THE Sweet Success OF RISK MANAGEMENT

PARMA ANNUAL CONFERENCE
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SACRAMENTO CONVENTION CENTER

UPDATE ON THE *KITE* AND *HIKIDA* CASES

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DISCLAIMER

Facts and law change frequently. Please consult your attorney for the most recent laws affecting your decisions and claims handling strategies.

BACKGROUND/INTRODUCTION TO KITE

- The advent of the SB 899 reforms not only included a new Permanent Disability Rating Schedule (PDRS) but also extensive litigation dealing with rebuttal of the PDRS as well as defining the parameters of disability under the AMA Guides.

- The most important and impactful cases that have resulted from this litigation is that of Kite (East Bay Municipal Utilities District v WCAB, Richard Kite 2/28/13 writ denied 78 CCC 213). This case decision probably had more actual impact on the escalation of PD than any other recent WCAB decision, and, yet not yet seen the last of its applications.

PRINCIPLES OF KITE

The essential principles of the Kite case are that although the 2005 PDRS provides that impairments (keep this term in mind for later reference) are generally combined by using reduction formula (i.e. combined values tables) the AMA guides describe several methods of combining impairments and that rigorous application of the multiple disabilities tables (keep this in mind for later reference) is not mandated and that an ADDITIVE formula by using simple addition rather than the combined values chart is appropriate where the overall impairment is most accurately reflected by using simple addition rather than using the combined values formula (CVT tables)

PRINCIPLES OF KITE CONT.

- The practical effect of this WCAB holding is that the combined values tables set forth in the PDRS are able to be disregarded if the medical examiner provides alternative methodology supporting the addition of the impairments. This, ultimately results in a higher PD rating than if a "strict" application of the CVT tables is utilized.
- EDITORIAL COMMENT– It is remarkable that the actual case had notes for Kite make reference to the Multiple Tables which is found in the prior 1997 version of the PDRS. Although both the MDT and CVT tables provide for a reduction of multiple disabilities they are technically different.
- The other remarkable matter about Kite is that it is a WCAB panel decision. It is not an EnBanc WCAB holding, nor is it a holding by the Court of Appeals.

PRINCIPLES OF KITE CONT.

- The CVT tables are part of the current 2005 PDRS. The text of the 2005 PDRS explicitly provides a rationale and examples of the formula for combining impairments and disabilities. The 2005 PRRS expressly states that multiple impairments "must" be combined "in a prescribed manner" to produce a final disability (pg. 1–5 2005 PDRS) .
- The CVT tables essentially provide a formula when ultiple impairments exist that produces a mathematical reduction formula when combining multiple impairments (A+B [1–A]. This formula results in the impairment being equal to or less than the sum of the individual impairment values.

PRINCIPALS OF KITE CONT.

- Well if the utilization of the CVT tables appear to be mandated by the express provisions of 2005 PDRS, then how could the WCAB a disability rating methodology that is contrary to CVT tables and allows for a simple addition of impairment methodology.

- DRUM ROLL (AND ANSWER).....

THE PDRS IS "REBUTTABLE"

- The WCAB as well as the Court of Appeals have held that the PDRS is subject to being rebutted. This is not a new legal concept. It allows applicant to show that a more "accurate" method for the rating of PD, other than that set forth under the strict confines of PDRS can be appropriate.
- Examples include;
- Hegglin v WCAB (1971) 36 CCC 93 WCJ ignored the MDT's
- Mihesuah v WCAB (1976) 41 CCC 81 MDT formula only a guide
- Chevron v WCAB (Arnold) 2000 65 CCC 922 45% preclusion from labor market = 45% PD (interesting case)

ALMARAZ/GUZMAN (A/G) & OGILVIE CASES

- The "bedrock" cases involving rebuttal of the new 2005 PDRS and portions of the AMA guides is set forth in the Almaraz/Guzman v WCAB (2009) 74 CCC 1084 and Olgilvie v City & County of San Francisco (2011) 76 CCC 624.
- The cases confirm that the schedule is rebuttable including the assessment of permanent disability. A physician may use any methodology that most accurately describes the injured workers impairment, however, the methodology must be contained within the four corners of the AMA guides fifth edition and constitute substantial evidence.
- The burden of proof to rebut the schedule lies with the applicant.

