

No. H046562

**IN THE
SIXTH DISTRICT COURT OF APPEAL
FOR THE STATE OF CALIFORNIA**

COUNTY OF SANTA CLARA,
Petitioner,
v.
WORKERS' COMPENSATION APPEALS BOARD
and BARBARA JUSTICE,
Respondents.

WCAB Case Number ADJ9339549
Hon. David Lauerman

**AMICUS CURIAE BRIEF OF
CALIFORNIA WORKERS' COMPENSATION INSTITUTE and
CALIFORNIA CHAMBER OF COMMERCE IN SUPPORT OF
PETITIONER COUNTY OF SANTA CLARA**

Ellen Sims Langille, General Counsel (SBN: 154329)
California Workers' Compensation Institute
1333 Broadway, Suite 510
Oakland, CA 94612
Telephone (510) 251-9470
Facsimile: (510) 763-1592
elangille@cwci.org

Counsel for Amici Curiae
California Workers' Compensation Institute
California Chamber of Commerce

I. CERTIFICATE OF INTERESTED ENTITIES OR PERSONS

California Rule of Court 8.208

Name of Interested Entity or Person	Nature of Interest
County of Santa Clara	Petitioner – employer
Workers’ Compensation Appeals Board	Respondent – court
Barbara Justice	Respondent – injured worker
California Chamber of Commerce	Amicus Curiae
California Workers’ Compensation Institute	Amicus Curiae

Respectfully submitted,

February 28, 2019

/s/ Ellen Sims Langille

Ellen Sims Langille, CWCI General Counsel

elangille@cwci.org

Counsel for *Amici Curiae* CWCI / CalChamber

II. CERTIFICATION OF COMPLIANCE

I, Ellen Sims Langille, swear that I have read the within Amicus Curiae Brief and know the contents thereof; that the within brief contains 4,964 words exclusive of tables, signature blocks, and this certificate, based on the automated word count of the computer word-processing program; that I am informed and believe that the facts stated therein are true and on the ground allege that such matters are true; that I make

such verification as an officer of the California Workers' Compensation Institute;
and that I make such verification on behalf of the California Chamber of Commerce
because the officers of the California Chamber of Commerce are absent from the
County where my office is located and are unable to verify the application, and
because as counsel, I am more familiar with the facts of this case than are the officers
of the California Chamber of Commerce.

Respectfully submitted,

February 28, 2019

/s/ Ellen Sims Langille
Ellen Sims Langille, CWCI General Counsel
elangille@cwci.org
Counsel for *Amici Curiae* CWCI / CalChamber

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V. INTRODUCTION

The central question presented by this case is whether apportionment of permanent disability applies to an injured worker who has undergone bilateral total knee replacements, where the need for that surgical intervention was the result of both industrial and non-industrial causes.

The analysis by both the parties and the WCAB to this point has been focused on whether or not the issue of apportionment is controlled by *Hikida v. Workers' Comp. Appeals Bd.*¹ This amicus curiae brief argues that not only is the answer to that question a resounding “No,” but also that this case is actually best guided by a different appellate decision altogether -- one that was not even in existence at the time of trial: *City of Petaluma v. Workers' Comp. Appeals Bd. (Lindh)*.²

At issue in this case is the Appeals Board's interpretation of the law. When a workers' compensation decision rests on the Board's erroneous interpretation or application of the law, the reviewing court will annul the decision.³ The Board's conclusions on questions of law are reviewed de novo.⁴

¹ *Hikida v. Workers' Comp. Appeals Bd.* (2017) 12 Cal. App. 5th 1249.

² *City of Petaluma v. Workers' Comp. Appeals Bd. (Lindh)* (2018) 29 Cal. App. 5th 1175, 83 Cal. Comp. Cases 1869, 2018 Cal. App. LEXIS 1137, dated 12/10/2018.

³ *Matea v. Workers' Comp. Appeals Bd.* (2006) 144 Cal. App. 4th 1335, 1444; *Boehm & Associates v. Workers' Comp. Appeals Bd.* (1999) 76 Cal. App. 4th 513, 515-516.

⁴ *Benson v. Workers' Comp. Appeals Bd.* (2009) 170 Cal. App. 4th 1535, 1542-1543.

VI. LEGAL ARGUMENT

A. A Historical Review of the Development of the New Apportionment Regime Confirms That Apportionment Is Required Where Both Industrial and Non-Industrial Factors Combine to Cause Permanent Disability.

