MEDICAL TREATMENT AND APPORTIONMENT TWO YEARS DOWNTHE ROAD: ASSESSING THE WCAB'S INTERPRETATION AND APPLICATION OF *HIKIDA*

Brief Refresher on *Hikida*

It's been over two years since the Court of Appeal issued its decision in *Hikida* on June 22, 2017. (***Hikida* v. *Workers' Comp. Appeals Bd.*,** (2017) 12 Cal.App.5th 1249, 82 Cal.Comp.Cases 679). The applicant in *Hikida* was a long term employee with Costco. She filed a cumulative trauma claim alleging multiple body parts and conditions. The primary body part at issue for purposes of permanent disability and apportionment was the applicant's carpal tunnel syndrome. With respect to applicant's carpal tunnel syndrome, the reporting AME initially indicated that 90% of applicant's permanent disability related to her carpal tunnel condition was industrial and 10% nonindustrial. Defendant authorized carpal tunnel surgery.

There were complications related to the carpal tunnel surgery that resulted in an applicant suffering an entirely new and previously undiagnosed condition of complex regional pain syndrome commonly referred to as "CRPS". The AME re-evaluated applicant and opined that with respect to the entirely new diagnosis and condition of CRPS, applicant was permanently totally disabled and that **all** of applicant's PD was "directly", "solely" and "entirely" attributable to the CRPS without any other contributing causal factors of the applicant's CRPS related permanent disability. The WCJ found apportionment of 90% industrial and 10% industrial related to applicant's carpal tunnel syndrome. Applicant filed a Petition for Reconsideration and the WCAB affirmed the WCJ's apportionment. Applicant filed a writ which was granted. The Court of Appeal reversed the WCAB finding that applicant was entitled to an unapportioned award of 100% PTD. The Court held that based on the AME's opinion that **all** of applicant's PD was related directly and entirely to the CRPS and since there were no other contributing nonindustrial causes of applicant's CRPS PD, she was entitled to an unapportioned award.

Post *Hikida* Cases

A review of a cross section of post *Hikida* decisions from the WCAB indicate the WCAB appears to be interpreting and applying *Hikida* in a much more conservative manner than was anticipated and hoped for by the applicant's bar. The *Hikida* related cases discussed and analyzed hereinafter are split into two distinct groups. The first group of cases reflect decisions from the WCAB where the Board based on the applicable facts and medical evidence applied *Hikida* resulting in an unapportioned award for the applicant.

The second group of cases reflect decisions from the WCAB where defendants authorized medical treatment that increased or caused new permanent disability and applicants argued that under *Hikida* there should be an unapportioned award of permanent disability. However, the Board determined *Hikida* was inapplicable and either found a basis for an apportioned award of permanent disability or remanded the case for further development of the record on apportionment.

What emerges from these two lines of cases is a suggested set of analytical guides at the end of this article that will hopefully assist the bench and bar as well as evaluating physicians to better understand in what particular situations the WCAB will strictly apply *Hikida* resulting in an unapportioned award and in what situations the Board will interpret and apply *Hikida* in a manner that does not negate apportionment of permanent disability related to authorized medical treatment.

Need for Precision When Using "Directly" as it Relates to Causation of Permanent Disability and Authorized Medical Treatment

A careful analysis of the post-*Hikida* decisions hereinafter, indicate there appears to be a pervasive analytical problem related to the imprecise application and use of the word "directly" when analyzing causation of permanent disability where defendants' authorize medical treatment that causes new or increased permanent disability. The medical treatment authorized by defendant viewed from a simple causational assessment may "directly" cause permanent disability, but as demonstrated by the second group of cases hereinafter, this alone may be insufficient to result in an unapportioned award under *Hikida.*

In terms of Labor Code sections 4663(c) and 4664(a), and the *Hikida* decision itself, the medical treatment must not only cause increased or new PD but must also be the "direct", "sole", "entire" and "exclusive" cause of **all** of the resulting permanent disability in order for there to be an unapportioned award under *Hikida*. Even if the authorized medical treatment causes increased or new permanent disability, if the medical treatment is not the "direct", "sole", "entire" and "exclusive" cause of **all** of the applicant's permanent disability related to an entirely new condition or diagnosis apportionment may be required if supported by substantial medical evidence.

