California Workers' Compensation Institute

Significant Decision

No. 17-05 June 29, 2017

HIKIDA v. WCAB (COSTCO)

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
B279412
FILED: JUNE 22, 2017

Applicant is entitled to an unapportioned award for disability resulting from industrially-related medical treatment.

Significance: Despite significant changes in the law governing apportionment, if the employer is responsible for the injured worker's medical treatment, then the employer is responsible for any disability arising directly from that medical treatment -- without apportionment.

Facts: Applicant obtained carpal tunnel surgery on an industrial basis. Following surgery, she developed chronic regional pain syndrome (CRPS) and never returned to work. The AME opined that applicant was permanently and totally disabled due entirely to the effects of the CRPS, but that the underlying carpal tunnel syndrome itself was only 90% industrially-related. The WCJ issued a 90% Award after apportionment. Applicant appealed, and in the first Decision After Reconsideration the Appeals Board affirmed the apportionment and remanded the case back to the WCJ to take into account medical reports showing applicant had sustained psychiatric injury. Commissioner Sweeney dissented, contending that applicant was entitled to compensation for any new injury resulting from the medical treatment of the industrial injury. Following remand, the WCJ issued a new Award at 98% after apportionment, and applicant appealed again. In a second Decision After Reconsideration, the Appeals Board found that the prior apportionment determination was final, and denied reconsideration; Commissioner Sweeney again dissented. Applicant appealed.

Holding: In a published decision, the Court of Appeal held that disability resulting from medical treatment for which the employer is responsible is not subject to apportionment.

Discussion: The Court of Appeal determined that applicant's permanent total disability was not caused by her carpal tunnel condition, but by the CRPS resulting from the medical treatment provided by her employer. The court held that, because the employer is responsible for the medical treatment without apportionment, the employer is also responsible for any disability arising directly from an unsuccessful medical intervention without apportionment.

In reaching this determination, the Court of Appeal reviewed not only the recent development of the "new apportionment regime," but also the long-standing case law requiring employers to pay for all medical treatment caused by an industrial injury, including the foreseeable consequences of such medical treatment.

It is axiomatic in workers' compensation that medical treatment is not apportionable. A similar maxim is that aggravation of an industrial injury resulting from its treatment is compensable. A long line of cases holds that injuries and aggravations due to industrial medical treatment are within the exclusive jurisdiction of the WCAB. Here, the Court of Appeal confirmed as a necessary corollary of these rules that it is "the employer's responsibility to compensate for medical treatment and the consequences of medical treatment without apportionment." The Court concluded:

> California's workers' compensation law relieves [the employer] of liability for any negligence in the provision of the medical treatment that led to petitioner's CRPS. It does not relieve [the employer] of the obligation to compensate petitioner for this disability without apportionment.

This decision is in line with the board panel decision in *Steinkamp v. City of Concord* (2006 Wrk. Comp. P.D. LEXIS 24), where the Board concluded that apportionment of disability resulting from an industrially related knee surgery was not warranted because "medical treatment is not apportionable." That decision, however, was not binding precedent; the decision in *Hikida* is.

There were some unusual procedural aspects of the *Hikida* case that merit attention. First, the Court of Appeal requested supplemental briefing on the issue of the timeliness of the appeal. Both defendant and the Appeals Board contended that the first Decision After Reconsideration was final with respect to the apportionment issue, and that applicant's failure to appeal that decision rendered her current challenge to apportionment as untimely. The Court of Appeal disagreed, pointing to the general rule that an order made by the Board remanding the matter for further hearing and leaving issues to be resolved by the WCJ does not constitute a "final order" for purposes of appeal. Plainly, the first decision was not a final order disposing of the case, since it was remanded for determination of additional compensation for the psychiatric disability. But the Court of Appeal held that the decision was also not final as to apportionment because it did not represent a threshold issue "crucial to the right to receive benefits." This finding could impact the current appeal in *Stevens*.

Second, approximately 10 days before oral argument, the parties notified the court that they had settled the case. But the Court of Appeal refused to take the matter off calendar, stating that the case represented an issue of continuing public concern. This is very unusual, as courts are generally loath to address issues rendered moot by settlement; here, the court believed that the issue is "likely to recur." As a practical matter, having resolved the underlying case, it is unlikely that the defendant will appeal this matter any further.

Finally, it has been suggested by at least one observer that there is some potential that this case could impact the decision in *King v. CompPartners* (now pending at the Supreme Court). One of the rationales in that appellate decision was the idea that the UR physician's error was not within the compensation bargain because the seizures were not industrially-related. The *Hikida* case underscores the concept that disability related to industrial medical treatment is subject to the exclusive remedy protections of the Workers' Compensation Act.

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