THE CANNON CASE

- A/G endorsed the legal notion that rating by "analogy" is permissible. The holding indicated that it was limited to "complex or extraordinary" cases. That no longer seems to be the reality.
- The Court of Appeals in City of Sacramento v WCAB (Cannon) (2013) 79 CCC 1 held that a case does not have to be either "complex" or "extraordinary" for A/G to apply–the physician must find the most accurate WPI rating based on his or her clinical judgement , expertise, knowledge, skill and education.
- COMMENT– The medical condition in Cannon was not even in the AMA Guides (plantar fasciitis). The DCA found that nothing precluded a finding of impairment based solely on subjective complaints.

AMA GUIDES

- Chapters 1 & 2 of the Guides should be read to fully understand the WCAB decision set forth in the Kite case. These chapters describe the "philosophy, purpose and appropriate use of the Guides". The Guides center on the concept of "impairment" (as opposed to disability and to be discuss later) and further explicitly confirm that the CVT tables were designed to enable a physician to account for multiple impairments so that the summary value would not exceed 100% of the whole person (see 1.4 pg 9). This section further confirms that a "scientific formula has not been established" to indicate the best way to combine multiple impairments.

AMA GUIDES CONT.

- Section 1.4 further sets forth;
- "combination of some impairments could decrease overall functioning more than suggested by just adding the impairment ratings…" "other options are to combine (add, subtract, or multiply) multiple impairments based upon the extent to which they affect individuals ability to perform activities of daily living."
- This portion of the philosophy and purpose of the Guides was utilized as a basis to rebut the use of the CVT's in the the PDRS and adopt a rating methodology that allowed for addition of the impairments.
- WHICH GETS US (FINALLY) TO THE KITE CASE

THE KITE CASE

- Mr. Kite sustained bilateral hip injuries requiring replacements.
- Dr. Ernest Cheng reported as the QME and found a "strict" AMA WPI impairment rating of 20% to each hip. As a result of further inquiry, Dr. Cheng concluded that it would be appropriate to "add" the impairments as they would produce a more accurate assessment under the AMA guides.
- The WCJ adopted this "additive" approach for the disability rating. This resulted in a greater level of permanent disability than what would called for had the strict approach utilizing the CVT tables.

THE KITE CASE cont.

- It should further be noted that Dr. Cheng did agree that the interplay between the disabilities for the hips were "synergistic" and justified a higher level of WPI because of compensation factors of the opposite body part.
- The judge observed;
- "… nowhere in the labor code, the rating schedule for the AMA guides is "combine" defined as entailing[the reduction] method or any particular method. The schedule provides that impairments are generally combined using the[reduction] formula. The Guides, upon which the schedule is based, describe several methods of combining impairments,… belying the narrow interpretation of "combined" urged here by defendant.[emphasized by WCJ]

THE KITE CASE cont.

- Additionally, the WCJ referenced Philosophy portions of the Guides set for the Chapter 1 to support the notion that a scientific formula has not been established to indicate the best way to combine multiple impairments.
- The judge further acknowledged the opinion of Dr. Cheng which pointed out the synergistic effect of one hip injury upon another opposite hip injury. It was considered “logical” and a person who is able to compensate through the opposite member of an injury to one limb is to some extent less disabled or impaired than someone who cannot so compensate.

PRACTICAL APPLICATION OF THE KITE CASE

- The practical result of adding the two 20% impairments, rather than utilizing the CVT tables resulted in a higher overall level of permanent disability and payment exposure. For example bilateral 20% hips;

STRICT CVT RATING FORMULA–2014 DOI

- R/hip 17.03–20%–28%–380 I- 36%–36%
- L /hip 17.03–20%–28%–380 I–36%–36%
- CVT 36% +36% = 59% = $99,542.50

KITE RATING FORMULA

- 17.03- 40%–56%–380 I–65%–65% = $113,462.50
- The result represents an additional $13,920 of indemnity payments and becomes disturbingly close to a 70% life pension scenario (simply adding the 36% PD's would push the overall PD a life pension 72%)

PRACTICAL APPLICATION OF KITE cont.

