

**WORKERS' COMPENSATION APPEALS BOARD  
STATE OF CALIFORNIA**

**MARILYN STREET, *Applicant***

**vs.**

**GREENFIELD UNION SCHOOL DISTRICT; SELF-INSURED SCHOOLS OF  
CALIFORNIA, *Defendants***

**Adjudication Numbers: ADJ10374813, ADJ10374814  
Bakersfield 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 of Fact, Awards and Order of March 9, 2020, the workers' compensation judge ("WCJ") found, in ADJ10374814, that applicant, while employed as a cafeteria manager during the period February 8, 2000 through October 14, 2015, sustained industrial injury to her right knee, that applicant's earnings were \$564.72 per week at the time of injury, and that the injury resulted in permanent disability of 52% and the need for further medical treatment. In ADJ10374813, the WCJ found that applicant did not sustain a specific injury to her right knee on October 14, 2015.

Defendant filed a timely Petition for Reconsideration of the WCJ's decision. Defendant contends, in substance, that the WCJ erred in following *Hikida v. Workers' Comp. Appeals Bd.* (2017) 12 Cal.App.5th 1249 [82 Cal.Comp.Cases 679] to disallow apportionment of permanent disability, because the disability was not solely caused by the medical treatment received by applicant on an industrial basis. Defendant further contends that *Hikida* is inapplicable here because there is no new injury caused entirely and solely by medical treatment. Finally, defendant contends that it "disagrees with the outcome of *Hikida* and believes that it was wrongly decided."<sup>1</sup>

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<sup>1</sup> We need not and will not address this contention. Defense counsel's disagreement with a published opinion issued by a California Court of Appeal is irrelevant.

It appears that no answer was filed by applicant.

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).<sup>2</sup> 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.<sup>3</sup> Therefore, the filing deadline for a petition for reconsideration that would have occurred during the district offices’ closure was tolled until April 13, 2020.

Turning to the merits, we have reviewed the record and we have considered the applicable law. We conclude that the WCJ must revisit the issues of permanent disability and apportionment in light of *County of Santa Clara v. Workers’ Comp. Appeals Bd. (Justice)* (2020) 49 Cal.App.5th 605 [85 Cal.Comp.Cases 467] (“*Justice*”). Therefore, we will rescind the WCJ’s finding on permanent disability and return this matter to the trial level for further proceedings and new decision on the outstanding issues by the WCJ.

As noted before, the sole issue raised upon reconsideration is defendant’s allegation that the WCJ erred in disallowing apportionment by following the Court of Appeal’s opinion in *Hikida v. Workers’ Comp. Appeals Bd.* (2017) 12 Cal.App.5th 1249, 1260 [82 Cal.Comp.Cases 679] (“*Hikida*”).<sup>4</sup> In that case, the Court held that where an injured employee sustains permanent

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<sup>2</sup> The March 16, 2020 DWC Newline may be accessed here: <https://www.dir.ca.gov/DIRNews/2020/2020-18.html>.

<sup>3</sup> The April 3, 2020 DWC Newline regarding reopening the district offices for filing may be accessed here: <https://www.dir.ca.gov/DIRNews/2020/2020-29.html>.

<sup>4</sup> Of course, it is settled law that defendant has the burden of proof on the issue of apportionment. (*Kopping v. Workers’ Comp. Appeals Bd.* (2006) 142 Cal.App.4th 1099, 1114 [71 Cal.Comp.Cases 1229].)

disability due to the industrial injury and medical treatment rendered to treat the injury, the employer is liable for both the treatment and any disability arising directly from unsuccessful medical intervention, without apportionment.

In this case, we note that in his Opinion on Decision and in his Report, the WCJ relies solely upon the *Hikida* principle to disallow apportionment. The WCJ rejected the apportionment opinion of Dr. Hanley, the Panel Qualified Medical Evaluator (PQME), who opined in his June 13, 2018 report that up to 90% of applicant's permanent disability is caused by non-industrial other factors (degenerative arthritis, etc.) under Labor Code section 4663. (Joint exhibit 3.) According to the WCJ, all of applicant's permanent disability was caused by the right knee replacement surgery that unfortunately produced a poor result.

