Case No.: B279412

COURT OF APPEAL OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT, DIVISION FOUR

MAUREEN HIKIDA,
Petitioner,
v.
WORKERS' COMPENSATION APPEALS BOARD OF THE STATE OF CALIFORNIA; COSTCO WHOLESALES CORPORATION; adjusted by HELMSMAN MANAGEMENT SERVICES
Respondents,

WCAB Case Nos.: ADJ7721810 and ADJ7721392
HONORABLE V. MITCHELL BUSHIN, WCJ

APPLICATION OF CALIFORNIA APPLICANTS' ATTORNEYS ASSOCIATION TO FILE AMICUS CURIAE BRIEF AND AMICUS CURIAE BRIEF IN SUPPORT OF THE APPLICANT AND PETITIONER, MAUREEN HIKIDA

Justin C. Sonnicksen, State Bar No.: 221008
Law Office of Mark Gearheart
367 Civic Drive, Suite 17
Pleasant Hill, CA 94523
Phone: (925) 671-9777
Facsimile: (925) 671-7916
Email: jsonnicksen@gearheartotis.com
Attorney for Amicus Curiae
California Applicants' Attorneys Association

Court of Appeal
State of California
Second Appellate District

CERTIFICATE OF INTERESTED ENTITIES OR PARTIES

Court of Appeal Case Number: B279412

Case Name: Maureen Hikida v. Workers' Compensation Appeals Board of the State of California; Costco Wholesales Corporation; adjusted by Helmsman Management Services

Please check the appropriate box:

☐ There are no interested entities or persons to list in this Certificate per California Rules of Court, Rule 14.5(d) (3).

[x] Interested entities or persons are listed below:

Name of Interested Entity or Person	Nature of Interest
1. Maureen Hikida	Petitioner
2. Alan Zane Gurvey	Attorney for Petitioner, Maureen Hikida
3. Costco Wholesales Corporation	Respondent
4. Jay Cohen	Attorney for Respondent, Helmsman Management Services
5. Workers' Compensation Appeals Board	Respondent

Signature of Attorney/Party Submitting Form

Printed Name: Justin C. Sonnicksen, Law Office of Mark Gearheart
Address: 367 Civic Drive, Ste. 17
Pleasant Hill, CA 94523
State Bar No.: 221008

Party Represented: Amicus Curiae
California Applicants' Attorneys Association

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APPLICATION TO FILE AMICUS CURIAE BRIEF

TO THE HONORABLE PRESIDING JUSTICE AND TO THE HONORABLE ASSOCIATE JUSTICES OF THE COURT OF APPEAL OF THE STATE OF CALIFORNIA, SECOND APPELLATE DISTRICT

Pursuant to Rule 8.520 (f) of the California Rules of Court, the California Applicants' Attorneys Association [hereinafter "CAAA"] hereby requests leave to file a brief as amicus curiae in support of Petitioner, MAUREEN HIKIDA, in the above-captioned case. Pursuant to Rule 8.200 (c), we request leave from the Presiding Judge to allow late filing of this Amicus Curiae brief.

CAAA is an association and organization comprised of members of the California State Bar who regularly engage in the representation of men and women in the state who sustain injuries arising out of, and occurring in the course of, their employment. As a regular part of its activities, CAAA, after leave is granted, files Amicus Curiae briefs before the WCAB, Courts of Appeal, and the Supreme Court in cases of far reaching significance and/or first impression. (See for example, *Brodie v. WCAB* (2007) 40 Cal. 4th 1313, 72 Cal. Comp. Cases 565 and *Ogilvie v. WCAB* (2011) 197 Cal. App. 4th 1262, 76 Cal. Comp. Cases 624, which are examples of cases where CAAA requested permission to file Amicus Curiae briefs and the court accepted CAAA's brief.) CAAA respectfully submits that the instant matter is a case of far reaching significance in that there is a split in opinion in the workers' compensation community regarding how to properly analyze apportionment of permanent disability under Labor Code Section 4663 in situations where the injured worker is clearly unable to compete in the open labor market.

The Court's ruling and decision in the instant case will have an immediate impact upon amicus curiae, its members, and their clients.

CAAA is familiar with the issues before this Court and the scope of their presentation. CAAA believes that further briefing will assist the Court by demonstrating that the WCAB incorrectly interpreted Dr. Hasday's apportionment opinion and issued an

award of permanent disability that is not supported by the record. CAAA respectfully submits that Respondent in its Answer in support of the WCAB's decision advocates for a legal standard of apportionment of permanent disability in a manner that is inconsistent with the WCAB *en banc* holding in the case of *Escobedo v. Marshall's* (2005) 70 Cal. Comp. Cases 604.