- The permanent disability ratings that we are seeing from the application of the Kite case are challenging enough for those in the claims/legal community, but, we now have the added challenge of dealing with an evolving permutation of the original Kite decision.
- This is now being known as the "Double Kite" methodology.

DOUBLE KITE

- You will recall that the actual Kite decision involved anatomical opposite body parts (hips). Arguably this concept of adding the impairment would also apply to other anatomical opposite body parts such as the knees, shoulders etc.
- The "Double Kite" situation deals with the evaluating physician adopting the position that the impairment ratings of other body parts be added rather than just opposite anatomical body areas.
- This development has been brought up in several recent cases that have resulted in disabilities in excess of 100%!

DOUBLE KITE cont.

- The concept of this method is that all separate body parts are capable of being subject to an "additive" method of rating.
- EXAMPLES (these are real WCAB decisions!)
- Hodson v Vacasa (2021) 2021 Cal. Wrk. Comp. P.D. Lexis 170– 100%based on adding 51% multi-ortho PD with cognitive and psychiatric impairments.
- Fraser v Geil Enterprises (2021) 49 CWCR 69– 100% PD award which allowed adding of 28% TBI, vertigo,15% dementia, 29% emotional disturbance plus orthopedic WPI's resulting in a PD rating calculation of 167%!

DOUBLE KITE cont.

- Editorial comment– The acceptance by the WCAB of the "Double Kite" methodology for adding WPI impairment represents a very clever way of achieving the goal of 100% total permanent disability without having to deal and utilizing the often used vocational expert route to rebut the schedule and establish total permanent disability under LC 4662b.
- The utilization of the "Double Kite" allows the applicant the ability to rebut the rating schedule pursuant to Kite and avoid the legal complications of attempting to create a "separate path" to total (100%) disability which was disfavored by the Court of Appeals in Dept. of Corrections v WCAB (Fitzpatrick) (2018) 83 CCC 1680.

ANTI-KITE CONSIDERATIONS/TRENDS

- All is not lost in the defense of cases involving the attempted utilization of a Kite rating analysis.
- It must be kept in mind that the doctors opinion concerning the rating of any alternative methodology must be based upon substantial evidence. The physician should be required to explain the "how and why" an addition method WPI impairment would be more appropriate.
- We often see that these are elements not fully explained by the examining physicians. They do represent a basis for the WCAB to reject a physicians opinion in attempting to apply Kite principles.

ANTI-KITE CONSIDERATIONS/TRENDS

- One of the "magic" utilized by Dr. Cheng was that of "synergy". When we look at the strict definition of this term it does not necessarily additive method of impairment must be imposed. The Courts have now become more skeptical as to medical Kite opinions that are not well explained just seem to rely on the "synergy" word.
- Again, in order for the physicians opinion on Kite to be considered legally valid there needs to be an analysis as to why there should be a deviation from the " strict" application of the PDRS. Mere conclusions by the medical examiner without medical backup are probably not going to suffice.

ANTI-KITE CONSIDERATIONS/TRENDS

- Case examples where a Kite analysis was not accepted
- Martinez v State of Calif. Dept of Corrections 2020 Cal.Wrk Comp P.D. Lexis 51)-attempted to add applicants hypertension orthopedic disabilities not accepted with comment by the WCAB at to do otherwise would cause the CVC to become irrelevant in any case involving injury to multiple body parts.
- Torres v Santa Barbara was a CC College 2021 Cal Wrk Comp P.D. Lexis
- 145- Failure of evidence to explain why adding the impairments would be more accurate

ANTI-KITE CONSIDERATIONS/TRENDS

- Borela v State of Calif. 2014 Cal Wrk. Comp. P.D. Lexis 217–Rejection of Kite analysis on the grounds that the WCJ had not sufficient reasoning the adoption of a Kite analysis (This also underscores the duty of the trial judge to also provide sufficient analysis to support a Kite methodology)
- Bradley v State of Calif. 2022 Cal Wrk. Comp. P.D. Lexis 26–Rejection of attempt Kite addition of orthopedic disabilities. Note that this case involved the situation where the QME's were not in agreement with each other on whether or not the impairments should be added per Kite.

