. Appeals Bd.* (2002) 96 Cal.App.4th 1418, 1425 fn. 6 [67 Cal.Comp.Cases 236].) However, panel decisions
26 are citeable authority and we consider these decisions to the extent that we find their reasoning persuasive, particularly on
27 issues of contemporaneous administrative construction of statutory language. (See *Guitron v. Santa Fe Extruders* (2011) 76
Cal.Comp.Cases 228, fn. 7 (Appeals Board En Banc); *Griffith v. Workers' Comp. Appeals Bd.* (1989) 209 Cal.App.3d 1260,
1264, fn. 2, [54 Cal.Comp.Cases 145].) Here, we refer to *Montenegro, supra*, because it considered a similar issue. We
recommend that practitioners proceed with caution when citing to a panel decision and verify its subsequent history.

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II.

APPLICANT'S INJURY CONSTITUTES A VIOLENT ACT AND APPLICANT'S
PSYCHIATRIC IMPAIRMENT IS COMPENSABLE

Applicant contends in the alternative that even if his psychiatric permanent disability were construed as arising from his physical injuries, the psychiatric disability would be compensable under section 4660.1(c) because the mechanism of applicant's injury constituted a "violent act" as intended by the Legislature in drafting section 4660.1. The WCJ limited the definition of "violent act" to a "volitional act set in force by a human being with at least if not intent something more than mere negligence[.]" However, we are persuaded by the panel decision in *Larsen v. Securitas Security Services*, which rejected a criminal or quasi-criminal definition of 'violent act' and defined the term for purposes of section 4660.1 as an act that is characterized by either strong physical force, extreme or intense force, or an act that is vehemently or passionately threatening.⁵ (2016 Cal. Wrk. Comp. P.D. LEXIS 237.)

Here, applicant was involved in a severe accident, which fractured applicant's neck and considerably threatened applicant's life. Applicant was trapped in an overturned tractor trailer for 35 to 40 minutes and could only be saved via the "jaws of life". Under these circumstances applicant's injury can be characterized as resulting from extreme or intense force and was vehemently threatening. Applicant's mechanism of injury constitutes a 'violent act' within the definition of section 3208.3(b). Thus, even if applicant's psychiatric permanent disability were construed as arising out of his physical

⁵ As noted in *Larsen*, we again emphasize that had the Legislature intended a violent act to constitute a perpetrated act of violence, the Legislature could have included such language in the statute. For example, section 4650.5 states:

Notwithstanding Section 4650, in the case of state civil service employees, employees of the Regents of the University of California, and employees of the Board of Trustees of the California State University, the disability payment shall be made from the first day the injured employee leaves work as a result of the injury, if the injury is the result of a criminal act of violence against the employee.

(§ 4650.5, emphasis added.)

1 injury, applicant would still be entitled to additional permanent disability for his psychiatric injury as an
2 exception to section 4660.1(c); thus, his psychiatric permanent disability is compensable.

3 Applicant's injury rates as follows:

4 (DRE-III Cervical Spine)

5 15.01.01.00 - 21 - [1.4]29 - 350G - 32 = 39%

6 (Psyche – GAF 58)

7 .95 (14.01.00.00 - 18 - [1.4]25 - 350H - 30 = 37%) = 35%

8 CVC 39 + 35 = 60 PD

9 Applicant's impairment rates to 60% permanent disability after apportionment. Applicant's
10 disability rating does not require the assistance of a DEU rater in this case. (See *Blackledge v. Bank of*
11 *America* (2010), 75 Cal.Comp.Cases 613, 624-625 (Appeals Board en banc).)

12 Accordingly, we rescind the October 13, 2016 F&A and substitute a new Findings and Award,
13 which includes an award of psychiatric impairment, which arose directly from the events of employment.

14 For the foregoing reasons,

15 **IT IS ORDERED** as the Decision After Reconsideration of the Workers' Compensation Appeals
16 Board that the Findings and Award issued on October 13, 2016, by the WCJ is **RESCINDED** with the
17 following Findings and Award **SUBSTITUTED** therefor:

18 **FINDINGS OF FACT**

- 19 1. Applicant, born [redacted], while employed as a truck
20 driver (Group 350) at Nipomo, California by Michael J. Cavaletto
21 Ranches, sustained an injury arising out of and in the course of
22 employment to his head, neck, shoulders, nervous system, and
23 psyche on May 17, 2013.
- 24 2. The employer was insured for workers' compensation purposes by
25 Zenith Insurance Company.
- 26 3. Applicant's earnings were maximum for permanent disability.
- 27 4. Temporary disability has been paid from May 18, 2013, to
May 14, 2015, for 104 weeks, the statutory maximum period.
5. Applicant is entitled to future medical care, which is reasonable and
necessary to cure or relieve from the effects of the injury.