This is consistent with Labor Code sections 4663(c) and 4664(a) as well as the recent decision from the court of Appeal in *City of Petaluma v. WCAB (Lindh).* In *Lindh* the Court of Appeal held that "[u]nder the current law, the salient question is whether the disability resulted from both industrial and nonindustrial causes, and if so, apportionment is required." (citing, *Brodie v. Workers' Comp. Appeals Bd.* (2007) 40 Cal.4th 1313 at p.1328; *City of Jackson v. Workers' Comp. Appeals Bd.* (2017) 11 Cal.App. 5th 109 at pp.116-117; *Acme Steel v. Workers' Comp. Appeals Bd.* (2013) 218 Cal.App.4th 1137 at p. 1142).

Decisions by the WCAB Where Applicants Have Received Unapportioned Awards of Permanent Disability Based on *Hikida*

Estrada v Edge Sales and Marketing 2018 Cal.Wrk.Comp. P.D. LEXIS 451 (WCAB panel decision) The WCJ and WCAB found applicant to be 100% PTD without apportionment after undergoing medical treatment consisting of a two-level fusion surgery. Following the surgery applicant developed severe deep vein thrombosis ("DVT') requiring several surgical procedures and the implantation of a stent and vena cava filter. Although she was able to return to work for a period of time, the DVT and related conditions eventually caused her to stop working. Substantial medical evidence indicated that applicant's inability to return to work and 100% PTD was directly and entirely attributable to the fusion surgery and therefore under *Hikida* was entitled to an unapportioned award.

Mills v. American Medical Response 2019 Cal.Wrk.Comp. P.D. Lexis 84; 47 CWCR 84 (May 2019) (WCAB panel decision), the WCAB in a case that involved a multiplicity of issues including *Benson* apportionment, the *Kite* addition method and *Hikida,* found applicant to be 100% PTD without apportionment in part based on the fact that applicant had an unsuccessful authorized surgery with serious complications. Applicant suffered two cumulative trauma and two specific injuries. There were six AME's in the case. In April of 2016, the applicant had surgery to implant a spinal cord stimulator. However, as a consequence of the surgery, applicant developed a hematoma and paralysis necessitating another emergency surgery the next day to remove the spinal cord stimulator.

As a direct result of these two surgeries applicant suffered a new condition in the form of a urological disorder causing bladder control issues (neurogenic bladder) that required him to self-catheterize himself and also sexual dysfunction. Applicant had never been diagnosed with these conditions nor had any similar symptoms before the two surgeries. The AME in Urology found 60% WPI without apportionment. The orthopedic AME also opined that applicant's PTD was solely due to the effects of the two surgeries in April of 2016 and was 100% PTD as a result of the complications from the spinal cord implant and removal of the spinal cord stimulator, "the need for which could not be apportioned between specific and cumulative trauma injuries."

The WCAB in analyzing *Hikida* and applying it to the facts in *Mills* stated that "[t]he important caveat was the resulting permanent disability had to arise *directly* from the unsuccessful medical treatment." As in *Hikida*, applicant's PTD in *Mills* "arises directly from the effects of the surgery to treat in (sic) his industrial and cannot be apportioned between them or to any other source." (original emphasis).

Chadburn v. Applied Materials, Inc., XL Specialty Insurance Company et al., 2019 Cal.Wrk.Comp. P.D. Lexis 235, 47 CWCR170 (August 2019) (WCAB panel decision) Applicant suffered three industrial injuries to her neck, both upper extremities, and psyche. Both the WCJ and WCAB found applicant entitled to an unapportioned award of a 100% permanent total disability. From 2007 to November 2013 applicant treated with a primary treating physician (PTP) in defendant's MPN. In early 2013 there was evidence of inappropriate remarks and physical contact between the PTP and applicant during office visits.