1. BEFORE 2004, CALIFORNIA LAW PRECLUDED APPORTIONMENT OF DISABILITY RESULTING FROM A PRE-EXISTING NON-DISABLING DISEASE PROCESS.

Prior to 2004, the general rule was that an employer had to take the employee as it found him or her at the time of the employment, with no apportionment for asymptomatic preexisting, or non-disabling conditions.⁵ Thus, when a subsequent injury “lit up” or aggravated a previously existing condition resulting in disability, liability for the full disability without apportionment would be imposed on the employer, and the WCAB could apportion disability only in those cases in which a portion of the disability would necessarily have resulted, in the absence of the industrial injury, from the normal progress of the pre-existing disease.⁶ The WCAB was required to allow compensation to an injured employee not only for the disability resulting solely from the employment, but also for the full extent of disability resulting from the acceleration, aggravation, or lighting up of a prior non-

⁵ *Lamb v. Workmen’s Comp. Appeals Bd.* (1974) 11 Cal. 3d 274 (“Industry takes the employee as it finds him. A person suffering from a preexisting disease who is disabled by an injury proximately arising out of the employment is entitled to compensation even though a normal man would not have been adversely affected by the event.”).

⁶ See, e.g., *Ballard v. Workmen’s Comp. Appeals Bd.* (1971) 3 Cal. 3d 832.

disabling disease.⁷ Apportionment was justified only if the Appeals Board found that the portion of the current disability would have resulted from the normal progress of the underlying nonindustrial disease, even absent the industrial event.⁸

2. THE OLD LAWS OF APPORTIONMENT WERE
COMPLETELY REVAMPED BY SB 899.

In 2004, the Legislature enacted a major workers' compensation reform package (Senate Bill 899). This reform bill completely overhauled the rules on apportionment, rewriting Labor Code section 4663 to mandate that apportionment of permanent disability must be based on causation.⁹ Section 4663 further requires an evaluating physician to make a determination of apportionment by finding the approximate percentage of the permanent disability caused as a direct result of the injury, and the approximate percentage of permanent disability caused by other factors both before and subsequent to the industrial injury.¹⁰

⁷ *Marsh v. Workers' Comp. Appeals Bd.* (2005) 130 Cal. App. 4th 906, 912.

⁸ *See, e.g., Pullman Kellogg v. Workers' Comp. Appeals Bd.* (1980) 26 Cal. 3d 450, 454; *see also Zemke v. Workers' Comp. Appeals Bd.* (1968) 68 Cal. 2d 794, 800 (annulling apportionment to pre-existing asymptomatic arthritic condition, and holding that compensation is payable even where employee's physical condition caused him to suffer disability from an injury which ordinarily would have caused little or no residual effect). As explained immediately below (Part A-2), the holding in *Zemke* was superseded by SB 899.

⁹ Lab. C. §4663(a): "Apportionment of permanent disability shall be based on causation."

¹⁰ Lab. C. §4663(c).

Senate Bill 899 also added Labor Code section 4664, which definitively outlines the limitations of the employer’s liability: **“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.”**¹¹

After SB 899, evaluating physicians, the WCJ, and the Appeals Board are required to “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.”¹²

The employer is liable to compensate the injured employee only for the former, and not the latter.¹³

3. THE EN BANC WCAB DECISION IN *ESCOBEDO* HELD THAT THE SCOPE OF APPORTIONMENT HAS BEEN EXPANDED BY THE LEGISLATURE.

Shortly after SB 899 was first implemented, the Workers’ Compensation Appeals Board issued an en banc decision in *Escobedo v. Marshalls*.¹⁴ The decision

¹¹ Lab. C. §4664 (emphasis added).

¹² Lab. C. §4663(c); *see also Benson, supra*, 170 Cal. App. 4th at 1550 fn. 13.

¹³ It should be emphasized that the new apportionment rules apply only to causation of permanent disability. An injured worker’s unfettered rights to temporary disability and medical treatment in any compensable claim remain unaltered by the new rules.

addressed the new requirement that apportionment be based on causation, outlined factors to be considered in making apportionment, and reaffirmed what constitutes substantial medical evidence of apportionment.

