WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

SAMMY VIGIL, *Applicant*

vs.

COUNTY OF KERN, *Defendants*

Adjudication Numbers: ADJ11201607 (MF); ADJ11201608
Bakersfield District Office

OPINION AND DECISION AFTER RECONSIDERATION

(Sections I, II, and IV - En Banc)

(Section III – Decision of the Panel)

We previously granted reconsideration in order to further study the factual and legal issues. This is our Opinion and Decision After Reconsideration (En Banc).

To secure uniformity of decisions in the future, the Chair of the Appeals Board, upon a unanimous vote of its members, assigned this case to the Appeals Board as a whole for an en banc decision.[1] (Lab. Code, § 115.) Sections I, II, and IV of this opinion are adopted as the En Banc decision of the Appeals Board. (*Ibid*.) Section III of this decision is not adopted as part of the En Banc opinion and instead shall constitute the decision of the panel. [2, 3]

---

[1] En banc decisions of the Appeals Board are binding precedent on all Appeals Board panels and workers' compensation administrative judges. (Cal. Code Regs., tit. 8, § 10325; C*ity of Long Beach v. Workers' Comp. Appeals Bd*. (*Garcia*) (2005) 126 Cal.App.4th 298, 316, fn. 5 [70 Cal.Comp.Cases 109]; *Gee v. Workers' Comp. Appeals Bd.* (2002) 96 Cal.App.4th 1418, 1424, fn. 6 [67 Cal.Comp.Cases 236].) This en banc decision is also adopted as a precedent decision pursuant to Government Code section 11425.60(b).

[2] Commissioner Sweeney was on the panel that issued the order granting reconsideration. Commissioner Sweeney no longer serves on the Appeals Board. A new panel member has been appointed in her place.

[3] Unlike en banc decisions, panel decisions are not binding precedent on other Appeals Board panels and WCJs. (See *Gee v. Workers' Comp. Appeals Bd.* (2002) 96 Cal.App.4th 1418, 1425 fn. 6 [67 Cal.Comp.Cases 236].) However, panel decisions are citable authority and the Workers' Compensation Appeals Board may consider these decisions to the extent that their reasoning is found persuasive, particularly on issues of contemporaneous administrative construction of statutory language. (See *Guitron v. Santa Fe Extruders* (2011) 76 Cal.Comp.Cases 228, fn. 7 (Appeals

Defendant seeks reconsideration of the "Rulings on Evidence, Findings of Fact, Awards and Orders" (F&A) issued on April 20, 2020, and the subsequent amendment to the F&A in the "Order Amending Findings of Fact, Awards and Orders; Opinion on Decision" (Order) issued on May 5, 2020, by the workers' compensation administrative law judge (WCJ).[4] The WCJ found, in pertinent part, that applicant sustained 68% permanent partial disability by adding the impairment to applicant's left and right hip pursuant to *East Bay Municipal Utility District v. Workers' Compensation Appeals Board* (*Kite*) (2013) 78 Cal.Comp.Cases 213 (writ den.). The WCJ further found that apportionment to the hips was not permissible pursuant to *Hikida v. Workers' Comp. Appeals Bd*. (2017) 12 Cal.App.5th 1249 [82 Cal.Comp.Cases 679] because the disability was caused by hip replacement surgery.

Defendant contends that the WCJ misapplied the analysis in the *Kite* decision because the opinion of the qualified medical evaluator (QME) was not substantial evidence and does not support rebuttal of the Combined Values Chart (CVC). Next, defendant contends that the WCJ erred in applying *Hikida*, because applicant's hip surgeries were successful and did not cause any increase in impairment.

We received an Answer from applicant. The WCJ filed a Report and Recommendation on Petition for Reconsideration (Report) recommending that we deny reconsideration. We have considered the allegations of the Petition for Reconsideration and the Answer and the contents of the WCJ's Report.

Board en banc); *Griffith v. Workers' Comp. Appeals Bd.* (1989) 209 Cal.App.3d 1260, 1264, fn. 2, [54 Cal.Comp.Cases 145].) Practitioners should proceed with caution when citing to a panel decision and verify its subsequent history.

