

## Medical Treatment and Apportionment

*County of Santa Clara v. Workers' Comp. Appeals Bd. (Justice)* (2020) 49 Cal.App.5<sup>th</sup> 605, 85 Cal.Comp.Cases 467, 2020 Cal.App. LEXIS 461, 48 CWCR 103 (Applicant's petition for review denied on 8/26/20)

**Issues and Holding:** Whether applicant was entitled to an unapportioned award of 48% bilateral knee permanent disability notwithstanding the fact she had significant nonindustrial preexisting degenerative arthritis she suffered from for many years preceding her 2011 industrial specific left knee injury. The Court of Appeal annulled the WCAB's decision and remanded the matter back to the Board to make an award apportioning 50% of applicant's bilateral knee permanent disability to nonindustrial contributing causal factors and 50% to applicant's industrial injury. In doing so the Court of Appeal held that apportionment of the applicant's 48% bilateral knee disability was required, and it was error for the WCJ and the Board to ignore unrebutted substantial medical evidence that nonindustrial factors, in part, caused applicant's permanent disability.

The Court of Appeal rejected both the WCJ's and WCAB's reliance on *Hikida v. Workers' Comp. Appeals Bd.* (2017) 12 Cal.App.5<sup>th</sup> 1249 (*Hikida*) indicating the *Hikida* court's conclusion that there should be no apportionment makes sense only because the medical treatment in *Hikida* resulted in a *new* compensable consequence injury, namely CRPS, which was *entirely* the result of the industrial medical treatment. It was the new compensable consequential injury that, in turn, led *entirely* to the injured workers' permanent disability." In *Hikida*, the AME determined the injured worker's "permanent disability was due entirely to the effects of the CRPS that she developed as a result of the failed carpal tunnel surgery."

The Court indicated there are parts of the *Hikida* opinion that can be read very broadly in the sense that there should be no apportionment when medical treatment increases or precedes permanent disability. But the Court expressly and unambiguously said that the rule or holding in *Hikida* is actually much narrower and that. "...*Hikida* precludes apportionment only where the industrial medical treatment is the sole cause of the permanent disability." In the instant case the applicant's bilateral knee permanent disability was not caused entirely by the industrial knee replacement surgeries. "The medical treatment did not result in a new, unexpected compensable consequence injury." Since there were multiple contributing causal factors of applicant's bilateral knee disability both industrial and nonindustrial apportionment was required.

**Factual and Medical Overview:** Applicant was employed by the defendant as a workers' compensation claims examiner from 1991 until she retired in December of 2016. She fell at work and suffered a specific left knee injury on November 22, 2011. Following her left knee injury, she developed right knee problems that were found to be a compensable consequence of the original left knee injury.

**Diagnostic Studies:** On November 28, 2011, six days after her specific left knee injury of November 22, 2011, an X-ray of applicant's knees showed marked osteoarthritis of both knees. An MRI done a few months later on January 18, 2012, also revealed significant preexisting degeneration which predated the specific knee injury of November 22, 2011. The MRI also revealed an old tear of the anterior cruciate ligament, "marked loss of articular cartilage in the medial compartment," as well as "moderate loss in the patellofemoral joint." There was also evidence of scar tissue on both knees indicating that applicant had undergone some sort of "significant open procedure" at some point in the past.

**Knee Replacement Surgeries:** Authorized medical treatment consisted of a June 2012 total knee replacement to applicant's right knee. She also had total knee replacement surgery on her left knee in September of 2013. The WCJ found both surgeries were successful in that they appeared to significantly increase applicant's "ability to walk and engage in weight-bearing activities."

**Medical Reporting:** The parties selected an orthopedic surgeon as the AME. He issued an initial report in March of 2016 followed by five supplemental reports and he was deposed twice. The AME indicated that based on the applicant's medical history there was significant degenerative arthritic joint disease in both knees that existed before the specific injury the applicant suffered to her left knee on November 22, 2011. The AME also opined that applicant's fall at work "hastened" the need for total knee replacement surgery by lighting up the underlying pathology." He also indicated that in the absence of the underlying pre-existing arthritis in both knees it was medically probable that the applicant would not have had the total knee replacement as she did when she did. The AME apportioned 50% of applicant's bilateral knee disability to the nonindustrial, extensive preexisting degenerative arthritis.

**The WCJ's Decision:** The WCJ found applicant suffered 48% PD (\$59,110.00) and also found that prior to the 2011 industrial injury that applicant had suffered from degenerative arthritis. "The available medical evidence makes plain that this condition played a large role in making the effects of the industrial injury significantly worse than they would...otherwise have been, both in the need for treatment...and in the ultimate [permanent disability]." The WCJ also indicated the industrial injury precipitated the need for the bilateral knee replacement surgeries and the need for the surgeries was partially non-industrial.

