WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

CRISTINA JACKSON, *Applicant*

vs.

FEDEX GROUND PACKAGE SYSTEMS, INC., permissibly self-insured, administered by SEDGWICK CLAIMS MANAGEMENT SERVICES, INC., *Defendants*

Adjudication Number: ADJ10048474
Sacramento District Office

OPINION AND DECISION AFTER RECONSIDERATION

The Appeals Board granted reconsideration to study the factual and legal issues. This is our Decision After Reconsideration.

In the Findings and Award of March 17, 2020, the Workers' Compensation Judge ("WCJ") found, in pertinent part, that applicant sustained industrial injury to her right knee and left knee on March 6, 2015, that Dr. James Han is the Panel Qualified Medical Evaluator ("PQME"), and that the injury resulted in permanent disability of 21%, after 60% apportionment to "other factors" of permanent disability under Labor Code section 4663(c).

Applicant filed a timely petition for reconsideration of the WCJ's decision. Applicant contends that the medical opinion of Dr. Han is not substantial evidence of apportionment under the requirements of *Escobedo v. Marshalls* (2005) 70 Cal.Comp.Cases 604 [Appeals Board en banc] ("*Escobedo*"), and that since applicant's permanent disability rating is based on her bilateral knee replacement surgeries necessitated by the industrial injury, she is entitled to an unapportioned award pursuant to *Hikida v. Workers' Comp. Appeals Bd.* (2017) 12 Cal.App.5th 1249 [82 Cal.Comp.Cases 679].

Defendant filed an answer.

The WCJ submitted a Report and Recommendation ("Report").

At the outset, we observe that to be timely, a petition for reconsideration must be filed with (i.e., received by) the WCAB within 25 days from a "final" decision that has been served by mail upon an address in California. (Lab. Code, §§ 5900(a), 5903; Cal. Code Regs., tit. 8,

§§ 10605(a)(1), 10615(b), 10940(a).) A petition for reconsideration of a final decision by a workers' compensation administrative law judge must be filed in the Electronic Adjudication Management System (EAMS) or with the district office having venue. (Cal. Code Regs., tit. 8, § 10940(a).)

The Division of Workers' Compensation (DWC) closed its district offices for filing as of March 17, 2020 in response to the spread of the novel coronavirus (COVID-19).[1] In light of the district offices' closure, the Appeals Board issued an en banc decision on March 18, 2020 stating that all filing deadlines are extended to the next day when the district offices reopen for filing. (*In re: COVID-19 State of Emergency En Banc* (2020) 85 Cal.Comp.Cases 296 (Appeals Board en banc).) The district offices reopened for filing on April 13, 2020.[2] Therefore, the filing deadline for a petition for reconsideration that would have occurred during the district offices' closure was tolled until April 13, 2020.

Turing to the merits of applicant's petition for reconsideration, we have considered the allegations of the petition and the contents of the WCJ's Report with respect thereto. Based on our review of the record, and for the reasons stated below and in said Report, which we adopt and incorporate except the WCJ's discussion of *Hikida v. Workers' Comp. Appeals Bd.* (2017) 12 Cal.App.5th 1249 [82 Cal.Comp.Cases 679] ("*Hikida*"), we will affirm the Findings and Award of March 17, 2020.

We further note that Dr. Han's three medical reports, taken together, are substantial evidence justifying the WCJ's determination that 60% of applicant's permanent disability is caused by non-industrial "other factors" under Labor Code section 4663(c). In his first report of May 12, 2017, Dr. Han deferred the issues of permanent disability and apportionment, but the doctor remarked, "the degenerative findings in both knees were predominantly pre-existent to this specific injury and [applicant] more likely than not would have required total knee replacement at some point based on her longstanding prior internal derangements." Dr. Han repeated that "there is evidence that she had significant preexisting pathology and symptomatic prior conditions." (Exhibit BB, p. 25.) In his second report dated April 5, 2019, Dr. Han evaluated applicant with Whole Person Impairment ("WPI") of 28% due to her bilateral knee replacement surgeries, with

[1] The March 16, 2020 DWC Newsline may be accessed here: https://www.dir.ca.gov/DIRNews/2020/2020-18.html.