The Appeals Board in *Escobedo* found that “[t]here is no doubt that [by enacting SB 899], the Legislature intended to significantly change the laws relating to apportionment of permanent disability.”¹⁵ The Appeals Board concluded that “the Legislature intended to expand rather than narrow the scope of legally permissible apportionment.”¹⁶

Under *Escobedo*, where there is substantial medical evidence establishing that factors other than the industrial injury have caused a portion of the employee’s permanent disability, the QME, the WCJ, and the Appeals Board are required to apportion to those factors.¹⁷

¹⁴ *Escobedo v. Marshalls* (2005) 70 Cal. Comp. Cases 604 (en banc).

¹⁵ *Escobedo, supra*, 70 Cal. Comp. Cases at 616.

¹⁶ *Escobedo, supra*, 70 Cal. Comp. Cases at 616 [emphasis added].

¹⁷ *Benson, supra*, 170 Cal. App. 4th at 1560 (apportionment excused only under extremely “limited circumstances,...when the evaluating physician cannot parcel out, with reasonable medical probability, the approximate percentages to which each distinct industrial injury causally contributed to the employee’s overall permanent disability....”); see also *State Comp. Ins. Fund v. Workers’ Comp. Appeals Bd. (Dorsett)* (2011) 201 Cal. App. 4th 443 (same).

4. THE NEW LAWS OF APPORTIONMENT WERE
DEFINITELY ADDRESSED BY THE SUPREME COURT IN
BRODIE.

The prior general rule that the employer takes the employee as it find him or her, with no apportionment for asymptomatic, preexisting, or non-disabling conditions, has now been replaced by SB 899 with new apportionment rules. The Supreme Court, writing in *Brodie v. Workers' Comp. Appeals Bd.*,¹⁸ has conclusively defined this new apportionment regime¹⁹ with its rules of apportionment to causation:

[T]he 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.²⁰

Under the new apportionment regime, employers are required to compensate injured workers only for that portion of their permanent disability attributable to a current industrial injury, and not for that portion attributable to previous injuries or to nonindustrial factors.²¹ “Apportionment is the process employed...to segregate the residuals of an industrial injury from those attributable to other industrial injuries, or

¹⁸ *Brodie v. Workers' Comp. Appeals Bd.* (2007) 40 Cal. 4th 1313.

¹⁹ The Supreme Court declared that the changes wrought by SB 899 established a “new regime of apportionment based on causation.” *Brodie, supra*, 40 Cal. 4th at 1327.

²⁰ *Brodie, supra*, 40 Cal. 4th at 1328.

²¹ Citing *Escobedo*, the Supreme Court stated that SB 899 had “eliminate[d] the bar against apportionment based on pathology and asymptomatic causes.” *Brodie, supra*, 40 Cal. 4th at 1327.

to nonindustrial factors, in order to fairly allocate the legal responsibility.”²² The Supreme Court emphasized that the effect of SB 899 was to **reverse** case law that had barred apportionment if, “but for” the industrial injury, the nonindustrial cause would not alone have given rise to a disability.²³

In light of the foregoing historical context of SB 899, and particularly the interpretation and application of apportionment as defined by *Escobedo* and *Brodie*, it must be recognized that the new apportionment regime requires apportionment in cases such as this one, where the medical evidence shows that the work injury combined with the pre-existing condition to cause the employee’s current disability.

B. *Hikida* Is Not Properly Compared to the Facts in This Case.

Relying upon an overly simplistic analysis of *Hikida*, the Appeals Board below has endorsed as a rule from that case that where industrially-provided medical treatment results in any definable permanent disability impairment, there can never be apportionment to non-industrial causation. This is a very clever expansion of *Hikida*, far beyond the context of the case itself. But it is not the rule set forth by *Escobedo*, and *Brodie*.

²² *Brodie, supra*, 40 Cal. 4th at 1321 (emphasis added) (citation omitted).

²³ *Brodie, supra*, 40 Cal. 4th at 1326.

1. THE DECISION IN *Hikida* SIMPLY CONFIRMED THAT
THE EMPLOYER IS RESPONSIBLE FOR COMPENSABLE
CONSEQUENCE INJURIES.

The decision in *Hikida* simply confirmed long-standing rules that the employer is responsible for compensable consequences of the industrial injury.