POST KITE OBSERVATIONS/CRITICISMS

- We have gone over some of the cases that support the underlying approval of addition of WPI rather than the strict application of the CVT tables in the PDRS.
- It is clear that the PDRS is rebuttable and that the WCAB will accept deviation from the strict confines of a disability rating when a more "accurate" assessment of injured workers disability is proven.
- However, there seems to be a disconnect concerning WPI and Disability in terms of how these concepts are being applied when an alternative Kite methodology is asserted.
- Therefore, legitimate criticisms exist as to the current application of alternative rating methodologies based upon the Kite case.

POST KITE OBSERVATIONS/CRITICISMS

- The Kite case involved the addition of WPI. At first blush, this would seem to be the equivalent of adding disability, but, in actuality, these two terms are distinctly different.
- The decisions subsequent to Kite seem to often be interchangeably utilizing the addition of impairment with disability. One has to question the legitimacy of this application due to the fact that the two concepts are different.

POST KITE OBSERVATIONS/CRITICISMS

WPI

- WPI (Whole Person Impairment) is defined under the AME Guides;
- "The person impairment percentages listed in the Guides estimate the impact of impairment on the individual overall ability to perform activities of daily living, excluding work…" Chapter 1.2 pg 4. This includes a very extensive array of activities that historically were not considered part of permanent disability (example, combing hair bathing dressing etc.)
- WPI is the essential element of the rating string which results in the calculation of PD under the PDRS

POST KITE OBSERVATIONS/CRITICISMS

PERMANENT DISABILITY

- The term Permanent disability has been a central feature of our disability rating system well before the 2005 changes that occurred by way of SB 899.
- The term is neither defined by the Labor Code nor the PDRS. Rather, it is a creature of case law.
- Permanent disability is designed to indemnify an injured worker for impaired future earnings capacity or decreased ability to compete in the open labor market. Livitsanos v Superior Court(Supreme Court) (1992) 57 CCC 355;Brodie v WCAB (2007) 71 CCC
- 1. See also pg.1-2 2005 PDRS.

POST KITE OBSERVATIONS/CRITICISMS

- This distinction is worth noting as permanent disability is characteristically what we get once you have completed the rating string, so, technically it would seem to follow that Kite would not allow for addition of "disabilities" but would rather be confined to the addition of "impairment" which is the factor the physician is supposed to address as part of the medical evaluation process of injured worker.
- Adding impairments would seem to run afoul of the rating method mandated under the PDRS which requires that each body part be individually rated pursuant to a string rating.

POST KITE OBSERVATIONS/CRITICISMS

- The matter of proper PDRS rating methodology becomes more apparent for those cases that attempt to adopt a Kite addition of impairment different body parts. How can this be properly accomplished under the PDRS when many body parts carry different values due to occupational adjustment issues?
- Another criticism of the Kite in addition methodology is the failure of the WCJ to adequately consider whether or not the physicians application of Kite is based upon substantial evidence. Fortunately, and as we have seen earlier, there is a growing group of cases which have been skeptical as to a rote application of Kite.
- Therefore, when a Kite issue is raised by applicant it should be incumbent on defendant to ensure the proper terms are being utilized (i.e WPI v PD).

CONSIDERATIONS IN DEFENDING A KITE CASE

- In spite of some of the bizarre cases we have seen involving the application of Kite, there are tools that can be utilized to defend a Kite claim.
- As have been discussed, The effort to utilize Kite is an effort to rebut the PDRS. We must therefore keep in mind that it is the applicants burden of proof to rebut the schedule.
- Secondly, it is important to determine if the evaluating physician who supports an additive methodology utilizes the correct terms (WPI) as opposed to disability and further explains the “how and why” an alternative method under Kite would result in a more accurate rating of disability.

