



California Workers' Compensation Institute
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July 14, 2020

Chief Justice Tani Cantil-Sakauye and Associate Justices
Supreme Court of California
350 McAllister Street
San Francisco, CA 94102

Re: *County of Santa Clara v. Workers' Compensation Appeals Board* (Justice)
Supreme Court Case No. S263128
Court of Appeal Case No. H046562

Dear Chief Justice and Associate Justices:

On behalf of the membership of the California Workers' Compensation Institute, we submit this letter pursuant to Rule 8.500(g) to urge this Court to DENY the pending Petition for Review.

CWCI is a private non-profit research, information, and educational organization dedicated to improving the California workers' compensation system. Institute members include insurers writing 81% of California's workers' compensation premium, and self-insured employers with \$88B of annual payroll (36.1% of the state's total annual self-insured payroll). CWCI further serves as a liaison for employer, labor, medical, regulatory, and legal communities within the workers' compensation system, and frequently provides written and oral input at legislative and regulatory hearings. Based upon its recognized expertise in workers' compensation, CWCI has been judicially permitted to join in multiple cases as *amicus curiae* before the California Supreme Court and Courts of Appeal – including this one.¹

¹ CWCI has been granted amicus status in the cases of *Christian v. WCAB* (1997); *SCIF v. WCAB* (Stuart) (1998); *Avalon Bay Foods v. WCAB* (1998); *Rosales v. Depuy Ace Medical Company* (2000); *Lockheed Martin v. WCAB* (McCullough) (2002); *Wal-Mart v. WCAB* (Garcia) (2003); *Honeywell v. WCAB* (Wagner) (2005); *Green v. WCAB* (2005); *Rio Linda School District v. WCAB* (Scheftner) (2005); *Nabors v. WCAB* (2006); *Yeager Construction v. WCAB* (Gatten) (2006); *Chang v. WCAB* (2007); *Vaira v. WCAB* (2007); *Brodie v. WCAB* (2007); *Babbitt v. Ow Jing* (2007); *Pendergrass v. Duggan Plumbing* (2007); *Tanimura & Antle v. WCAB* (Lopez) (2007); *Palm Medical Group v. State Compensation Insurance Fund* (2007); *Smith & Amar v. WCAB* (2007); *Facundo-Guerrero v. WCAB* (2008); *Smith & Amar v. WCAB* (2009); *Benson v. WCAB* (2009); *Boughner v. WCAB* (2009); *Aguilar v. WCAB* (2009); *El Aguila Food Products v. WCAB* (Cervantes) (2010); *Almaraz & Guzman v. WCAB* (2011); *Baker v. WCAB* (X.S.) (2011); *Ogilvie v. WCAB* (2011); *Valdez v. WCAB* (2012); *Pacific Compensation v. WCAB* (Nilsen) (2013); *Southern California Edison v. WCAB* (Martinez) (2013); *Stevens v. Outspoken Enterprises* (2014); *CIGA v. WCAB* (Elite Surgery Centers) (2014); *South Coast Framing v. WCAB* (Clark) (2014); *Angelotti Chiropractic v. Baker* (2014); *Contra Costa County v. WCAB* (Dahl) (2015); *State Compensation Ins. Fund v. WCAB* (Margaris) (2016); *Ramirez v. WCAB* (2017); *Zuniga v. WCAB* (2018); *SCIF v. WCAB* (Guzman) (2018); *Co. of San Diego v. WCAB* (Pike) (2018); *King v. CompPartners* (2018); *Black v. CorVel* (2018); *City of Petaluma v. WCAB* (Lindh) (2018); *Travelers v.*

The pending Petition for Review asserts, as it must, that the decision in this case has created a conflict of law between the Sixth District and the earlier decision in *Hikida* from the Second District. The assertion is demonstrably untrue.