The injured worker in *Hikida* underwent carpal tunnel surgery for her industrial injury, and as an unfortunate consequence of that medical treatment sustained a new and disabling diagnosis of complex regional pain syndrome (CRPS).²⁴ The Court of Appeal determined that applicant’s permanent total disability was not caused by her carpal tunnel condition, but by the poor result and new diagnosis (CRPS) resulting from the medical treatment provided by her employer.²⁵ The court held that, because the employer is responsible for the medical treatment without apportionment, the employer is also responsible for disability arising directly from “unsuccessful medical intervention” without apportionment.²⁶

²⁴ *Hikida, supra*, 12 Cal. App. 5th at 1253.

²⁵ *Hikida, supra*, 12 Cal. App. 5th at 1260.

²⁶ *Hikida, supra*, 12 Cal. App. 5th at 1260. In its Reply Brief, Petitioner herein challenges Respondent’s Answer Brief for relying on text contained in the Reporter’s Summary of *Hikida*, rather than the court’s own words. Reply Brief, p. 5. While it would certainly have been helpful for Respondent to have provided a page citation and the precise language from the decision, amicus curiae recognizes that the disputed text is not only contained in the Reporter’s Summary but is also repeated by the court in the opening paragraph of the decision. *Hikida, supra*, 12 Cal. App. 5th at 1252. Nevertheless, a careful reading of the entire decision demonstrates that the disputed text relied upon by Respondent has been taken out of context, and that Petitioner’s point remains valid: The court in *Hikida* concluded only that “an

In reaching this determination, the Court of Appeal reviewed not only the development of the “new apportionment regime,”²⁷ 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.²⁸

Under the Workers’ Compensation Act, the employer is responsible for compensable consequences stemming from the original industrial injury, including injury resulting from medical treatment provided by the employer for an industrial injury.²⁹ Thus, in *Hikida*, the employer was held liable for the consequential injury (CRPS) that was entirely caused by the industrial medical treatment.

That the ruling in *Hikida* was limited to such compensable consequence injuries and new diagnoses (such as the CRPS in that case) is demonstrated by the penultimate paragraph of the opinion itself, wherein the court reiterated the

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 (emphasis added).

²⁷ *Hikida*, *supra*, 12 Cal. App. 5th at 1257-1260.

²⁸ *Hikida*, *supra*, 12 Cal. App. 5th at 1261-1262.

²⁹ 1 Hanna *California Law of Employee Injuries and Workers’ Compensation*, §4.66[1][a]. “The additional harm resulting from the medical treatment is related to the employment because furnishing or requiring treatment under the circumstances is itself a causal connection with the employment and within the scope of activities contemplated by the employment bargain.”

employer’s responsibility for “all medical treatment necessitated in any part by an industrial injury, including new injuries resulting from that medical treatment.”³⁰

2. UNDERSTOOD IN CONTEXT, *HIKIDA* DOES NOT PRECLUDE APPORTIONMENT WHERE THE MEDICAL TREATMENT IS NOT THE SOLE CAUSE OF THE COMPENSABLE CONSEQUENCE INJURY.

In *Hikida*, the compensable consequence injury of CRPS was determined to be the sole cause of applicant’s permanent and total disability. Because the CRPS injury was itself caused by surgical treatment provided on an industrial basis, the new CRPS injury / diagnosis was deemed compensable.

But in the present case, the surgical treatment provided on an industrial basis did not cause either a new injury or a new diagnosis. Instead, the total knee replacements were actually “quite successful” and significantly increased applicant’s ability to walk and engage in weight-bearing activities.³¹ In this case, there is no new injury or diagnosis that is subject to a compensability analysis. As such, *Hikida* does not require an unapportioned award here.

³⁰ *Hikida, supra*, 12 Cal. App. 5th at 1263 (emphasis added).

³¹ Opinion on Decision, dated 10/9/2018, page 1.

3. THE QUESTION OF APPORTIONMENT IN THIS CASE
CANNOT BE VALIDLY DETERMINED BY CONFINING THE
INQUIRY TO WHETHER SURGERY WAS PROVIDED ON AN
INDUSTRIAL BASIS.

The interplay between disability and apportionment in this case cannot be validly determined by confining the inquiry to whether the surgery was provided on an industrial basis. Instead, inquiry must also be made as to whether the underlying need for the surgery itself was due to both industrial and non-industrial factors.