[4] WCAB Rule 10961 (Cal. Code Regs., tit. 8, § 10961) provides that jurisdiction remains with the district office for 15 days after the timely filing of a petition for reconsideration and sets forth the following actions that a WCJ may take in response: (1) The WCJ may prepare a report and transfer jurisdiction to the Appeals Board to address the merits of the petition (Cal. Code Regs., tit. 8, § 10961(a); see Cal. Code Regs., tit. 8, § 10962); (2) The WCJ may rescind the entire order, decision or award and initiate proceedings within 30 days (Cal. Code Regs., tit. 8, § 10961(b)); or (3) The WCJ may rescind the order, decision or award and issue an amended order, decision or award, and a new petition for reconsideration must be filed in response to the amended order, decision or award (Cal. Code Regs., tit. 8, § 10961(c)).

Here, applicant filed a Petition for Reconsideration on May 1, 2020. In response, the WCJ issued the Order on May 5, 2020. Defendant then filed a timely Petition for Reconsideration on June 1, 2020. Thus, under WCAB Rule 10961(c), we treat the Order as including the April 20, 2020 F&A. We note that it is preferable to rescind the entire decision and issue a new decision so as to maintain a clear record of proceedings.

Based on our review of the record, and for the reasons discussed below, we hold En Banc that:

> The Combined Values Chart (CVC) in the Permanent Disability Ratings Schedule (PDRS) may be rebutted and impairments may be added where an applicant establishes the impact of each impairment on the activities of daily living (ADLs) and that either:
>
> > (a) there is no overlap between the effects on ADLs as between the body parts rated; or
> >
> > (b) there is overlap, but the overlap increases or amplifies the impact on the overlapping ADLs.

As our Decision After Reconsideration, we will rescind the WCJ's F&A as amended pursuant to the May 5, 2020 Order and return these matters to the trial level for further proceedings consistent with this decision.

I.

FACTS

Applicant worked for defendant as a maintenance painter, and he claimed injury to his hips and back on December 7, 2017 (ADJ11201608), and during the cumulative period ending on February 7, 2018 (ADJ11201607). (Minutes of Hearing and Summary of Evidence, February 7, 2020, p. 2, lines 39-43.)

Following trial, applicant's cumulative injury was found to be industrial, and the WCJ calculated applicant's permanent disability by adding the impairment to the left and right hips, and then combining it with the impairment to the lumbar spine. (F&A, p. 3.) The WCJ did not apply 15% non-industrial apportionment to the hips based upon *Hikida* because the WCJ opined that the disability was a result of applicant's surgical hip replacement. (*Id*. at p. 2.)

Thus, the issue on reconsideration is the calculation of permanent disability, including the application of the *Kite* analysis to the hips, and whether apportionment was properly excluded.

Applicant was evaluated by QME Peter Newton, M.D., who authored four reports in evidence and was deposed. (Applicant's Exhibits 1 through 5.) Dr. Newton took a history of applicant undergoing bilateral hip replacement surgeries and noted the following complaints:

> LUMBAR SPINE:
>
> > The applicant experiences pain in the low back, which is present all the time, [greater] in the mornings and evenings. The pain is

> increased with prolonged walking, bending, kneeling, stooping, forward bending, ascending and descending stairs and curbs, lilting and carrying greater than 40 pounds. There is no radiating pain, numbness or tingling.
>
> RIGHT HIP:
>
> There is currently no pain in the right hip however, he has intermittent pain that is aggravated by prolonged walking and lifting and carrying greater than 40 pounds.
>
> LEFT HIP:
>
> The applicant experiences pain in the left hip, which is present all the time for the last month. The pain is aggravated by prolonged walking and lifting and carrying greater than 40 pounds.

(Applicant's Exhibit 2, Report of QME Peter Newton, M.D., June 24, 2019, p. 3.)

Dr. Newton assigned 15% whole-person impairment (WPI) to the right hip, 15% WPI to the left hip, and 7% WPI to applicant's lumbar spine. (*Id*. at p. 13.)

Dr. Newton discussed apportionment as follows:

> The issue of apportionment is addressed pursuant to Labor Code Section 4663 and 4664 and the opinions must be made to a reasonable medical probability. My opinion regarding Causation is based on the applicant's history, physical examination, radiologic and other diagnostic studies, and medical records if I have received them. This information is used to consider other significant causative factors including prior documented injuries, permanent disability, or impairments as well as preexisting conditions whether they be congenital, result of injuries, or degenerative conditions, which have evolved over time. These conditions together are taken into consideration in determining other factors, which may have contributed to this applicant's current condition / disability / impairment.
>
> To a reasonable degree of medical probability, 15% of this applicant's lumbar spine and right and left hip condition/disability/impairment is apportioned to age-appropriate and age-related degenerative changes and 85% to the continuous trauma of his work through 03/26/18.