In terms of the AME's apportionment determination that applicant's bilateral knee PD was 50% non-industrial, the WCJ stated the AME's opinion and conclusion on apportionment "was sound and in accordance with the law." However, the WCJ felt bound by the Court of Appeal's decision in *Hikida* and as a consequence applicant should receive an unapportioned award of 48% PD. The WCJ's interpretation and application of the holding in *Hikida* was based on the fact that applicant's medical treatment in the form of bilateral knee replacement surgery resulted in an increase in permanent disability and therefore any PD "should be awarded without apportionment." Defendant filed a Petition for Reconsideration.

**The WCAB's Decision:** On reconsideration, defendant argued the WCJ erroneously applied *Hikida* to the facts of the case. The WCJ's report on reconsideration while recommending the WCAB deny reconsideration, also noted that but for the holding in *Hikida* both parties agreed that the AME's opinion on apportionment constituted substantial medical evidence with respect to applicant's bilateral knee PD being 50% nonindustrial. The WCAB granted reconsideration only for the purpose of amending the award to correct a clerical error but with respect to the merits of the petition for reconsideration, adopted and incorporated the WCJ's decision to award applicant a 48% unapportioned award as its own decision.

**The Court of Appeal's Decision:** The Court of Appeal annulled the WCAB's decision since it was based on "the Board's erroneous interpretation of the law." In that regard the Court cited *City of Petaluma v. Workers' Comp.Appeals Bd.* (2018) 29 Cal.App.5th 1175, 1181-1182 (*Petaluma*),) In annulling the WCAB's decision, the Court also cited several other significant decisions on apportionment including *Brodie v. Workers' Comp.Appeals Bd.* (2007) 40 Cal.4th 1313, 1329 (*Brodie*); *Escobedo v. Marshalls* (2005) 70 Cal.Comp.Cases 604; *Marsh v. Workers' Comp.Appeals Bd.* (2005) 130 Cal.App.4th 906; *E.L.Yeager Construction v. Workers' Comp.Appeals Bd.* (2006) 145 Cal.App.4th 922, and *Acme Steel v. Workers' Comp.Appeals Bd.* (2013) 218 Cal.App.4th 1137.

The Court also discussed and analyzed the Second District Court of Appeal's decision in *Hikida* at great length. In *Hikida*, the Court noted that following authorized unsuccessful carpal tunnel surgery, applicant developed an entirely new condition of chronic regional pain syndrome (CRPS) leaving her in a far more disabling condition that would never be alleviated. "The *Hikida* court reasoned that the employer was responsible for this new consequential injury based on longstanding case law requiring employers to pay for all industrial medical treatment without apportionment." The *Hikida* court also determined "that the consequences of such medical treatment were also within the ambit of the workers' compensation system...and "an employee is entitled to compensation for a new or aggravated injury which results from the medical or surgical treatment of an industrial injury." (citations omitted).

The Court of Appeal acknowledged these two principles in the *Hikida* decision are correct statements of the law but that it does not necessarily follow "that an employer is responsible for the consequences of medical treatment without apportionment when the consequence is permanent disability." The Court noted that in order for the *Hikida* court's conclusion to be properly understood and correctly applied it must be "understood in context." In terms of proper context, the court stated:

"...[T]he *Hikida* court's conclusion that there should be no apportionment makes sense only because the medical treatment in *Hikida* resulted in a *new* compensable consequential injury, namely CRPS, which was *entirely* the result of the industrial medical treatment. It was this new compensable consequential injury that, in turn, led *entirely* to the injured workers' permanent disability. The agreed medical

examiner's findings underlined this point, as he determined that the injured worker's "permanent total disability was due *entirely* to the effects of the CRPS that she developed as a result of the failed carpal tunnel surgery." (original emphasis, citations omitted).

The Court stated that while parts of the *Hikida* opinion can be read in a manner that indicates a very broad rule "that there should be no apportionment when medical treatment increases or precedes permanent disability" in actuality the rule and holding are much narrower. "Put differently *Hikida* precludes apportionment only when the industrial medical treatment is the sole cause of the permanent disability."

Factually the instant case is clearly distinguishable from *Hikida* since "the permanent disability in this case was not caused entirely by the industrial medical treatment. Also, in this case "the medical treatment did not result in a new, unexpected compensable consequential injury. Since the AME's opinion on apportionment constituted substantial evidence and was not rebutted the court stated, ..."[i]t was error for the workers' compensation judge and the Board to ignore unrebutted substantial medical evidence that nonindustrial factors, in part, caused Justice's permanent disability."