In the present case, the essence of the Appeals Board’s decision below is that the knee replacement surgeries have broken the chain of causation between preexisting degenerative changes and applicant’s current disability. But it is not reasonable to conclude that the provision of medical treatment constitutes an intervening cause serving to completely break the chain of causation between the non-industrial factors leading to the injured worker’s surgery and applicant’s resultant permanent disability. Every injured worker receives medical treatment between the time of injury and the time that the residual disability is evaluated. “If medical treatment received after an injury is held to break the causative chain of disability, then no permanent disability would ever be subject to apportionment.

Clearly this is a result neither compelled by the language of Labor Code section 4663, nor intended by the Legislature in promulgating it.”³²

The Appeals Board decision below fails to squarely address the real question at issue: Did the industrial medical treatment (knee surgery) break the chain of causation of the disability from her original “bone-on-bone” osteoarthritis pathology, such that the industrial event was the *sole* cause of applicant’s permanent disability? In the past, the Appeals Board has issued conflicting decisions on the question of whether there can be apportionment when applicant undergoes surgery that is necessitated by both industrial and non-industrial causes. While the Appeals Board has on occasion found that there can be no apportionment,³³ the Appeals Board in other cases has concluded that if both industrial and non-industrial causes have necessitated the surgery, the residual permanent disability may be

³² *Kline v. Burbank Unified School District* (2016) 2016 Cal. Wrk. Comp. P.D. Lexis 491 (Razo, J., dissenting) (writ denied *sub nom. Burbank Unified School District v. Workers’ Comp. Appeals Bd. (Klein)* (2016) 82 Cal. Comp. Cases 98).

³³ *See, e.g., Steinkamp v. City of Concord* (2006) 71 Cal. Comp. Cases 1203 (writ denied).

apportioned.³⁴ This result holds even if the non-industrial pathology was removed by the surgery.³⁵

The Appeals Board must look to the underlying cause of the medical treatment in question before determining whether the resulting disability is subject to apportionment. In *Markham v. Workers' Comp. Appeals Bd.*,³⁶ very much like the injured worker in the present case, the employee's knee replacement surgery was necessitated by both industrial injury and by "other factors" including prior injuries and surgeries; the Appeals Board concluded that the disability should have been apportioned to those "other factors" that caused the need for surgery and the resulting disability. In another case also involving knee replacement surgery, *Williams v. Workers' Comp. Appeals Bd.*, the Appeals Board endorsed apportionment to an

³⁴ See, e.g., *Markham v. Workers' Comp. Appeals Bd.* (2007) 72 Cal. Comp. Cases 265 (writ denied) (apportionment awarded where knee replacement surgery was necessitated by both industrial injury and by pre-existing pathology caused by prior injuries and surgeries); *Malcolm v. Workers' Comp. Appeals Bd.* (2008) 73 Cal. Comp. Cases 1710 (writ denied) (applicant's hip replacement surgery did not preclude apportionment, when need for hip replacement was caused by non-industrial osteonecrosis, and both industrial injury and pre-existing osteonecrosis caused permanent disability).

³⁵ See, e.g., *Williams v. Workers' Comp. Appeals Bd.* (2008) 74 Cal. Comp. Cases 88 (writ denied) (removal of pre-existing arthritis by knee replacement did not preclude apportionment because need for knee replacement was caused by arthritis).

³⁶ *Markham v. Workers' Comp. Appeals Bd.* (2007) 72 Cal. Comp. Cases 265 (writ denied).

underlying arthritic condition “*because the arthritis caused the need for the knee replacement.*”³⁷

And in yet another knee replacement case, *Gunter v. Workers’ Comp. Appeals Bd.*, the Appeals Board concluded that “when the medical evidence establishes that a combination of factors results in the need for surgery and consequent permanent disability, causation of the permanent disability lies with all the factors, even pathology removed by the surgery; and Labor Code section 4663 requires apportionment to those factors.”³⁸

Finally, in a different factual scenario, *Alvarez v. Workers’ Comp. Appeals Bd.*,³⁹ the injured worker was deemed permanently totally disabled and confined to a wheelchair. The Appeals Board upheld apportionment where the medical evidence supported a finding that 95% of the employee’s condition for which she needed a wheelchair was apportionable to her nonindustrial (and previously undiagnosed) multiple sclerosis and only 5% to her industrial injury. The medical evaluator had found permanent and total disability requiring the use of a wheelchair, but opined

³⁷ *Williams v. Workers’ Comp. Appeals Bd.* (2008) 74 Cal. Comp. Cases 88 (writ denied) (emphasis added).