(*Id*. at p. 14.)

Dr. Newton provided the following analysis regarding *Kite*:

> Q. Okay. And are you familiar with the Kite case, K-i-t-e?
>
> A. Yes.
>
> Q. And would you feel a Kite analysis would be proper in this case?
>
> A. I assume you're asking me for the hips, right?
>
> Q. Yes.
>
> A. Yes, for the hips, I agree. Somebody with limitations due to both hips is going to have significantly more limitations than if somebody had one normal hip and one hip that they had surgery on.
>
> Q. So in this case would you add disability for the hips rather than just combine them?
>
> A. Yes. I think that's reasonable.

(Applicant's Exhibit 5, Deposition of QME Peter Newton, M.D., October 28, 2019, p. 30, lines 9-22.)

II.

DISCUSSION

Permanent disability in workers' compensation cases is determined using the Permanent Disability Ratings Schedule (PDRS), which is prima facie evidence of applicant's level of permanent disability. (Lab. Code, §§ 4660(c), 4660.1(d).) However, the PDRS is rebuttable. (*Milpitas Unified School Dist. v. Workers' Comp. Appeals Bd.* (*Guzman*) (2010) 187 Cal.App.4th 808, 822 [75 Cal.Comp.Cases 837].) As the Court stated in *Guzman*:

> Section 4660, subdivision (b)(1), recognizes the variety and unpredictability of medical situations by requiring incorporation of the descriptions, measurements, and corresponding percentages in the Guides for each impairment, not their mechanical application without regard to how accurately and completely they reflect the actual impairment sustained by the patient.

(*Ibid.*)

One element of the PDRS is the Combined Values Chart (CVC). The purpose of the CVC is described within the PDRS, which cites to the American Medical Association Guides to the Evaluation of Permanent Impairment, 5th Edition (2001) (AMA Guides), which is adopted and

incorporated for purposes of rating permanent disability under the 2005 PDRS. (Lab. Code, §§ 4660, 4660.1; Hoch, Andrea, *Schedule for Rating Permanent Disabilities*, (2005), p. 1-11; AMA Guides, pp. 9-10.) In sum, impairment under the AMA Guides is designed to reflect how a disability affects a person's activities of daily living ("ADLs") (self-care, communication, physical activity, sensory function, non-specialized hand activities, travel, sex, and sleep). (AMA Guides, pp. 2-9.) CVC "values are derived from the formula A + B(1-A) = combined value of A and B, where A and B are the decimal equivalents of the impairment ratings." (AMA Guides, p. 604.)[5]

Impairments to two or more body parts are usually expected to have an overlapping effect upon the activities of daily living, so that generally, under the AMA Guides and the PDRS, the two impairments are combined to eliminate this overlap. For example, impairments to the low back and the knee would likely both affect a person's physical activity, ability to travel, and potentially other ADLs. In this example, the two impairments would then be combined in a way to eliminate this overlap.

As an element of the PDRS, the CVC may also be rebutted, and when the CVC is rebutted, those impairments may simply be added. For example, under the CVC, a 13% disability to the lumbar spine combines with 20% psychiatric disability to equal 30% [20 + 13(1-0.2)]. In this example, when 20% + 13% are added, the sum is equal to 33% permanent disability.

In our panel decisions, two methods have been used to rebut the CVC to date. In the first approach, the CVC has been rebutted where there was evidence showing *no actual overlap* between the effects on ADLs as between the body parts rated. In the second approach, the CVC has also been rebutted where there is overlap, but the overlap creates a *synergistic effect* upon the ADLs.

a. No overlap of ADLs.

The first method for rebuttal of the CVC is to show that the multiple impairments, in fact, have no overlap upon the effects of the ADLs. (See e.g., *Devereux v. State Comp. Ins. Fund*, 2018 Cal.Wrk.Comp. P.D. LEXIS 592; *Guandique v. State of California*, 2019 Cal.Wrk.Comp. P.D. LEXIS 53.) We believe that one significant point of confusion on the issue of overlap is that the analysis should focus on overlapping **ADLs**, not body parts.