[2] The April 3, 2020 DWC Newsline regarding reopening the district offices for filing may be accessed here: https://www.dir.ca.gov/DIRNews/2020/2020-29.html.

the doctor apportioning 60% of the above permanent impairment "to pre-existing conditions and 40% to the specific [industrial] incident of March 6, 2015." (Exhibit CC, p. 15.) Dr. Han further supported his opinion on apportionment by explaining that applicant had prior surgeries, fell off a curb in 2016, and had obesity, which all contributed to degenerative changes in applicant's knees that necessitated her bilateral knee replacement surgeries. (*Id*.) In his supplemental report of July 5, 2019, Dr. Han reaffirmed his prior opinion on apportionment, stating that applicant's "long history of pre-existing knee conditions and injuries and surgeries and morbid obesity significantly contributed to the ultimate need for total knee replacements bilaterally." (Exhibit DD, p. 2.)

Based on the above review of Dr. Han's reports, we note the doctor did employ language describing causation of the injury and the need for applicant's bilateral knee replacements, in contrast to language that seeks to isolate the causes of permanent disability. (See *Reyes v. Hart Plastering* (2005) 70 Cal.Comp.Cases 223 [Significant Panel Decision].) Nevertheless, we agree with the WCJ that Dr. Han's medical opinion still rises to the level of substantial evidence of apportionment under *Escobedo*, because the doctor evaluated applicant's permanent impairment based on the result of her bilateral knee replacement surgeries. Dr. Han convincingly explained that apportionment of the need for those surgeries applied equally to apportionment of the permanent impairment.

However, we do not adopt or incorporate the discussion of *Hikida* found in the WCJ's Report. In *Hikida*, the injured employee sustained industrial injury in the form of carpal tunnel syndrome, and she underwent surgery to alleviate that condition. The surgery was unsuccessful and resulted in the injured employee developing chronic regional pain syndrome ("CRPS"). The CRPS left her permanently and totally disabled. On one hand, the Agreed Medical Evaluator ("AME") concluded that the permanent and total disability was entirely due to the injured employee's new CRPS condition. On the other hand, the AME found apportionment based on his opinion that 10% of the disability resulting from the original carpal tunnel syndrome condition was non-industrial. On those facts, the Court of Appeal framed the issue as "whether an employer is responsible for both the medical treatment and *any disability arising directly from unsuccessful medical intervention, without apportionment*." (*Hikida, supra,* 12 Cal.App.5th at 1260, italics added.) Although the Court answered yes to that specific question, the Court further explained in pertinent part: "Nothing in the 2004 legislation [broadening application of apportionment] had any impact on the reasoning that has long supported the employer's responsibility to compensate

for medical treatment *and the consequences of medical treatment without apportionment*." (*Hikida, supra,* 12 Cal.App.5th at 1263, italics added.)

Given the additional rationale just stated, it might be posited that the *Hikida* principle is not limited to situations involving failed treatment or new injuries. In *County of Santa Clara v. Workers' Comp. Appeals Bd.* (*Justice*) (2020) 49 Cal.App.5th 605, 615 [85 Cal.Comp.Cases 467], however, the Court of Appeal does seem to have made an attempt to limit *Hikida*, with the Court in *Justice* stating: "*Hikida* precludes apportionment *only where* the industrial medical treatment is the *sole cause* of the permanent disability." (Italics added.)

The instant case is more like *Justice* than *Hikida*. In *Hikida*, the injured employee developed the entirely new medical condition of CRPS following her treatment and surgery, whereas here, as in *Justice*, the applicant had a significant prior history of the same knee problems and degenerative conditions, some of them non-industrial, which continued to the date of injury.

For the foregoing reasons,

IT IS ORDERED, as the Decision After Reconsideration of the Workers' Compensation Appeals Board, that the Findings and Award of March 17, 2020 is **AFFIRMED.**

WORKERS' COMPENSATION APPEALS BOARD

/s/ KATHERINE A. ZALEWSKI, CHAIR

I CONCUR,

/s/ MARGUERITE SWEENEY, COMMISSIONER

/s/ JOSÉ H. RAZO, COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

JUNE 15, 2022

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

CRISTINA JACKSON
HANNA, BROPHY, MACLEAN, MCALEER & JENSEN, LLP
MCMONAGLE STEINBERG

JTL/ara

I certify that I affixed the official seal of the Workers' Compensation Appeals Board to this original decision on this date.
CS

REPORT AND RECOMMENDATION ON PETITION FOR RECONSIDERATION

I

Date of Injury:	March 6, 2015
Date of Birth:	[]
Age on DOI:	42 years old
Occupation:	Package handler
Parts of Body Injured:	Accepted: right knee and left knee
Identity of Petitioners:	Applicant
Timeliness:	Petition filed timely
Verification:	Petition was verified
Date of Order:	March 17, 2020
Petitioners Contentions:	Applicant contends the findings of QME Dr. Han regarding apportionment are not substantial medical evidence.