6. Applicant is entitled to a permanent disability award of 60% permanent disability amounting to 351.25 weeks of permanent disability indemnity payable at the rate of \$270 a week in the total sum of \$94,837.50.
7. The issue of the lien claim of Employment Development Department is deferred to the parties to adjust with jurisdiction reserved at the trial level in the event of a dispute.
8. Applicant's attorney is entitled to a fee of \$14,225.00, which is to be commuted from the far end of applicant's permanent disability award.
9. The issue of reimbursement for vocational rehabilitation expert costs is deferred to the parties to adjust with jurisdiction reserved at the trial level in the event of a dispute.

AWARD

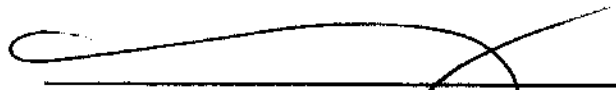
AWARD IS MADE in favor of RUSSELL MADSON against ZENITH INSURANCE COMPANY of:

- a) Permanent disability of 60% amounting to 351.25 weeks of permanent disability indemnity payable at the rate of \$270 a week beginning May 15, 2015, in the total sum of \$94,837.50, less attorney's fees of \$14,225.00, which is to be commuted from the far end of applicant's permanent disability award.
- b) Future medical care, which is reasonable and necessary to cure or relieve from the effects of the injury.
- c) The issue of the lien claim of Employment Development Department is deferred to the parties to adjust with jurisdiction reserved at the trial level in the event of a dispute.

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1 d) The issue of reimbursement for vocational rehabilitation expert
2 costs is deferred to the parties to adjust with jurisdiction reserved at
3 the trial level in the event of a dispute.

4 **WORKERS' COMPENSATION APPEALS BOARD**

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6 **MARGUERITE SWEENEY**

7 **I CONCUR,**

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10 _____
11 **KATHERINE ZALEWSKI**



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13 _____
14 **DEIDRA E. LOWE**

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

17 **FEB 22 2017**

18
19 **SERVICE MADE ON THE ABOVE DATE ON THE PERSONS LISTED BELOW AT THEIR**
20 **ADDRESSES SHOWN ON THE CURRENT OFFICIAL ADDRESS RECORD.**

21 **FABIANO CASTRO & CLEM**
22 **RUSSELL MADSON**
23 **WILLIAM HERRERAS**



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27 **EDL:mm**

CASE NOS. ADJ9914916

RUSSELL MADSON

vs. MICHAEL J CAVALETTO RANCHES;
ZENITH

WORKERS' COMPENSATION ADMINISTRATIVE LAW JUDGE:
MICHAEL LeCOVER
October 28, 2016

REPORT OF WORKERS' COMPENSATION ADMINISTRATIVE LAW JUDGE
ON PETITION FOR RECONSIDERATION

INTRODUCTION:

Applicant, born [redacted], while employed as truck driver (Group 350) sustained an admitted injury arising out of and in the course of employment to his head, neck, shoulders and nervous system and claimed to have sustained injury arising out of and in the course of employment to his psyche on May 17, 2013.

On October 13, 2016, a findings and award issued determining, in part, that applicant did not sustain injury AOE/COE to his psyche.

Applicant has filed a timely petition for reconsideration contending that this injury, a motor vehicle accident, is a "violent act" under Labor Code §3208.3(b).

DISCUSSION:

The facts in this case are, in the undersigned's opinion, almost undisputed. Applicant was involved in a significant motor vehicle accident while he was driving in a big rig that resulted in the admitted injury noted above. The question, as appropriately put by applicant is whether or not this injury constitutes a violent act.

Petitioner directed the court's attention to the case of *Larsen vs. Securitas Security Services (2016) 44 CWCR 111*. This is a Board panel decision and as the undersigned noted it was not inappropriate for counsel to call the court's attention to it. For the reasons stated below for which the undersigned is largely quoting the undersigned's opinion of judge on decision, the undersigned must respectfully disagree with the reasoning of this decision. Perhaps more fundamentally this is an inquiry into what the Legislature meant in adding this statute.