³⁸ *Gunter v. Workers’ Comp. Appeals Bd.* (2008) 73 Cal. Comp. Cases 1699 (writ denied) (emphasis added) (combination of industrial and non-industrial factors, including pathology removed by surgery, caused applicant’s need for surgery and resultant permanent disability, thereby requiring apportionment of disability).

³⁹ *Alvarez v. Workers’ Comp. Appeals Bd.* (2017) 2017 Cal. Wrk. Comp. P.D. LEXIS 209.

that only 5% of the need for a wheelchair was due to the industrial injury. According to the Appeals Board in *Alvarez*, “It would be **fundamentally unfair** to award applicant 100% permanent total disability without apportionment for the use of a wheelchair due 95% to nonindustrial multiple sclerosis.”⁴⁰

But contrary to its own holding in *Alvarez*, the Appeals Board’s position in the instant case would consider the wheelchair in *Alvarez* as “medical treatment” not subject to apportionment. Such a result flies in the face of the statutory requirement that the employer be charged only with that portion of the disability directly caused by industrial factors.⁴¹ Like *Alvarez*, it would be fundamentally unfair to award applicant herein a disability without apportionment for the knee replacements that were due 50% to the pre-existing osteoarthritis condition.

Taken to a logical extreme, the ruling below actually creates a perverse incentive for injured workers to proceed with invasive and potentially unnecessary medical care. In this case, on the day prior to the knee replacement surgery, applicant would have been properly evaluated for permanent disability using AMA Guides Table 17-31 (“Arthritis”), describing a 20% Whole Person Impairment for each knee; one day after her knee replacement surgery, applicant falls under AMA Guides Table 17-33 (“Total Knee Replacement”), again with a 20% Whole Person

⁴⁰ *Alvarez, supra* (emphasis added).

⁴¹ Lab. C. §4664.

Impairment. But while the former instance is plainly subject to apportionment to nonindustrial causes, the Appeals Board's position in this case is that the latter instance of residual disability is not subject to apportionment for the sole reason that the disability is related to the industrial medical treatment provided.

Could such a legal standard morph into ill-advised pursuit of invasive medical treatment, for the sole purpose of avoiding the reduction in compensation that accompanies apportionment? Obviously, any answer would be speculative -- but it must be presumed that the Legislature did not intend to create such a perverse incentive when it enacted the statutory rules for apportionment.

C. The Best and Most Relevant Analytical Framework For This Case Is Based on *Lindh*.

Notably subsequent to the proceedings below, a new published appellate decision has issued that provides the best and most relevant analytical framework by which to consider the case at bar: *City of Petaluma v. Workers' Comp. Appeals Bd. (Lindh)*.⁴²

1. THE PORTION OF THE DISABILITY CAUSED BY NON-INDUSTRIAL FACTORS WAS SUBJECT TO APPORTIONMENT IN *LINDH*.

Police officer Aaron Lindh was engaged in a canine training exercise at work when he sustained three to six blows to his head from the muzzled dogs.

⁴² *City of Petaluma v. Workers' Comp. Appeals Bd. (Lindh)* (2018) 29 Cal. App. 5th 1175, 83 Cal. Comp. Cases 1869, 2018 Cal. App. LEXIS 1137, dated 12/10/2018.

Approximately six weeks later, while off duty, he suddenly lost vision in his left eye.⁴³ The evaluating physician found that Lindh had a congenital abnormality causing defective blood circulation to his left eye, and opined that it was “unlikely” that Lindh would have suffered vision loss from the industrial event if he did not have the underlying condition.⁴⁴ Accordingly, the evaluator apportioned 85% of the permanent disability to the pre-existing condition, and 15% to the industrial injury.⁴⁵

Although the Appeals Board initially refused to award apportionment, the Court of Appeal reversed. Following an exhaustive historical review of the rules on apportionment, the Court in *Lindh* endorsed the view that apportionment is appropriate where medical evidence shows that the pre-existing condition went beyond being a risk factor to being an actual cause of permanent disability.⁴⁶ “[W]hat is required is substantial medical evidence that the asymptomatic condition or pathology was a contributing cause of the disability.”⁴⁷ The *Lindh* Court concluded:

⁴³ *Lindh, supra*, 29 Cal. App. 5th at 1179.