At the time of the WCJ's Opinion and Report, however, the Court of Appeal had not yet issued its opinion in *County of Santa Clara v. Workers' Comp. Appeals Bd. (Justice)* (2020) 49 Cal.App.5th 605 [85 Cal.Comp.Cases 467]. In that case, the Court of Appeal stated that the *Hikida* principle may have "narrower" application, as follows: "Although parts of the *Hikida* opinion can be read to announce a broader rule that there should be no apportionment when medical treatment increases or precedes permanent disability, it is clear that the rule is actually much narrower. Put differently, *Hikida* precludes apportionment only where the industrial medical treatment is the sole cause of the permanent disability." (*Justice, supra*, 49 Cal.App.5th at 615.)

Here, the WCJ states in his Report that "no part of applicant's 30% [Whole Person Impairment] results from anything other than her total knee replacement surgery." The WCJ's statement seems to preempt the *Justice* Court's "narrowing" of the *Hikida* principle, but it is inconsistent with what the Court actually stated in *Justice*: "*Hikida* precludes apportionment *only where* the industrial medical treatment is the *sole cause* of the permanent disability." (Emphasis added.) Further, in the last opinion on apportionment expressed by Dr. Hanley in his supplemental report, the doctor did not state that applicant's failed right knee replacement surgery is the sole cause of her permanent disability. (Joint exhibit 3.) Under the circumstances, we conclude that even if the WCJ believes Dr. Hanley's final opinion on apportionment may not be substantial evidence, the WCJ still needs to revisit the issues of permanent disability and apportionment in light of the Court of Appeal's opinion in *Justice*. We will rescind the WCJ's finding on permanent disability and return this matter to the trial level for that purpose.

Finally, as a housekeeping matter, we note that the WCJ appears to have made a clerical error in Finding 4, which states that applicant's earnings were \$564.72 per week at the time of injury. However, the Minutes of Hearing of January 8, 2020 (p. 2) reflect the parties' stipulations that applicant's earnings were \$845.54, warranting a temporary disability indemnity rate of \$564.72 and a permanent disability rate of \$290.00 per week. We will rescind Finding 4 and substitute a new Finding 4 to make the necessary correction.

In closing, we note defendant states in its petition that "the parties were close to settlement" during the Mandatory Settlement Conference (MSC) of November 13, 2019. Even though we are returning this matter to the WCJ to revisit the issue of apportionment in light of *Justice, supra*, we believe the parties should not hesitate to reconnect on their settlement efforts. In fact, we express no final opinion on the issues of permanent disability or apportionment. When the WCJ issues new findings on those issues, any aggrieved party may seek reconsideration as provided by Labor Code sections 5900 et seq.

For the foregoing reasons,

**IT IS ORDERED**, as the Decision After Reconsideration of the Workers' Compensation Appeals Board, that the Findings of Fact, Awards and Order of March 9, 2020 is **AFFIRMED**, except that Findings 4 and 5, and paragraphs (1) and (3) of the Award are **RESCINDED**, and the following Findings 4 and 5, and paragraphs (1) and (2) of the Award are **SUBSTITUTED** in their place:

#### **FINDINGS OF FACT**

4. At the time of injury, applicant's earnings were \$845.54 per week, warranting a temporary disability indemnity rate of \$564.72 and a permanent disability rate of \$290.00 per week.
5. In case number ADJ10374814, the issues of permanent disability and apportionment are deferred pending further proceedings and determination by the WCJ, jurisdiction reserved.

**AWARD**

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1. The award of permanent disability is deferred pending further proceedings and determination by the WCJ, jurisdiction reserved.
2. The allowance of a reasonable fee for applicant's attorney is deferred pending further proceedings and determination by the WCJ, jurisdiction reserved.

**IT IS FURTHER ORDERED**, as the Decision After Reconsideration of the Workers' Compensation Appeals Board, that this matter is **RETURNED** to the trial level for further proceedings and new findings on the outstanding issues by the WCJ, consistent with this opinion.

**WORKERS' COMPENSATION APPEALS BOARD**

**/s/ PATRICIA A. GARCIA, DEPUTY COMMISSIONER**

**I CONCUR,**

**/s/ JOSÉ H. RAZO, COMMISSIONER**

**/s/ CRAIG SNELLINGS, COMMISSIONER**



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

**JANUARY 11, 2022**

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

**MARILYN STREET  
LAW OFFICES OF CHAIN, COHN & STILES  
HANNA, BROPHY, MACLEAN, MCALEER & JENSEN, LLP**

**JTL/ara**

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

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