In late 2013 the PTP visited applicant at her home and they engaged in sexual relations. Applicant testified she did not object due to her reliance on the PTP for treatment. Over the following several weeks the PTP and applicant had ongoing sexual relations. Applicant filed a complaint with the PTP's employer. Treatment was discontinued and applicant began treating with another PTP who found that applicant was significantly over medicated.

Two QME's opined that applicant with suffering from psychiatric sequelae from all three injuries. One of the QME's who examined the applicant prior to her having sexual relations with the PTP also examined her after she stopped treating with the PTP. Upon reexamination, the PTP in addition to his prior diagnosis, also found that the improper conduct engaged in by the PTP had severely affected the applicant and had produced a post traumatic stress disorder (PTSD) which the applicant had never

been diagnosed with before, and this new condition alone resulted in applicant being permanently totally disabled.

On reconsideration, the WCAB affirmed the WCJ's finding that applicant was entitled to an unapportioned award of permanent disability stating that applicant "is permanently totally disabled from PTSD, which disability was caused **directly and entirely** by Dr. Massey's misconduct, and arose out of the medical treatment for all of applicant's industrial injuries. This is consistent with *Hikida v. Workers' Comp. Appeals Bd.* (2017) 12 Cal.App.5th 1249 [82 Cal.Comp.Cases 679], which held that an applicant is entitled to an unapportioned award of permanent disability where the permanent disability is directly caused by the medical treatment provided for an industrial injury."

McFarland v. Charles Abbott Associates 2019 Cal.Wrk.Comp. P.D. LEXIS 209 (WCAB panel decision).With respect to a petition to reopen for new and further disability both the WCJ and the WCAB found that applicant was entitled to a 100% permanent total disability award without apportionment relying primarily on the decision from the Court of Appeal in *Hikida*. Applicant suffered a back injury on September 20, 2005. The reporting physician was an AME in orthopedics. After the date of injury and before a Petition to Reopen was filed, applicant had two back surgeries authorized by a defendant. After the 1st back surgery the applicant had a second back surgery consisting of a lumbar re-exploration described as a "redo". Following the second back surgery the AME indicated the applicant had 21% WPI with 60% industrial and 40% nonindustrial related to 2 prior back episodes.

Stipulations with request for award were issued on January 11, 2010. It was stipulated that applicant had 16% prominent disability after apportionment. On June 9, 2010 applicant filed a timely petition to reopen for new and further disability. He was re examined by the AME in orthopedics. In April of 2013 the AME determined applicant was 100% permanently totally disabled but that his previous opinion on apportionment had not changed.

The AME was deposed and indicated that applicant was 100% permanently totally disabled and was unable to compete in the open labor market. The AME also indicated that applicant's 100% permanent disability was the direct result of the authorized back surgery and the **new diagnosis of failed back syndrome. During the course of his deposition the AME also indicated that the diagnosis of failed back syndrome was the direct result of the spinal surgery**. Following trial on the petition to reopen, the WCJ found that applicant was entitled to an unapportioned award due to the fact that all of his permanent disability arose directly from the unsuccessful spinal surgery pursuant to *Hikida*.

Defendant filed a petition for reconsideration that was denied by the WCAB. The WCAB affirmed the WCJ's unapportioned award of 100% permanent total disability and that the WCJ had properly relied on the opinions of the AME in orthopedics. The fact that the parties may or may not have stipulated that there was 40% nonindustrial apportionment related to the January 11, 2010 stipulations with request for award does not preclude the applicant receiving a 100% PTD unapportioned award. In that regard the WCAB stated:

> The WCJ properly relied upon *Hikida* to determine that applicant was entitled to a permanent disability award without apportionment. Dr. Green repeatedly stated that the industrial injury caused applicant's need for surgery. Dr. Green also repeatedly stated that applicant was 100% disabled as a result of the surgery. Per *Hikida*, applicant's permanent total disability directly arose from the effects of the surgery to treat applicant's injury and cannot be apportioned to any other cause. Defendant's argument that the applicant's surgeon did nothing wrong technically, and that applicant's condition is a "common consequence of an instrumented spine fusion" does not change this analysis.