⁴⁴ *Lindh, supra*, 29 Cal. App. 5th at 1180.

⁴⁵ As in the instant case, the expert medical-legal evaluator concluded that the relatively minor industrial injury alone could not explain the very significant residual effects sustained by Mr. Lindh. Instead, it was the fragility of Mr. Lindh’s underlying pathology and congenital abnormality that was *combined* with the industrial event to cause a serious disability -- loss of vision in the left eye.

⁴⁶ *Lindh, supra*, 29 Cal. App. 5th at 1192.

⁴⁷ *Lindh, supra*, 29 Cal. App. 5th at 1193.

Under the current law, the salient question is whether the disability resulted from both nonindustrial and industrial causes, and if so, apportionment is **required**. Whether or not an asymptomatic pre-existing condition that contributed to the disability would, alone, have inevitably become manifest and resulted in disability, is immaterial.⁴⁸

The facts in *Lindh* mirror the facts here. As in *Lindh*, the injured worker here had extensive pre-existing pathology that, *combined with* a relatively minor industrial injury, caused the need for bilateral knee replacements. The disability resulting from the knee replacements was caused by both non-industrial and industrial factors. As such, the rule from *Escobedo* and *Brodie*, and as expressly articulated in *Lindh*, requires apportionment in this case.

2. WHERE A MINOR INDUSTRIAL INJURY IS
SUPERIMPOSED UPON PRE-EXISTING PATHOLOGY, AND
THE COMBINATION OF THE INDUSTRIAL AND NON-
INDUSTRIAL FACTORS RESULTS IN DISABILITY,
APPORTIONMENT IS REQUIRED.

As the *Lindh* court painstakingly explained, the old rules of apportionment held that an employer was liable for the entire disability if an industrial injury aggravated a previously existing nonindustrial condition.⁴⁹ But since 2004, those rules have changed, and the *Lindh* court awarded apportionment where the medical

⁴⁸ *Lindh, supra*, 29 Cal. App. 5th at 1193 (emphasis added, citations omitted).

⁴⁹ *Lindh, supra*, 29 Cal. App. 5th at 1182.

evidence demonstrated that the head trauma sustained at work would not alone have resulted in the vision loss.⁵⁰

Previous cases are in accord. In *Costa v. Workers' Comp. Appeals Bd.*,⁵¹ the employee was found to be 100% permanently and totally disabled due to cauda equina syndrome. However, 20% apportionment was granted where the medical examiner opined that the employee's permanent disability was worsened by the existence of a congenital spinal stenosis, even though the employee was asymptomatic prior to the industrial injury.⁵² The Appeals Board pointed to medical evidence that applicant's industrial injury would have produced a less severe disability if the congenital condition had not been present, and held that apportionment was properly attributed to the cause of applicant's permanent disability.⁵³

⁵⁰ *Lindh, supra*, 29 Cal. App. 5th at 1192.

⁵¹ *Costa v. Workers' Comp. Appeals Bd.* (2011) 76 Cal. Comp. Cases 261, 264 (writ denied).

⁵² “[T]he fact that an asymptomatic pathological condition is not labor disabling at the time of the industrial injury, but is lit up by the injury, will not prevent apportionment.” *Costa, supra*, 76 Cal. Comp. Cases at 264 (apportionment allowed where medical evidence showed that pre-existing spinal stenosis caused employee's industrial condition to be more severe than it would have been had he not had the congenital condition).

⁵³ *Costa, supra*, 76 Cal. Comp. Cases at 264.

More recently, the 2017 decision in *City of Jackson v. Workers' Comp. Appeals Bd. (Rice)*⁵⁴ confirmed that apportionment may now be based on “the natural progression of a non-industrial condition or disease, a pre-existing disability, or a post-injury disabling event[,]. . . pathology, asymptomatic prior conditions, and retroactive prophylactic work conclusions. . . .”⁵⁵ In *Rice*, the injured worker sustained a relatively trivial injury superimposed upon severe congenital degeneration, and the Court of Appeal ruled that the evaluating physician had provided substantial evidence to support 49% apportionment of the residual disability to the underlying condition. The *Rice* decision validates apportionment where, as in the instant case,⁵⁶ the industrial event would not have resulted in as severe a residual disability absent the underlying pre-existing disease process.