**Applicant's Argument that Notwithstanding *Hikida* the Unapportioned Award was Legally Correct:** On appeal applicant argued that even assuming the *Hikida* opinion was not controlling, applicant was still entitled to an unapportioned award, because her total knee replacements were directly caused by the work injury and "because the total knee replacement provided the sole basis for the disability rating, Justice contends that it was appropriate to conclude that there should be no apportionment." In essence if applicant had not fallen at work neither of the knee surgeries would have occurred.

The Court of appeal characterized these arguments as "misplaced" since "[w]hether or not an asymptomatic preexisting condition that contributed to the disability would, alone, have inevitably become manifest and resulted in disability, is immaterial." (citation omitted). The real issue is whether there are multiple contributing causes of the permanent disability that can be described as "direct" (industrial) and "indirect"(nonindustrial). In that regard the Court stated:

In this case, Dr. Anderson concluded that Justice had significant nonindustrial preexisting knee degeneration, which caused 50 percent of the postsurgical permanent disability. Whether or not the workplace injury "directly caused" the need for surgery, the apportionment statutes nevertheless demand that the disability be sorted among direct and indirect causal factors. In this case, there was unrebutted medical evidence that Justice's permanent disability was caused, in part, by extensive preexisting knee pathology. Apportionment was therefore required.

**Comments:** It should also be noted that prior to the Court of Appeal’s decision in *Justice*, there were a number of WCAB panel decisions that rejected an expansive application of *Hikida* for many of the same reasons articulated by the Court of Appeal in *Justice*. In those cases, the WCAB applied a narrow interpretation of *Hikida* that allowed nonindustrial apportionment where there were multiple contributing causes of the applicant’s permanent disability and where the authorized medical treatment in question was not the sole cause of the applicant’s permanent disability. (*Burr v. The Best Demolition & Recycling Co. Inc.* (2018) 83 Cal.Comp.Cases 1300, 2018 Cal.Wrk.Comp. P.D. LEXIS 143 (WCAB panel decision); *Rojas v. Gay and Lesbian Community Center* 2018 Cal.Wrk.Comp. P.D. LEXIS 494 (WCAB panel decision); *Fuller v Monterey Bay Aquarium* 2018 Cal.Wrk.Comp. P.D. LEXIS 454 (WCAB panel decision); *Hayden v. Pomona Unified School District* 2019 Cal.Wrk.Comp. P.D. LEXIS 227; *Diaz v. Reyes Masonry Contractors Inc.* 2019 Cal.Wrk.Comp. P.D. Lexis 187 (WCAB panel decision); *Sweet v Garden Grove Unified School District, PSI* 2020 Cal.Wrk.Comp. P.D. LEXIS 167 (WCAB panel decision.)

With respect to joint replacement cases, hopefully the Court of Appeal’s decision in *Justice* will finally put an end to the argument there can be no valid apportionment in joint replacement cases based on either *Hikida* or alternatively on a few very questionable pre-*Hikida* cases that were premised on the theory there was no valid basis for apportionment since the underlying degenerative disease processes that necessitated the joint replacement surgery in the first place had been removed and therefore there was nothing left to apportion to. In two 2006 decisions, *Steinkamp* and *Kien*, the Board found there was no valid basis for Labor Code §4663 apportionment since the resultant permanent disability was caused by the knee replacement and there were no other factors causing permanent disability. In *Kien* since no degenerative arthritis remained after the total knee replacement there were no “other factors” contributing to applicant’s disability existing and therefore there was no basis for apportionment under Labor Code §4663. (*City of Concord v. WCAB (Steinkamp)* (2006) 71 Cal.Comp.Cases (writ denied) and *Kien v. Episcopal Homes Foundation* (2006) 34 Cal. Workers’ Comp. Rptr. 228.).

These two decisions were quickly discredited by the WCAB as wrongly decided and were followed by numerous subsequent decisions allowing nonindustrial apportionment in joint replacement cases. Notwithstanding a veritable tsunami of cases after 2006 finding valid nonindustrial apportionment in joint replacement cases as detailed hereinafter, the applicant’s bar tried repeatedly to resuscitate and revive both *Steinkamp* and *Kien* both prior to and even more aggressively after the *Hikida* decision.

In *Markham v. WCAB* (2007) 72 Cal.Comp.Cases 265 (writ denied), (because the knee replacement surgery was necessitated by both the industrial injury and by “other factors” in the form of pre-existing pathology, apportionment was appropriate to the “other factors.”); *Gunter v. WCAB* (2008) 73 Cal.Comp.Cases 1699 (writ denied), (50% valid apportionment to pre-existing osteoarthritis, when the medical evidence established that the combination of the