Shortly prior to the filing of the petition herein, this Court denied the Petition for Writ of Review in a case called *Target Corporation v. WCAB* (*Estrada*) (2016) 81 Cal. Comp. Cases 1192. The WCAB's reasoning in *Estrada* in awarding 100% permanent disability is legally sound and should be applied to the case presently in front of this court.

The issue of whether apportionment of permanent disability based upon non-industrial factors is appropriate in cases where the injured worker is 100% permanently disabled on a vocational basis is one of great controversy in the workers' compensation community.

CAAA wishes to provide the court with an analysis regarding whether an award of less than 100% permanent disability is appropriate in situations such as the case at bar. Although oral argument is currently scheduled for June 15, 2017, CAAA respectfully points out that the WCAB has been directed to file a response to the Petition for Writ of Review no later than March 27, 2017. Accordingly, this Court recognizes the importance of this issue and has not yet received all of the briefs from the interested parties.

CAAA respectfully points out that it is a volunteer organization and submits that the parties in this case will not be prejudiced by the lateness of this amicus curiae brief.

CAAA therefore respectfully requests leave to file the following proposes Amicus Curiae brief.

Date: March 16, 2017

RESPECTFULLY SUBMITTED

Justin C. Sonnicksen
Attorney for Amicus Curiae
California Applicants' Attorneys Association

AMICUS CURIAE BRIEF

Factual Introduction

Petitioner Maureen Hikida sustained an industrial cumulative trauma injury to her spine, upper extremities, elbows, fingers, and psyche during a period of over 25 years working as an employee of Costco Wholesale Corporation. As a result of her cumulative trauma injury, she also developed chronic pain, headaches, sleep disturbance, cognitive impairment, hypertension, and irritable bowel syndrome. (Exhibit 6 to Petition for Writ of Review, pg. 1.)

The parties agreed to utilize Dr. Chester Hasday as an Agreed Medical Examiner in orthopedics to evaluate her injury claim. (Exhibit 2 to Petition for Writ of Review.) Ms. Hikida underwent carpal tunnel surgery in order to cure or relieve from the effects of her industrial injury, and unfortunately, she had a poor surgical result. As a result of the surgery, she developed complex regional pain syndrome ("CRPS"). (Exhibit 2, pg. 17.)

The parties conducted the deposition of Dr. Hasday on July 30, 2013 and on October 14, 2014. (Exhibits 3 and 17.) At his second deposition, he testified that 100% of the CRPS is caused by the carpal tunnel release surgery. (Exhibit 3, pg. 18.) He further testified that 90% of the need for carpal tunnel surgery was industrially related, and 10% was not work related. (Exhibit 3, pg. 18.) He also testified that the causation of the injury was 90% industrial, but that the causation of disability is 100% caused by the effects of CRPS. (Exhibit 3, pg. 18.)

Furthermore, at his first deposition, Dr. Hasday testified that based upon the injured worker's deposition testimony describing her non-vocational activities such as weight lifting, he would apportion 10% of the "initial carpal tunnel" to these non-work activities. (Exhibit 17, pg. 32.) Dr. Hasday gave no testimony on the issue of whether Ms. Hikida's non-industrial activities such as weight lifting affected her ability to earn income.

In addition to medical experts, Ms. Hikida was evaluated by a vocational expert – Enrique Vega. (Exhibit 24.) Mr. Vega opined that Ms. Hikida, prior to her industrial injury had access to perhaps hundreds of thousands of skilled and unskilled occupations in the labor market. (Exhibit 24, pg. 20.) Mr. Vega opined that Ms. Hikida now has zero capacity to work in the open labor market. (Exhibit 24, pg. 21.)

The case proceeded to trial, and on June 22, 2015, the trial judge issued a Findings and Award awarding 90% permanent disability to the injured worker. (Exhibit 6.) Petitioner filed a Petition for Reconsideration with the WCAB, and on February 8, 2016 the Board granted the petition and rescinded the Findings and Award of the trial judge. (Exhibit 10.) The WCAB indicated in the Opinion that it agreed with the trial judge that there is a basis for apportionment as to the permanent disability caused by CRPS. However, the Board made no specific finding in the decision regarding the percentage of non-industrial apportionment and remanded the case back to the trial level for a determination of how petitioner's psych disability should be calculated in her overall final award of permanent disability. (Exhibit 10, pg. 5.)