DEFENDING A KITE CASE

- Too often, we encounter situations where an evaluating physician will merely mimic popular buzzwords (synergy) in support of a medical legal conclusion. It is therefore important to carefully review, and if necessary, take the deposition of a medical examiner to pin them down as to the basis for their conclusion.
- EDITORIAL COMMENT– This writer has not encountered any evidence that multiple disabilities necessarily result in a 1+1=2x level of PD. In fact, most medical examiners do not have a thorough understanding of how our disability system produces the disability rating. No medical examiner that this writer has deposed has been able to confirm medical literature or studies supporting simple addition of biomechanical disabilities. However, most, acknowledge the existence of biomechanical overlapping factors of ADL's and disability.

DEFENDING A KITE CASE

- Separate and apart the issue as to whether or not the medical examiner is able to explain their opinion concerning the application of an additive method for rating is the concept of overlapping/duplicating factors of disability and/or WPI.
- The cases involving Kite mention these concepts and they represent a major tool for defending a claim involving attempts to add WPI and PD.
- The core legal concept involving duplication/overlap is that injured workers disability is capable of being reduced to the extent that there are overlapping factors which duplicate.

DEFENDING A KITE CASE

- The legal concept of duplicating/overlapping factors of disability has been accepted by the Disability Evaluation Unit for years. It is also a concept accepted by physicians.
- As early as 1963 the WCAB recognized concepts of overlapping/duplicating factors of disability per SCIF v WCAB(Hutchinson) (1963) the 28 CCC 20 see also Hegglin v WCAB (1971) 36 CCC 93 and SCIF.
- The concept has also been acknowledged post 2005 in Kopping v CHP (2006) 71 CCC 1229; Sanchez v County of Los Angeles (2005) 70 CCC 1440; Strong v City and County of San Francisco (En Banc) 70 CCC 1460

DEFENDING A KITE CASE

- Establishing a record where the medical examiner agrees that there are overlapping ADL factors for WPI (and even overlapping factors of physical restrictions for consideration of permanent disability) would seem to mitigate the application of a simple "adding" either WPI or permanent disability.
- Thus, in defending any case involving Kite principles, there should be a thorough workup to establish overlapping ADL factors for WPI as well as permanent disability.

FUTURE TRENDS FOR KITE

- For the immediate future, the industry can anticipate vigorous efforts to apply Kite case principles. It remains to be seen how far and expansive Courts will go in allowing the application of this case to the ratings of disability, but, right now, it does present a problem for us in the industry in terms of being able to determine the accurate value of a case. Moreover, the application of Kite principles make it much more easy to establish levels of PD at 70% + and permanent total(100%).
- COMMENT-Kite allowed for "addition" of WPI. Do not be surprised if we see a Kite application based upon "multiplication" of WPI factors.

THE END?

- NOT BY A LONG SHOT

AND THE BEAT GOES ON

Hikida Update

Why is the applicant demanding a higher PD rating claiming it was caused medical treatment for their industrial injury?

What can you do about it?

Hikida v. Workers' Comp. Appeals Bd. (2017) 12 Cal.App.5th 1249, 82 CCC 679

Dealing with liability for PD an injured worker claims was caused by medical treatment for their industrial injury.

Apportionment

"The issue presented is whether an employer is responsible for both the medical treatment and any disability arising directly from unsuccessful medical intervention, **without apportionment.**" (Emphasis added)

Hikida facts

Ms. Hikida developed carpal tunnel syndrome. She had a surgery that went badly and she developed chronic regional pain syndrome (CRPS).

The AME found that Ms. Hikida's carpal tunnel condition was industrial, and that she was permanently and totally disabled.

The AME apportioned one-tenth of the PD to non-industrial factors.

The WCJ made a finding of a 90% rating due to industrial factors after apportionment (100% less 10% non-industrial factors).