Decisions by the WCAB Finding Valid Apportionment or Ordering Development of the Record on Apportionment Even Though *Hikida* was Raised as an Argument for an Unapportioned Award of 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) Applicant argued that apportionment of applicant's lumbar spine permanent disability was prohibited and that based on *Hikida,* his permanent disability was the result of authorized medical treatment in the form of lumbar surgery in 2014. Both the WCJ and WCAB rejected applicant's *Hikida* argument. In *Burr*, applicant already had a lumbar spine injury, including one non-industrial and two industrial complex spine surgeries before the current industrial injury. He also had urinary incontinency and sexual dysfunction prior to the authorized surgery in 2014. Most importantly "unlike in *Hikida* where the surgery caused the entire new onset of chronic pain syndrome which standing alone rendered applicant permanently totally disabled, in Mr. Burr's case the 2014 surgery alone did not result in applicant being permanently totally disabled". As a consequence the WCAB indicated that applicant's lumbar spine disability was properly subject to apportionment pursuant to Labor Code §4663.

Rojas v. Gay and Lesbian Community Center 2018 Cal.Wrk.Comp. P.D. LEXIS 494 (WCAB panel decision) The WCAB rejected application of *Hikida* and that applicant was entitled to an unapportioned award since not all of applicant's permanent disability was directly and entirely caused by the cervical spine surgery authorized by defendant. The WCAB found there was a basis for valid apportionment since the AME determined applicant had pre-existing congenital stenosis before the surgery that contributed to applicant's cervical spine permanent disability.

In ***Fuller v Monterey Bay Aquarium*** 2018 Cal.Wrk.Comp. P.D. LEXIS 454 (WCAB panel decision). The Applicant suffered an admitted specific injury on October 21, 2010. As a result he had a series of nine knee surgeries including two total right knee replacements. Applicant had a history of a previous infection in his right leg following an auto accident in 1976, in which he sustained a fracture of his tibia. Also based on a 2013 MRI, applicant had documented advanced osteoarthritis with related anatomic changes associated with chronic and recalcitrant right knee symptomatology. With respect to the applicant's right knee, the AME in orthopedics initially apportioned 80% to a specific injury and 20% to pre-existing non-industrial degenerative arthritis. In a later report the orthopedic AME after having been sent a copy of the *Hikida* decision, changed his opinion and opined that the applicant's right knee disability was entirely attributable to the October 21, 2010 specific injury without apportionment.

However, the WCJ in issuing an Award of 91% PD **after** apportionment followed the orthopedic AME's original apportionment determination/opinion of 80% industrial and 20% non-industrial. Applicant filed a Petition for Reconsideration and argued that *Hikida* precluded apportionment and applicant was 100% PTD. In his report on reconsideration the WCJ distinguished *Hikida* stating that "*Hikida* had nothing to do with apportionment to factors that pre-existed the industrial injury." The WCJ also stated that the AME was misled as to the holding in *Hikida*. The WCAB granted Reconsideration and remanded the case back to the trial level for the orthopedic AME to clarify his apportionment determination by way of deposition or supplemental report. In that regard the WCAB indicated that in *Hikida* "[t]he important caveat was the resulting permanent disability had to arise *directly* from the unsuccessful medical treatment." The WCAB also stated "Here, it is not clear from the existing medical record whether applicant's right knee impairment as described by Dr. Gravina is due to the effects of his nine knee surgeries, as was the case in *Hikida*."

Hayden v. Pomona Unified School District 2019 Cal.Wrk.Comp. P.D. LEXIS 227 involved an applicant who suffered a minor right ankle sprain related to a specific injury on 10/13/16. Defendant authorized treatment at a clinic and applicant was given a boot to wear. She was then referred to a podiatrist who had her continue to wear the boot and then later the ankle was casted. However, applicant experienced severe swelling and was sent to an orthopaedist. He had the applicant undergo a Doppler ultrasound that indicated a lump that was a sarcoma. Applicant was then sent to see an oncologist at the City of Hope and was advised the sarcoma was too far advanced for any effective oncological treatment. Applicant's right leg was amputated 2 inches above the knee.