Following the completion of further proceedings, the trial judge issued an Amended Findings and Award on August 3, 2016 awarding 98% permanent disability to the injured worker. (Exhibit 13.) Petitioner filed a Petition for Reconsideration of this final judicial determination. The WCAB on October 25, 2016 denied the Petition for Reconsideration and affirmed the 98% permanent disability award. (Exhibit 1.)

It is from this decision of the WCAB that petitioner timely seeks review from this Court. For the reasons set forth below, CAAA contends that the Appeals Board decision herein is incorrect and that an award of 100% permanent disability should issue. CAAA respectfully requests that the October 25, 2016 decision of the WCAB be overturned.

Questions Presented

A) Is Petitioner's industrial permanent disability conclusively presumed to be total pursuant to Labor Code Section 4662 (a) (2)?

B) Has the vocational evidence herein established that Petitioner is entitled to a 100% permanent total disability award?

C) Has Respondent met its burden of proof on apportionment pursuant to Labor Code Section 4663?

D) Did the Trial Judge issue a decision on apportionment of permanent disability that is legally valid?

Legal Argument

A. Petitioner should be awarded 100% permanent total disability due to the conclusive presumption of Labor Code Section 4662 (a) (2)

Pursuant to Labor Code Section 4662, there are four categories of disability that by law are conclusively presumed to be total in nature. One of these is the "loss of both hands or the use thereof". The facts in the present case clearly establish that Petitioner has lost the use of both of her hands due to her industrial injury, and therefore she is entitled to an award of 100% permanent total disability pursuant to the conclusive presumption of Labor Code Section 4662 (a).

There was a reform of the workers' compensation system in 2004 with the passage of Senate Bill 899. One of the major components of SB 899 was the enactment of Labor Code Section 4664, which enabled employers to reduce their liability for permanent disability benefits if the injured worker had received a prior award of permanent disability in the same region of the body. Subsection (c) of Section 4664 states that the accumulation of all permanent disability awards with respect to any one region of the body in favor of an employee shall not exceed 100% over the employee's lifetime *unless the employee's injury or illness is conclusively presumed to be total in character pursuant to Section 4662.* (Italics added.)

The issue of apportionment under Labor Code Section 4664 was litigated in a case called *Kaiser Foundation Hospital v. WCAB* (*Dragomir-Tremoreux*) (2006) 71 Cal. Comp. Cases 538. The Sixth District Court of Appeal declined defendant's Petition for

Writ of Review in that case following an award by the WCAB of 100% permanent total disability. In the case of *Dragomir-Tremoreux*, the injured worker had received a permanent disability award of 18 ¾% for an industrial injury to her wrists in June 1989. She then sustained a subsequent cumulative trauma injury to her upper extremities which resulted in an 80% loss of grip strength bilaterally and a greater than 75% loss of her pre-injury capacity for gripping, lifting, handling, and twisting activities. The WCAB in the case of *Dragomir-Tremoreux* found that since the injured worker was unable to grip, grasp, handle, write, type, or drive, then she was entitled to an award of 100% permanent total disability due to her subsequent industrial injury alone, despite her prior permanent disability award of 18 ¾% to the wrists. The Board relied on the plain language of Labor Code Sections 4662 and 4664 in holding that apportionment of permanent disability does not apply despite the injured worker receiving a previous permanent disability award to the same region of the body if the injured worker's disability falls under one of the four conclusively presumed total disability categories.

This Court had occasion to deny a defendant's Petition for Writ of Review on a similar issue in the case of *Regents of the University of California v. WCAB (Siegel)* (2011) 76 Cal. Comp. Cases 1237. In the case of *Seigel*, the injured worker had lost 70% of her use of one hand and 93% of her use of the other hand as a result of her upper extremity industrial injury. The evaluating physician in the case found that for practical purposes, the injured worker had lost the use of her hands in the open labor market due to the massive loss of grip strength in each hand. The evaluating physician also found that 10% of her right hand disability was apportionable to a prior injury. However, the WCAB awarded 100% permanent total disability to the injured worker based upon the conclusive presumption of Labor Code Section 4662. This Court in *Siegel* not only denied defendant's Petition for Writ of Review, but ruled that there was no reasonable basis for the petition.