After the initial appeal, remand, and second WCJ finding, the WCAB panel majority eventually upheld the apportionment determination.

Hikida facts

The Court of Appeal disagreed and found no applicable apportionment.

Applicant had numerous other accepted injuries cervical spine, thoracic spine, upper extremities, psyche, fingers, as well as employment-related headaches, memory loss, sleep disorder, and "deconditioning." She also had numerous denied claims.

The key here is that the medical evidence showed that Ms. Hikida's permanent total disability was caused by the CRPS, not by the underlying carpal tunnel or her other injuries. The PD was **entirely caused by the new medical condition**. The new medical condition was **entirely caused by the medical treatment**.

Hikida facts

This ruling is largely predicated on a long line of cases holding that injuries and aggravations due to industrial medical treatment are within the exclusive jurisdiction of the WCAB. Workers can not sue the employer and insurer for medical negligence or poor outcomes.

Also, the California Supreme Court in *Granado v. WCAB* (1968) 69 Cal. 2d. 399 held that medical treatment is not apportionable.

Thus the adverse consequences of industrially provided medical treatment cannot be apportioned.

Therefore, the PD consequences could not be apportioned.

Hikida Holding

“Here, there is no dispute that the disabling carpal tunnel syndrome from which petitioner suffered was largely the result of her many years of clerical employment with Costco. It followed that Costco was required to provide medical treatment to resolve the problem, without apportionment. The surgery went badly, leaving appellant with a far more disabling condition — CRPS — that will never be alleviated. California workers’ compensation law relieves Costco of liability for any negligence in the provision of the medical treatment that led to petitioner’s CRPS. It does not relieve Costco of the obligation to compensate petitioner for this disability without apportionment.

"Our review of the authorities convinces us that in enacting the 'new regime of apportionment based on causation,' the Legislature did not intend to transform the law requiring employers to pay for all medical treatment caused by an industrial injury, including the foreseeable consequences of such medical treatment.”

Is apportionment available after medical treatment?

Labor Code §4663(a) "Apportionment of permanent disability shall be based on causation."

Labor Code §4664(a) "The employer shall only be liable for the percentage of permanent disability directly caused by the injury arising out of and occurring in the course of employment."

Brodie v. WCAB (2007) 40 Cal. 4th 131,

"The new approach to apportionment is to look at the current disability and parcel out its causative sources—nonindustrial, prior industrial, current industrial—and decide the amount directly caused by the current industrial source." (Id. at p. 1328.)

City of Petaluma v. WCAB (Lindh) (2018) 29 Cal. App. 5th 1175

"[T]he salient question is whether the disability resulted from both nonindustrial and industrial causes, and if so, apportionment is required." (Id. at. p. 1193.)

County of Santa Clara v. WCAB (Justice) (2020) 49 Cal.App.5th 605, 85 CCC 467

Court of Appeal – *County of Santa Clara v. WCAB (Justice)* (2020)

The applicant had a knee injury underwent bilateral knee replacement surgeries.

The AME found the applicant had underlying osteoarthritis and that 50% of the overall disability was related to the applicant's underlying non-industrial factors.

The surgeries were successful and the only cause for a change in the impairment rating was that the surgeries were ratable under the AMA Guides.

The WCJ rejected the apportionment determination on the basis the *Hikida* case did not allow it because the PD resulted from the medical treatment.

On Recon, the WCAB agreed with the trial Judge.

County of Santa Clara v. WCAB (Justice) (2020) 49 Cal.App.5th 605, 85 CCC 467

Echoing *Lindh*, the Justice Court held:

"Where there is unrebutted substantial medical evidence that nonindustrial factors played a causal role in producing the permanent disability, the Labor Code demands that the permanent disability 'shall' be apportioned".

The Court went on to hold:

"There is no case or statute that stands for the principle that permanent disability that follows medical treatment is not subject to the requirement of determining causation and thus apportionment, and in fact such a principle is flatly contradicted by sections 4663 and 4664".