II
FACTS

Applicant was working as a package handler for FedEx Ground Package System, Inc. when she sustained injury arising out of and in the course of employment to her right knee and left knee. Defendant accepted the claim and provided medical treatment and indemnity benefits.

The matter went to trial on the issue of occupational group number, permanent disability, apportionment, and attorney's fees. Applicant testified at trial and the parties offered joint exhibits of a benefit printout and three QME Reports by Dr. James Han. In the Finding and Award, it was found Applicant established the occupational group number of 460, there was permanent disability of 21% after apportionment, and a reasonable attorney fee was 15% of the permanent disability awarded. In response, Applicant filed a Petition for Reconsideration contending the findings of apportionment by Dr. Han were are not substantial medical evidence.

III
DISCUSSION

APPORTIONMENT

Applicant had an initial QME evaluation with Dr. Han on April 13, 2017 where she was found not permanent and stationary. (Joint Exhibit BB) She returned for a re-evaluation on March 21, 2019, which resulted in a report dated April 5, 2019 wherein Dr. Han provided a record review, physical examination, and interview of Applicant. He diagnosed Applicant with bilateral post-traumatic osteoarthritis of the knee post knee replacement, internal derangement of the right knee with lateral meniscus tear and internal derangement of the left knee with lateral and medial meniscus tear. He described Applicant's medical history which included prior bilateral meniscectomies in 1995 and

1996 and a left ACL reconstruction in 1992. He found industrial causation and 15% whole person impairment for each knee based on bilateral total knee replacement surgeries. (Joint Exhibit CC)

The basis for apportionment must be clear; the medical-legal report must "describe in detail the exact nature of the apportionable disability, and set forth the basis for the opinion." *Escobedo v. Marshalls* (2007) 70 Cal. Comp. Cases 604, 621. This means that the medical-legal report must explain the nature of the non-industrial factor, and how and why the non-industrial factor is responsible for part of the disability. *Id.* at 622. In his report dated report dated April 5, 2019, Dr. Han apportioned 60% of the disability to pre-existing and 40% to the industrial injury. He explained that Applicant had prior surgeries, fell off a curb in 2016, and had obesity resulting in degenerative changes that made the bilateral total knee replacement surgeries necessary, which is the basis for the permanent disability. (Joint Exhibit CC)

In his supplemental report dated July 5, 2019, Dr. Han returned to the issue of apportionment, explaining that Applicant had a long history of pre-existing knee conditions, injuries, surgeries, and obesity that contributed to the need for total knee replacements bilaterally. (Joint Exhibit DD) In his initial report, Dr. Han indicated that Applicant already had significant pre-existing derangements within the right knee for which she was receiving ongoing care. He found that the pre-existing conditions had become significantly worse since the specific incident of March 6, 2015. He described the previous right knee arthroscopy in 1995 with residual symptoms and the right knee x-ray from 2012 that revealed degenerative changes that progressed since the prior study in 2007. He described another prior right knee injury on October 21, 2013 and a left knee x-ray from that date revealing moderate tri-compartmental joint space narrowing and osteoarthritis. He described the right knee x-ray done after this specific injury, which revealed similar degenerative findings as the x-ray from 2012. Based on objective findings, Dr. Han opined that the degenerative findings in both knees were predominately pre-existing and Applicant would have required a total knee replacement at some point, which was the basis for the permanent disability finding. (Joint Exhibit BB) Dr. Han adequately explains the nature of the non-industrial factors, which include bilateral meniscectomies and a left ACL reconstruction, and how they relate to the permanent disability.

The reports by Dr. Han rate as follows:

Right knee	.4 (17.05.10.08 – 15 [1.4] 21 – 460G – 26 – 28) 11
Left knee	.4 (17.05.10.08 – 15 [1.4] 21 – 460G – 26 – 28) 11
Combined value	11 c 11 = 21%

The evidence supports a finding that Applicant is entitled to permanent disability of 21%, which is equivalent to 80.50 weeks of indemnity payable at the rate of $283.73 per week in the total sum of $22,840.27.

[…]

RECOMMENDATION

For the reasons stated above, it is respectfully recommended that Defendant's Petition for Reconsideration be denied.

Respectfully submitted,

Ariel Aldrich
WORKERS' COMPENSATION
ADMINISTRATIVE LAW JUDGE

DATE: April 20, 2020