As these cases demonstrate, where the medical evidence shows that an industrial injury is superimposed upon a pre-existing pathology and that those factors have combined to produce a disability, apportionment may be applied. Like the severe underlying vasospastic pathology in *Lindh* that caused 85% of the injured worker's blindness, the applicant herein had massive non-industrial pathology,

⁵⁴ *City of Jackson v. Workers' Comp. Appeals Bd. (Rice)* (2017) 11 Cal. App. 5th 109.

⁵⁵ *Rice, supra*, 11 Cal. App. 5th at 116.

⁵⁶ In his Opinion on Decision, the WCJ opined, “The available medical evidence makes plain that [the pre-existing arthritis] condition played a large role in making the effects of the industrial injury significantly worse than it would otherwise have been, both in the need for treatment required and in the ultimate PD the Applicant was left with.” Opinion on Decision, dated 10/9/2018, p. 1.

including severe degeneration, joint space collapse, subluxation, and significant end-stage osteoarthritis (Grade IV/IV, “exposed bone”) -- all of which pre-existed the industrial injury. And like the injured worker in *Lindh*, it was the combination of the industrial and non-industrial factors that caused applicant’s disability, and thus requires apportionment:

[T]he salient question is whether the disability resulted from both non-industrial and industrial causes, and if so, apportionment is ***required***.⁵⁷

As relevant to this case, the rule from *Lindh* is that if the residual disability has been caused by both industrial and non-factors, then apportionment should be applied.

VII. CONCLUSION

As compared to the facts of the case at bar, because there is neither unsuccessful medical treatment nor a new compensable injury, *Hikida* does not provide real guidance. The facts of the current case include a simple slip and fall injury that would be expected to cause a small amount of disability -- but solely because of the extensive pre-existing pathology, the injury has actually resulted in comparatively significant disability. That fact pattern is exactly what the Court of Appeal faced in *Lindh*.

⁵⁷ *Lindh*, *supra*, 29 Cal. App. 5th at 1193 (emphasis added).

Where an evaluating physician determines that a pre-existing condition and/or disease process causes a percentage of a current disability, and apports accordingly, he is simply following the new apportionment regime outlined in *Brodie*. The physician is recognizing that a portion of the disability exists for reasons other than the industrial injury. A properly apportioned award would be in full compliance with the requirement that an injured worker may be compensated only for that portion of the permanent disability caused by the industrial injury.⁵⁸

The Appeals Board erred in this case by continuing to endorse the traditional apportionment rules – concepts that have been eliminated in California’s workers’ compensation system by SB 899.⁵⁹ Because the Appeals Board below failed to properly evaluate the medical-legal evidence under the new rules of apportionment, the decision below is invalid and should be reversed.

Respectfully submitted,

February 28, 2019

/s/ Ellen Sims Langille
Ellen Sims Langille, CWCI General Counsel
elangille@cwci.org
Counsel for *Amici Curiae* CWCI / CalChamber

⁵⁸ Lab. C. §4664.

⁵⁹ Because temporary disability and medical treatment benefits are not apportionable, those rights are unaffected by the new apportionment regime, which applies only to permanent disability.

VIII. CERTIFICATE OF SERVICE

I certify that on February 28, 2019, I electronically filed the foregoing

**AMICUS CURIAE BRIEF OF CALIFORNIA WORKERS' COMPENSATION
INSTITUTE and CALIFORNIA CHAMBER OF COMMERCE IN SUPPORT
OF PETITIONER COUNTY OF SANTA CLARA**

with the Clerk of the Court for the Sixth District Court Of Appeal by using the
appellate TrueFiling system. The following case participants were served
electronically through the TrueFiling system:

Todd Johnson, Esq. Butts & Johnson 675 North First Street, #975 San Jose, CA 95112	Mark Cartier, Esq. THOMAS, LYDING, et al. P. O. Box 8072 Walnut Creek, CA 94597
Recon Unit Workers' Compensation Appeals Board P.O. Box 429459 San Francisco, CA 94142	Heather Wallace, Esq. California Chamber of Commerce 1215 K Street, 14th Floor Sacramento, CA 95814

I certify that all participants in the case are registered TrueFiling users and that
service will be accomplished by the appellate TrueFiling system.

Respectfully submitted,

February 28, 2019

/s/ Ellen Sims Langille

Ellen Sims Langille, CWCI General Counsel

elangille@cwci.org

Counsel for *Amici Curiae* CWCI / CalChamber