County of Santa Clara v. WCAB (Justice) (2020) 49 Cal.App.5th 605, 85 CCC 467

Justice Court reconciled itself with the *Hikida* decision

"Understood in context, 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 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 worker's permanent disability".

"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".

County of Santa Clara v. WCAB (Justice) (2020) 49 Cal.App.5th 605, 85 CCC 467

Apportionment is required unless the medical treatment resulted in a new condition which was entirely the result of that treatment. Otherwise, per *Lindh*, "the salient question is whether the disability resulted from both nonindustrial and industrial causes, and if so, apportionment is required".

There has been substantial litigation since SB899 on the issue of whether a defendant can obtain apportionment where a joint has been replaced. Most of the more recent cases found that it is permissible but these have been lower level or writ denied cases.

We now have a published Court of Appeal case in which apportionment was allowed where there has been a joint replacement that removed the underlying degenerative condition.

Apportionment after joint replacement

WCAB Panel Decision – *Fuller v Monterey Bay Aquarium (Fuller III)* 2020 Cal.Wrk.Comp. P.D. LEXIS 190

The Applicant had an admitted injury that led to nine knee surgeries including two total right knee replacements.

The Applicant also had a long history of knee injuries, osteoarthritis with anatomic changes, and the knee was occasionally symptomatic before the industrial injury.

Apportionment of the PD was required under Labor Code sections 4663 and 4664 since the industrial medical treatment did not cause an entirely new injury that was the sole cause of the permanent disability.

Relied on Justice, to apply apportionment after nine surgeries, including two total knees.

Apportionment after joint replacement

WCAB Panel Decision – *Durazo v. Dental Wellness* (2020) ADJ8884861

Applicant had a knee injury and documented pre-existing osteoarthritis. She had multiple surgeries including a knee replacement. The PQME found 50% apportionment to non-industrial factors

At trial, no apportionment was allowed based on a PTP opinion and the *Hikida* holding. Decision upheld on Recon. Justice issued after Recon but during Appeal.

"[I]f a conflict exists between *Justice* and *Hikida*, then the WCAB is free to choose between the conflicting lines of authority until either the Supreme Court resolves the conflict or the Legislature clears up the uncertainty by legislation".

Justice – 6th

Hikida – 2d

Correct legal principles after medical treatment — *Hikida* or *Justice*

"A medical opinion that refuses to accept correct legal principles does not constitute substantial medical evidence." (*Hegglin v. WCAB* (1971) 4 Cal. 3d 162; 36 CCC 93; *Zemke v. WCAB* (1968) 68 Cal. 2d 794, 33 CCC 358)

"We do not comprehend how the parties can expect any physician to properly report in workers' compensation matters unless he is advised of the controlling legal principles."

(*Gay v. WCAB* (1979) 96 Cal.App.3d 555, 564, 44 CCC 817

Boots on the ground bottom line

If the medical treatment results in a new condition that is the sole cause of the applicant's disability, then there can be no apportionment.

If the medical treatment results simply in PD, then apportionment is required.

Issues for AME/PQME:

1. Is there a new condition brought on by the medical treatment?
2. If yes, is the new condition the sole cause of the PD?

Best Practice – areas to explore

1. Was the medical treatment authorized?

(But see *Valdez v. L.A. County Prob. Dep't, 2022* Cal. Wrk. Comp. P.D. LEXIS 283, WCAB rejected defendant's argument that medical treatment provided by applicant's private insurance resulted in increased permanent disability, where WCAB found that applicant was permitted to treat for his industrial injury with his own physician at his own cost and *Hikida v. W.C.A.B.*, applied to that medical treatment.)

2. Did the medical treatment result in a **completely new condition** that did not exist prior to the authorized medical treatment?
3. Did the medical treatment legally cause the permanent disability?
4. Was the permanent disability related to the new condition entirely the result of the industrial injury treatment with no nonindustrial contributing causal factors?
5. Is the medical report that describes the industrial or nonindustrial causal factors of applicant's permanent disability substantial medical evidence ?

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