[5] Although the formula for the CVC is from the AMA Guides, the chart used to calculate the CVC is from the PDRS.

In determining whether the application of the CVC table has been rebutted in a case, an applicant must present evidence explaining what impact applicant's impairments have had upon their ADLs. Where the medical evidence demonstrates that the impact upon the ADLs overlaps, without more, an applicant has not rebutted the CVC table. Where the medical evidence demonstrates that there is effectively an absence of overlap, the CVC table is rebutted, and it need not be used.

Here, Dr. Newton's testimony does not appear to be based upon no overlap, but instead appears to argue for CVC rebuttal based upon a synergistic effect between the two hips, as discussed below.

b. Overlapping ADLs with a Synergistic Effect

The next method for rebutting the CVC was first discussed in *Kite*, where applicant was awarded permanent disability by adding the impairment to each hip and not by combining the impairments as ordinarily required by the PDRS under the CVC. (*Kite, supra,* 78 Cal.Comp.Cases 213.) In *Kite*, the CVC was rebutted by substantial medical evidence showing the synergistic effect of the two impairments on applicant.[6]

'Synergy' is "(1) the interaction of two or more agents or forces so that their combined effect is greater than the sum of their individual effects; or (2) Cooperative interaction among groups. . . that creates an enhanced combined effect." (American Heritage Dict. (Fifth Edition, 2022).) In some cases, two impairments overlap with one another in their effect on ADLs to the extent that they amplify one another to cause further impairment than what is anticipated in the AMA Guides. Thus, it is permissible to add impairments where a synergistic amplification of ADLs is shown.

For example, if applicant had an impairment in the dominant hand, an evaluator might find that the impairment impacts the ADL of non-specialized hand activities, such as being able to button a shirt. If applicant's impairment was to both hands, one might expect the ability to button a shirt to be even more difficult. The purpose of the CVC, avoiding duplication, does not apply in

[6] In *Kite*, applicant was awarded permanent disability based on the opinion of the QME. The QME explained that, in his opinion, the best way to combine applicant's impairments to his right and left hips would be to add them together rather than using the CVC. As quoted by the WCJ in their Report, the QME stated that "there is a synergistic effect of the injury to the same body parts bilaterally versus body parts from different regions" so that adding the impairments for both hips produced the most accurate reflection of applicant's actual permanent disability. (*Kite*, *supra* 78 Cal.Comp.Cases at p. 214.)

such cases as the impairments are not duplicative, because the two impairments together are worse than having a single impairment.

We cannot emphasize enough that to constitute substantial evidence ". . . a medical opinion must be framed in terms of reasonable medical probability, it must not be speculative, it must be based on pertinent facts and on an adequate examination and history, **and it must set forth reasoning in support of its conclusions**." (*Escobedo v. Marshalls* (2005) 70 Cal.Comp.Cases 604, 621 (Appeals Board en banc), (emphasis added).) The term 'synergy' is not a "magic word" that immediately rebuts the use of the CVC. Instead, a physician must set forth a reasoned analysis explaining how and why synergistic ADL overlap exists. If parties are searching for a magic word to use during a doctor's deposition, that word is "Why?". Rather than focusing on whether a specific term, including the term synergy, was used, it is imperative that parties focus on an **analysis** that applies critical thinking based on the principles articulated in *Escobedo* to support a conclusion based on the facts of the case. Such an analysis must include a detailed description of the impact of ADLs and how those ADLs interact.

Accordingly, where an applicant seeks to rebut the CVC, they must establish the following:

1) The ADLs impacted by each impairment to be added, and
2) Either:
    a) The ADLs do not overlap, or
    b) The ADLs overlap in a way that increases or amplifies the impact on the overlapping ADLs.[7]

Here, Dr. Newton concluded that applicant would have significantly more limitations after having both hips replaced, but he provided little analysis in support of this conclusion. Dr. Newton should have reviewed the impacts upon the ADLs in each individual hip, and then explained why the disability in the two hips combined in a way to increase the impact on overall ADLs. Yet, Dr. Newton's reporting and the present record contain no discussion of ADLs. Accordingly, the finding that the impairments should be added is not based on substantial medical evidence.

III.

[*See below. This section is not part of the en banc decision and is not citeable as an en banc precedent.*]

[7] We emphasize that our goal is to explain the known methods of rebutting the CVC and not to exclude the unknown.

