

# Trovillion, Inveiss & Demakis

Trovillion, Inveiss & Demakis, APC has grown in reputation as one of Southern California's premier law firms specializing in representation of employers, insurance carriers and third party administrators in workers' compensation litigation.

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## **THE HIKIDA CASE AND APPORTIONMENT**

This case was the topic of much discussion at the CAAA convention in January of 2018. Applicant's attorneys contend that this case changes the apportionment landscape and are hailing it as a landmark case.

### **SUMMARY OF CASE**

To summarize, the applicant, Maureen Hikida, worked in a clerical capacity for Costco Wholesale Corporation for 16 years. She developed carpal tunnel syndrome AOE/COE and underwent surgery, which left her with a poor result causing her to develop chronic regional pain syndrome (CRPS).

The parties utilized an AME, who found that the applicant was permanently and totally disabled. The AME apportioned 90% of causation to the carpal tunnel syndrome caused by the applicant's work at Costco and 10% to non-industrial activities. In deposition, the AME concluded that the applicant's CRPS was caused by the unsuccessful medical treatment for the carpal tunnel syndrome, and that the CRPS was the cause of 100% of the applicant's disability. The case proceeded to Trial and resulted in the Trial Judge finding 100% permanent disability, but with apportionment of 90% to industrial causation and 10% to non-industrial causation.



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The applicant filed a Petition for Reconsideration, arguing the apportionment was unlawful. In support, the applicant argued the following: that the WCAB erred in applying apportionment to causation to injury rather than causation to disability, that a 100% disability award was appropriate because the applicant's vocational expert concluded no non-industrial causes for the applicant's total loss of earning capacity, as well as application of Labor Code §4662 because the applicant sustained the loss of the use of her hands and, therefore, the applicant was entitled to a presumption of 100% permanent disability.

In a two-to-one decision, the WCAB affirmed the apportionment but concluded that the Trial Judge failed to take into account medical reports showing the applicant suffered employment-related psychiatric injuries. The case was remanded back to the Trial Judge for purposes of evaluating the psychiatric disability and other industrial causative sources.

After remand, the Trial Judge increased the applicant's permanent disability award to 98% after apportionment to non-industrial factors. The applicant, again, filed a Petition for Reconsideration seeking an increase in the permanent disability award based on the same arguments presented in the prior Petition for Reconsideration. In a two-to-one decision, the WCAB denied reconsideration, finding that the apportionment was appropriate.

In response, the applicant filed a writ petition seeking review of the WCAB's decision. Interestingly, days before the scheduled oral arguments, the parties settled the case. Instead of dismissing the appeal as moot, the Court proceeded to hear oral argument and issued a decision, as they considered the issues presented of substantial importance to the workers' compensation community.

The Court of Appeal of the State of California, Second Appellate District held that the disability caused by the

applicant's medical treatment should not be apportioned, thereby concluding that both the Trial Judge and the WCAB were in error by apportioning the disability based on injury rather than disability.

The Court reasoned that there is no dispute that the disabling carpal tunnel syndrome from which the applicant suffered was the result of her many years of clerical employment with Costco, and therefore, Costco was required to provide medical treatment for this condition without apportionment. The surgery to address the applicant's carpal tunnel syndrome went poorly, which caused the applicant's CRPS, a far more disabling condition that will never be alleviated. Although California workers' compensation law relieves Costco of liability for any negligence in the provision of the medical treatment that led to the applicant's CRPS, it does not relieve Costco of the obligation to compensate the applicant for this disability without apportionment.

The Court stated that its "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."

According to the Court, the cause of the disability was a result of the medical treatment and therefore the disability should be un-apportioned. In reaching this conclusion, the Court relied on *Escobedo vs. Marshals* (causation of injury may be different than causation of disability); *Granado vs. WCAB* (medical treatment is not subject to apportionment); and *Steinkamp v. City of Concord* (the injured worker was entitled to an un-apportioned award for a joint replacement despite apportionment to injury).

#### **WHAT IS THE AFTERMATH OF HIKIDA?**

The short answer is that applicants are entitled to permanent disability that is caused by industrial medical treatment. This will typically arise in situations where an applicant receives treatment on an industrial-basis that is unsuccessful. A common example is when an applicant undergoes a surgery that goes badly and leaves the applicant with a poor result.

However, this could also potentially arise when an applicant is injured further during the course of other industrial medical treatment, for example, while engaging in physical therapy or as the result of a botched injection.

Applicant attorneys are also expected to argue that Hikida can be expanded to include any disability caused by the use of medications (such as cognitive side effects, gastrointestinal disorders, as well as addiction to pain medications). In addition, arguments may be made that Hikida also includes any disability caused as a result of delays in or denials of medical treatment as the result of UR and IMR. The scope and extent of Hikida will reveal itself over time through the course of new litigation.

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