Contrary to the contentions of the Petition for Review, this case did not “overrule” *Hikida*. Rather, the Sixth District Court of Appeal has reviewed, interpreted, and limited the decision in *Hikida* to its own facts. Central to the facts in *Hikida* is that the injured worker there originally sustained a carpal tunnel injury that was 90% due to her employment; but as the result of industrial surgery, she sustained a new compensable consequential injury (CRPS) and that new injury was the sole cause of her 100% permanent total disability. Under Labor Code section 4663 and considering all causes combined of the permanent disability, apportionment simply did not apply to reduce her 100% award because there was only one cause – her industrial medical treatment. The *Hikida* court found that the fact that her underlying injury (carpal tunnel syndrome) was only 90% caused by her work activity was not relevant and apportionment did not apply.

But the Petition for Review misconstrues these central facts and instead contends that *Hikida* and *Justice* are in conflict:

One can easily determine that the *Hikida* court did not follow the *Justice* court reasoning as the carpal tunnel surgery treatment in *Hikida* was only partly caused (90%) by industrial factors. Yet, the *Hikida* court did not allow apportionment of the permanent disability caused by the medical treatment.²

In making that assertion, the Petition herein demonstrates the fundamental fallacy of its primary contention: **Regardless of the percentage of industrial causation of the treatment, the ultimate residual disability in *Hikida* was entirely caused by industrial factors and that is what precluded apportionment in that case.** In its decision below, the *Justice* court provides the correct interpretation of the rule from *Hikida*:

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

WCAB (Mastache) (2019); *Universal Furniture v. WCAB (Morales)* (2019); and *Co. of Santa Clara v. WCAB (Justice)* (2020).

² Petition for Review, p. 12.

only where the industrial medical treatment is the sole cause of the permanent disability.³

Our legal system is founded upon the principle of *stare decisis* (Latin: let the decision stand; or, to stand by that which is decided). In practice, this principle generates case law that develops over time, with the analysis of each new fact pattern resting on the reasoning of cases that preceded it. That is precisely what has occurred in this instance. The court in *Justice* has taken the rule set out by *Hikida* and analyzed it in context. Rather than assuming the expansive view urged by the Petition for Review, the *Justice* court carefully considered the holding of the earlier case, the applicable statutory rules, and the facts in this case.

Foremost among the rules that the court below had to contend with is one that the Petition would have this Court ignore: Labor Code section 4663(c), which requires that an “apportionment determination” be made by separating the approximate percentage of the permanent disability that was caused by the “direct result” of the industrial injury and the approximate percentage of the permanent disability that was caused by “other factors” both before and subsequent to the industrial injury. The Petition herein suggests that the *Justice* court overstepped its authority by looking to “indirect” causation in making its ruling on apportionment. But, as eloquently stated by the County in its Answer, is it not a logical and proper use of the word “indirect” to refer to the causes other than the direct ones?

Finally, it must be considered that the decision below was not created in a vacuum. Rather, it was premised upon years of case law relevant to the new apportionment regime, including *Escobedo*, *Brodie*, *Costa*, *Rice*, and *Lindh*. These cases demonstrate that 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, 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**.⁴

As such, we urge this Court to DENY the Petition for Review. Thank you for your consideration of this request.

Very truly yours,

/s/ Ellen Sims Langille

Ellen Sims Langille, CWCI General Counsel
California Workers’ Compensation Institute
Counsel for Amicus Curiae CWCI

³ *County of Santa Clara v. Workers' Comp. Appeals Bd. (Justice)* (2020) 49 Cal.App.5th 605, 615.

⁴ *City of Petaluma v. Workers' Comp. Appeals Bd. (Lindh)* (2018) 29 Cal.App.5th 1175, 1193 (emphasis added).

CERTIFICATE OF SERVICE

I certify that on July 14, 2020, I electronically filed the foregoing

**RULE 8.500(g) LETTER BY CALIFORNIA WORKERS' COMPENSATION
INSTITUTE IN OPPOSITION TO PETITION FOR REVIEW**

with the Clerk of the Court for the Supreme Court of California by using the TrueFiling system.
The following case participants were served electronically through the TrueFiling system:

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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,

July 14, 2020

/s/ Ellen Sims Langille

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