IV.

The WCJ and the Appeals Board have a duty to further develop the record where there is insufficient evidence on an issue. (*McClune v. Workers' Comp. Appeals Bd.* (1998) 62 Cal.App.4th 1117, 1121-1122 [63 Cal.Comp.Cases 261].) The Appeals Board has a constitutional mandate to "ensure substantial justice in all cases." (*Kuykendall v. Workers' Comp. Appeals Bd.* (2000) 79 Cal.App.4th 396, 403 [65 Cal.Comp.Cases 264].) The Board may not leave matters undeveloped where it is clear that additional discovery is needed. (*Id.* at p. 404.) The preferred procedure is to allow supplementation of the medical record by the physicians who have already reported in the case. (*McDuffie v. Los Angeles County Metropolitan Transit Authority* (2003) 67 Cal.Comp.Cases 138 (Appeals Board en banc).) Upon return, we recommend that the WCJ consider further development of the record under the principles outlined in this decision.

Therefore, we hold En Banc that:

> The Combined Values Chart (CVC) in the Permanent Disability Ratings Schedule (PDRS) may be rebutted and impairments may be added where an applicant establishes the impact of each impairment on the activities of daily living (ADLs) and that either:
>
> (a) there is no overlap between the effects on ADLs as between the body parts rated; or
>
> (b) there is overlap, but the overlap increases or amplifies the impact on the overlapping ADLs.

Accordingly, as our Decision After Reconsideration (En Banc), we rescind the WCJ's F&A as amended per the May 5, 2020 Order and return this matter to the trial level for further proceedings consistent with this opinion.

For the foregoing reasons,

IT IS ORDERED as the Decision After Reconsideration of the Workers' Compensation Appeals Board (En Banc) that the Order Amending Findings of Fact, Awards and Orders issued on May 5, 2020 is **RESCINDED** and this matter is **RETURNED** to the trial level for further proceedings consistent with this opinion.

WORKERS' COMPENSATION APPEALS BOARD (EN BANC)

/s/ KATHERINE A. ZALEWSKI, CHAIR

/s/ JOSÉ H. RAZO, COMMISSIONER

/s/ KATHERINE WILLIAMS DODD, COMMISSIONER

/s/ CRAIG SNELLINGS, COMMISSIONER

/s/ JOSEPH V. CAPURRO, COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

June 10, 2024

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

SAMMY VIGIL
LAW OFFICE OF JOSEPH PLUTA
COUNTY COUNSEL-COUNTY OF KERN
EMPLOYMENT DEVELOPMENT DEPARTMENT

EDL/abs

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

The following Section is not an en banc decision of the Appeals Board and should not be cited as an en banc precedent.

III.

APPLICATION OF APPORTIONMENT UNDER *HIKIDA*

Defendant contends that the WCJ erred in applying *Hikida* and not finding apportionment, because applicant's hip surgeries were successful and did not cause any increase in impairment.

As explained in *Nunes I*:

> The California worker's compensation system requires that, "[e]mployers must compensate injured workers only for that portion of their permanent disability attributable to a current industrial injury, not for that portion attributable to previous injuries or to nonindustrial factors. 'Apportionment is the process employed by the Board to segregate the residuals of an industrial injury from those attributable to other industrial injuries, or to nonindustrial factors, in order to fairly allocate the legal responsibility.'" (*Brodie v. Workers' Comp. Appeals Bd*. (2007) 40 Cal.4th 1313, 1321 [57 Cal. Rptr. 3d 644, 156 P.3d 1100, 72 Cal.Comp.Cases 565], quoting *Ashley v. Workers' Comp. Appeals Bd*. (1995) 37 Cal.App.4th 320, 326 [43 Cal.Rptr. 2d 589, 60 Cal.Comp.Cases 683].)
>
> Section 4663(c) provides, in relevant part:
>
> > (c) In order for a physician's report to be considered complete on the issue of permanent disability, the report must include an apportionment determination. A physician shall make an apportionment determination by finding what approximate percentage of the permanent disability was caused by the direct result of injury arising out of and occurring in the course of employment and what approximate percentage of the permanent disability was caused by other factors both before and subsequent to the industrial injury, including prior industrial injuries.
> >
> > (Lab. Code, § 4663(c).)
>
> In *Escobedo v. Marshalls* (2005) 70 Cal.Comp.Cases 604 [2005 Cal. Wrk. Comp. LEXIS 71] (Appeals Board en banc) (*Escobedo*), we explained:
>
> > Section 4663(c) not only prescribes what determinations a reporting physician must make with respect to apportionment, it also prescribes what standards the WCAB must use in deciding apportionment; that is, both a reporting

> physician and the WCAB must make determinations of what percentage of the permanent disability was directly caused by the industrial injury and what percentage was caused by other factors.