A later report from a QME in internal medicine indicated that what caused the need for the amputation was not the minor right ankle sprain at work but rather it was a malignant peripheral nerve sheath tumor that was caused by a congenital autosomal-dominant mutation of a specific gene that affects people in the same family. Applicant's son had been diagnosed with the same condition. The QME opined that the applicant's industrial right ankle sprain was minor and healed without complications. Her persistent complications were due entirely to the nonindustrial nerve sheath tumor and that her right ankle injury did not aggravate or accelerate the complications from the nerve sheath tumor. It was the nonindustrial tumor that was the sole cause of the need for the amputation.

Following trial, the WCJ found that applicant sustained injury only to her right ankle as a result of the 10/13/16 specific injury and not to her entire right lower extremity. He awarded no PD and no need for future medical treatment. Applicant filed a Petition for Reconsideration which was denied by the WCAB who adopted and incorporated the WCJ's Report on Reconsideration in its entirety.

Applicant raised *Hikida* claiming she was entitled to an unapportioned permanent disability award based on her post-amputation condition of her right lower extremity. The WCAB found that *Hikida* was not applicable since "[n]o evidence was offered to indicate that the applicant's non-industrial condition was caused or aggravated by any of the treatment she received for the industrial injury to her right ankle."

Diaz v. Reyes Masonry Contractors Inc. 2019 Cal.Wrk.Comp. P.D. Lexis 187 (WCAB panel decision). WCJ's award of 93.75% permanent disability after apportionment was affirmed by the WCAB on reconsideration. The WCJ's apportionment of 30% was based on applicant's prior industrial low back injury. One of applicant's arguments on reconsideration was based on *Hikida*. Applicant argued that he should receive an unapportioned award since the alleged loss of the use of his upper extremities was the direct result of the multiple surgeries he had for his 1992 industrial injury.

The WCAB rejected applicant's *Hikida* argument and stated:

> Applicant further cites to *Hikida v. Workers' Comp. Appeals Bd*. (2017) 12 Cal.App.5th 1249 [82 Cal.Comp.Cases 679], to argue that apportionment to pre- existing disability is precluded where all of applicant's current disability was directly caused by the medical treatment provided for his industrial injury. In *Hikida*, the court held an applicant is entitled to an unapportioned award of permanent disability where the permanent disability arises "directly" from unsuccessful medical treatment, even though the need for the surgery or medical treatment was necessitated by both industrial and nonindustrial factors. As noted by the WCJ, applicant has not presented medical opinion that states that his current permanent disability is the direct result of the medical treatment he received to treat his industrial injury, rather than from the effects of his injury.

Some Suggested Analytical Guides and Issues for Assessing Authorized Medical Treatment and *Hikida* Related Apportionment

1. Was the medical treatment authorized?

2. Did the medical treatment result in or cause a completely new diagnosis or condition that did not exist prior to the authorized medical treatment? In *Hikida*, before the carpal tunnel surgery, applicant had never been diagnosed with nor did she experience any symptoms related to complex regional pain syndrome (CRPS).

3. Is the permanent disability directly related to the medical treatment from a basic causational standpoint?

4. Is the permanent disability related to the entirely new condition or diagnosis caused by the medical treatment the "direct", sole", "entire" and "exclusive" cause of **all** of the applicant's permanent disability with no other nonindustrial contributing causal factors?

5. Is there a medical report that constitutes substantial evidence that there may be multiple contributing causal factors either industrial or nonindustrial of applicant's permanent disability other than the medical treatment that directly caused the entirely new diagnosis or new condition?

6. In *Hikida* it is extremely important to remember that the AME opined that **all** and not a portion of applicant's permanent disability was directly and solely attributable to

the complex regional pain disorder (CRPS) that was caused by the unsuccessful carpal tunnel surgery authorized by the defendant. In *Hikida* the sole cause of **all** of applicant's PD was industrial. According to the AME, there were no multiple contributing causal factors of her CRPS permanent disability that would have required apportionment.