



A 100 Percent PD Award Cannot Be Based On Non-Industrial Factors Such As Limited Education Or English Skills

In Hertz Corporation vs. WCAB (Aguilar) (2009) 73 CCC 1653, 37 CWCR 1, the Sixth District Court of Appeals annulled an order by the WCAB and held that defendant was not liable for increased permanent total disability benefits when the injured worker's inability to participate in vocational rehabilitation was due to non-industrial causes. This case has been granted review by the Supreme Court of California as of March 25, 2009.

Applicant was born in Mexico and lived there until approximately 1980. He subsequently immigrated to the United States and began working as an auto washer with Hertz. He worked there until he sustained a specific injury to his left knee in March 21, 2000, a cumulative trauma injury to his bilateral wrists, shoulders and right ankle through January 29, 2002, and a specific injury to his right knee on November 14, 2001. He was declared permanent and stationary in 2005 and referred for vocational rehabilitation services. Both QME doctors found that Applicant's permanent disability rated approximately 60% under the 1997 PDRS, which Applicant was entitled to be rated under. Both certified rehabilitation counselors agreed that Applicant's disability, standing alone, did not make him unemployable, however, his limited language skills and education also ruled out other types of training, which ultimately affected his ability to benefit from vocational rehabilitation.

The WCJ found Applicant entitled to a 100% permanent disability award as his "educational background, his native intelligence, and his level of skill in the English language" "together with [his] physical impairment" rendered him "permanently unemployable." The Board also denied reconsideration.

The Appeals Court found that under Labor Code §4660(a), the rating must consider Applicant's diminished future earning capacity rather than his reduced ability to compete in the open labor market and furthermore, under Labor Code §4663(c), the rating must also consider what approximate percentage of permanent disability was the direct result of the injuries and what part was caused by other factors. The Appeals Court found that there was no evidence to support the Board's conclusion that Applicant's injuries directly caused him to be 100% disabled. An employer may be held liable only for permanent disability directly caused by the industrial injury as apportionment is now based on causation. The Appeals Court found that since the VR non-feasibility finding was based in part on pre-existing non-industrial factors (lack of education and limited language skills), and defendant was only liable for that permanent disability directly caused by the injuries, the 100% award should be annulled and the case remanded for a revised rating.