(*Id*. at p. 607.)

> Accordingly, section 4663(c) authorizes and requires the reporting physician to make an apportionment determination, and further prescribes the standards the physician must use. (Lab. Code, § 4663(c); *Escobedo*, *supra*, at pp. 607, 611–612.) Apportionment must account for "other factors both before and subsequent to the industrial injury," and may include disability that formerly could not have been apportioned, including apportionment to pathology, asymptomatic prior conditions, and retroactive prophylactic work restrictions. (*Ibid*.) In addition, when a physician considers all appropriate factors of apportionment but nevertheless determines that it is not possible to approximate the percentages of each factor contributing to the employee's overall permanent disability to a reasonable medical probability, the physician has made the apportionment determination required under section 4663(c). (*Benson v. Workers' Comp. Appeals Bd.* (2009) 170 Cal. App. 4th 1535 [89 Cal. Rptr. 3d 166, 74 Cal.Comp.Cases 113, 133]; see also *James v. Pacific Bell Tel. Co*. (May 10, 2010, ADJ1357786) [2010 Cal. Wrk. Comp. P.D. LEXIS 188].)

(*Nunes v. State of California, Dept. of Motor Vehicles* (*Nunes I*), (2023) 88 Cal.Comp.Cases 741, 748-749 (Appeals Board en banc).)

In *Hikida, supra,* 12 Cal.App.5th 1249, the Court of Appeal held that an injured worker was entitled to a permanent disability award without apportionment where her disability was due entirely to a new condition of chronic regional pain syndrome (CRPS) that she developed as a result of failed carpal tunnel surgery. The Court reasoned that legislative reforms to California's apportionment scheme had not changed the longstanding principle that medical treatment for an industrial injury is not subject to apportionment. (*Id*. at 1261.) Thus, where medical treatment that is not subject to apportionment results in additional disability, the resulting disability is also not subject to apportionment. The court in *Hikida* reasoned:

> 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 [applicant's employer] 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.

(*Id*. at p. 1262.)

In *County of Santa Clara v. Workers' Comp. Appeals Bd*. (*Justice*) (2020) 49 Cal. App. 5th 605 [85 Cal.Comp.Cases 467], the Court clarified that *Hikida* applies to preclude apportionment of new, more disabling conditions resulting from industrial surgery. (*Id*. at pp. 614-615.)

> 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.

(*Id*. at p. 615.)

We agree with defendant that the WCJ misapplied the holding in *Hikida* as the basis for finding no apportionment to the hips. Here, applicant had a good result from industrial hip replacement surgery. According to the *Justice* court, the principles of *Hikida* would not apply to this scenario. However, for the reasons discussed below, we conclude that defendant simply failed its burden of proving apportionment to the hips under Labor Code section 4663.

Defendant carries the burden of proof on apportionment. (Lab. Code, § 5705.) Apportionment of permanent disability must address causation of disability and must constitute substantial evidence. (*Escobedo, supra,* 70 Cal.Comp.Cases at pp. 611, 620-621.)

Here the apportionment opinion of Dr. Newton does not constitute substantial medical evidence as it is conclusory without adequate explanation for what non-industrial factors caused the need for applicant's hip replacements. Without a proper explanation of how and why, defendant has failed to meet its burden of proof on the issue of apportionment. (See *Escobedo*, *supra*.)

WORKERS' COMPENSATION APPEALS BOARD

/s/ KATHERINE A. ZALEWSKI, CHAIR

I CONCUR,

/s/ CRAIG SNELLINGS, COMMISSIONER

/s/ JOSEPH V. CAPURRO, COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

June 10, 2024

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

SAMMY VIGIL
LAW OFFICE OF JOSEPH PLUTA
COUNTY COUNSEL-COUNTY OF KERN
EMPLOYMENT DEVELOPMENT DEPARTMENT

EDL/abs

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