The severity of Petitioner's bilateral hand condition is analogous to the situation present for the injured workers in the cases of *Siegel* and *Dragomir-Tremoreux*.

Dr. Hasday has indicated that Ms. Hikida has such limited digital dexterity bilaterally as to make her ability to compete in the open labor market impossible. The evidence also demonstrates that Ms. Hikida has almost no functional ability in her right hand, has extremely poor digital dexterity in her left hand, and suffers from stiffness in the joints, tingling and numbness in her hands, burning sensations, allodynia (hypersensitivity of the skin), and high frequency tremors. (Exhibit 2, pg. 4.) She has effectively for all practical purposes lost the use of both hands, and under the straight forward language of Labor Code Section 4662, her disability is conclusively presumed to be 100% total. Even if hypothetically she had a prior industrial permanent disability award to either one of her upper extremities, she would still be entitled to an award of 100% permanent total disability due to her May 2010 industrial injury alone.

Therefore, consistent with the holding in the cases of *Siegel* and *Dragomir-Tremoreux*, this Court should overturn the WCAB's Decision of October 25, 2016 and remand the case back to the Board with instruction to award Ms. Hikida 100% permanent total disability due to the fact that she has lost the use of both hands, and therefore, apportionment is inapplicable to her disability under Section 4662 (a).

B. <u>The vocational evidence herein clearly establishes that Petitioner should be awarded 100% permanent total disability</u>

The vocational evidence herein establishes that Ms. Hikida is unable to compete in the open labor market due to her bilateral hand condition and her complex regional pain syndrome. It is well established that an injured worker can introduce vocational evidence to rebut the scheduled permanent disability rating and prove an entitlement to 100% permanent total disability due to an inability to compete in the open labor market. *LeBoeuf v. WCAB* (1983) 34 Cal. 3d 234, 193 Cal. Rptr. 547, 48 Cal. Comp. Cases 587. *LeBoeuf* states, "The fact that a worker has been precluded from vocational retraining is a significant factor to be taken into account in evaluating his or her potential employability.

A prior permanent disability rating and award which fails to reflect that fact is inequitable." *LeBoeuf* 34 Cal. 3d at 246.

Even if this Court disagrees that petitioner is entitled to an award of 100% permanent total disability pursuant to Labor Code Section 4662, she should still be awarded 100% permanent total disability based upon the evidence that she is completely taken out of the labor market due to her industrial bilateral hand condition.

Ms. Hikida's industrial injury occurred after January 1, 2005, in part therefore her permanent disability under the disability rating schedule is premised on the *AMA Guides* (Labor Code Section 4460). On page 4 of the *AMA Guides*, it states that "impairment ratings were designed to reflect functional limitations and not disability." The *AMA Guides* further caution on page 5 that "a 30% impairment rating does not correspond to a 30% reduction in work capability" and "impairment ratings are not intended for use as direct determinants of work disability". Therefore, for injured workers with more significant industrial injuries, the doctor's opinion regarding the level of permanent impairment under the *AMA Guides* often does not provide an accurate description of the worker's true level of permanent disability, and vocational evidence is often appropriate in such situations in order to ensure that the WCAB issues an accurate permanent disability award.[1]

Several cases have dealt with the issue of whether it is appropriate to apportion an injured worker's permanent disability award to non-industrial conditions when there is vocational evidence of 100% loss of access to the open labor market. This Court declined to grant a Petition for Writ of Review in the case entitled *County of Los Angeles v. WCAB* (*LeCornu*) (2009) 74 Cal. Comp. Cases 645. In the *LeCornu* case, the injured worker sustained industrial injury to his neck, back, hips, upper extremities, knees, and psych. The evaluating physician in his case found that apportionment of his spinal

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[1] Page 14 of the *AMA Guides* acknowledges that there are "cases in which the physician is requested to make a broad judgment regarding an individual's ability to return to any job in his or her field. A decision of this scope usually requires input from medical and non-medical experts, such as vocational specialists . . ."

disability was indicated due to pre-existing, non-industrial factors. The psychiatric physician also found that apportionment of permanent disability was appropriate due to non-industrial conditions. However, the doctor also stated that the injured worker was not feasible to return to any job in the open labor market.

Despite the fact that the regularly scheduled permanent disability rating was only 96%, and despite the fact that the evaluating physicians found a basis for non-industrial apportionment of permanent disability under Labor Code Section 4663, the WCAB in *Lecornu* awarded 100% permanent total disability to the injured worker. The Board found that the injured worker's inability to compete in the open labor market permitted the judge to award 100% permanent total disability pursuant to Labor Code Section 4662 (b).