As the undersigned stated in the Judge's Opinion on Decision:

"The big issue in this case, as the undersigned perceives it, is whether or not applicant sustained injury AOE/COE to the psyche and whether or not that injury, assuming it occurred, is barred by Labor Code §4660.1(c)? That section provides, essentially, that a psychiatric disorder caused by physical injury does not entitle an injured worker to additional permanent disability unless the injured worker is under Section 4660.1 (c) (2) (A) which states:

"Being a victim or violent act or direct exposure significant violent act within the meaning of Section 3208.3."

In this case the obvious question is what constitutes a violent act? The undersigned must hasten to add that the wisdom of the legislative enactments is, in the undersigned's opinion, not subject to judicial review. Legislation emerges from the political process and while its constitutionality can be challenged in a court of general jurisdiction which the WCAB is not the wisdom of any particular legislative enactment is part of the political process and not the judicial process.

Furthermore, the undersigned thinks it's fair to note that over the years the Legislature has seemed fit to restrict or limit psychiatric injuries or perhaps better put to make the requirement for these injuries to be more stringent. For example, in the undersigned's opinion, the limitation in §3208.3(h), the good faith personnel defense was, again in the undersigned's opinion, meant to repeal the Supreme Court's ruling in large part in *Cole vs. Fair Oaks Fire Protection District (1987) 52 CCC 27*. Again, the undersigned must emphasize this is his own opinion. We then continue to consider what constitutes a "violent act"?

This is perhaps more of a philosophical issue. The undersigned knows of no statutory or decisional definition.

The undersigned's Black's Law Dictionary (revised 4th edition) defines violent as follows:

"Moving, acting, or categorized by physical force, especially by extreme and sudden or by unjust or improper force; furious, virement; as a violent storm or wind; a violent attack: mark by, or due to, strong mental excitement; virement, passionate; as, violent speech; violent reproaches: produced or effectuated by force; not spontaneous or unnatural; abnormal; as, a violent death: acting with or exerting great force on the mind or as evidence; nearly conclusive, as in the phrase often used in legal contention, violent presumption: great; extreme; used intensively; as a violent contrast in colors, violent pain, passion, etc. [citation omitted]"

The undersigned has employed different websites and research looking for a definition. The World Health Organization defines violence as "the intentional use of physical force or power, threatened or actual, against oneself, another person or against a group or community..." The Miriam Webster Dictionary site in its simple definition of violence is the use of physical force to harm someone to damage property, etc. and the second definition is great destructive force or energy.

Under one construction any instance where energy is applied whether it be chemical, mechanical, gravitational or any cause could constitute a violent act. For example an earthquake or a bolt of lightning or a brick falling from a building could all be described as violent acts. Along this line an individual slipping and falling and hitting the pavement could be described as a violent act given the energy supplied by the force of gravity.

The undersigned can think of another definition, where no real energy is applied such as an individual being robbed with the perpetrator brandishing a firearm but not using it and in this instance, the undersigned would have little difficulty saying this is an act of violence which was contemplated by the Legislature.


Suppose an individual were driving and their tire blew out which caused the individual to go off the road and hit a pole or a tree. Clearly there is energy being expended in the tire blowing out and the vehicle going off the road and colliding with an object and one could categorize this is a violent act. Automobile accidents are, in reality an everyday part of modern life and there is certainly a certain amount of energy involved whether it be single or multiple vehicle accident. One could take the position that any automobile accident is therefore a violent act because the forces of injury causing an incident. Or, the example employed above a brick falling off a building and hitting somebody would be a violent act because it involves an expenditure of energy that is the gravitational force being applied.

In the undersigned's opinion as unfortunate as the applicant's vehicle accident was, the undersigned believes that the better and more reasonable interpretation of the statute is that there has to be at least some volitional act set in force by a human being with at least if not intent something more than mere negligence to bring the violent act exception into play. There is no evidence of that and accordingly, applicant is not entitled to receive permanent disability indemnity for his psychiatric claim."


While the undersigned is certainly unsympathetic to applicant's position the undersigned continues to believe a violent act must be something more than a negligent act.

RECOMMENDATION:

It is respectfully recommended that applicant's Petition for Reconsideration be denied.


MICHAEL LeCOVER
Workers' Compensation
Administrative Law Judge

ML/sr

Dated: 10/28/2016
Served by mail on the interested parties listed on the Official Address
By: 
Sonia Rodriguez