The First District Court of Appeal similarly declined to grant writ in a case called *City of Oakland v. WCAB* (*Brown-Kuria*) (2014) 79 Cal. Comp. Cases 152. In *Brown-Kuria*, the WCAB awarded 100% permanent total disability to the injured worker based upon vocational expert testimony that she was unable to compete in the open labor market. The WCJ acknowledged in her decision that the injured worker had a pre-existing condition and that she was more likely prone to sustaining an injury because of the exposure she suffered at work. However, the judge indicated that the defendant produced no credible evidence to show that her employment would not be a *major contributing factor* for taking applicant out of the open labor market (italics added). The Court of Appeal in *Brown-Kuria*, found that defendant had no reasonable basis for the Petition for Writ of Review.

Recently, this Court declined to issue a Writ of Review in *Target Corporation v. WCAB* (*Estrada*) (2016) 81 Cal. Comp. Cases 1192. In *Estrada*, the WCAB explained the importance of distinguishing between disability and impairment under the *AMA Guides*. The trial judge in the case stated that "The apportionment analysis must not be limited to asking what each doctor thought was causing each underlying impairment under the *AMA Guides*, but must answer the ultimate question of what is causing a total loss of earning capacity and ability to compete in the open labor market." The injured

worker presented vocational testimony stating that there was no evidence that he had any significant work disabilities prior to his industrial injury. Although he may have had some pre-existing medical impairments, these impairments do not seem to have resulted in any work disability. Accordingly, even though a medical evaluator in the case found that on a medical basis, there was a basis for apportionment of the injured worker's permanent impairment, the WCAB awarded the injured worker in *Estrada* a 100% award of permanent total disability premised on the vocational expert opinion.

Pursuant to Labor Code Section 4663, an employer is arguably not responsible for that portion of an injured worker's permanent disability due to his or her pre-existing inability to earn due to a non-industrial limitation such as not being able to read or write English. *Hertz Corporation v. WCAB (Aguilar)* (2008) 73 Cal. Comp. Cases 1653. However, cases such as *Brown-Kuria* and *Estrada* demonstrate that the burden is on the employer to establish that the injured worker had pre-existing labor impairment that directly contributes to his or her inability to earn income following the industrial injury.

In the present case, not only has a vocational expert, Mr. Vega, demonstrated that Ms. Hikida now has a total loss of earning capacity due to her CRPS, but there is a lack of any evidence, vocational or medical, indicating that she suffered restrictions on her ability to earn income prior to her 2010 industrial injury. In fact, Ms. Hikida worked for the employer for over 25 years at multiple positions throughout the company. Cases such as *Estrada* and *Brown-Kuria* make clear that even if there is an appropriate basis to apportion the cause of an injured worker's medical impairment, it does not necessarily follow that there should be any apportionment with respect to their final award of permanent disability, especially in instances where they have suffered a complete loss of the ability to compete in the open labor market.

The vocational evidence is clear that as a result of her disabling CRPS, Ms. Hikida no longer has any realistic ability to compete in the open labor market. Given the lack of any evidence establishing that she had any significant pre-existing barriers to earning income in the labor market before her industrial injury, this Court should reverse the WCAB and remand the case back for a finding of 100% permanent total disability

consistent with the logic of cases such as *Lecornu*, *Brown-Kuria*, and the recent decision in *Estrada*.

C. Respondent has failed to meet its burden of proof in establishing apportionment of permanent disability under Labor Code Section 4663

It has long been established in California workers' compensation law that the establishment of a defendant's entitlement to apportionment of permanent disability is an affirmative defense for which defendant bears the burden of proof. *Pullman Kellogg v. WCAB* (*Normand*) (1980) 26 Cal. 3d 450, 45 Cal. Comp. Cases 170. Petitioner herein is correct in her assertion that the WCAB has permitted the issuance of an apportioned award of permanent disability despite the fact that defendant has not met its burden of proof on establishing apportionment pursuant to Labor Code Section 4663. If the Court considers the standards of establishing apportionment of permanent disability pursuant to *Escobedo v. Marshalls* (2005) 70 Cal. Comp. Cases 604, it becomes clear that the WCAB's award of 98% permanent disability herein is invalid.

The WCAB *en banc* decision in *Escobedo* makes clear that when a doctor is addressing the issue of apportionment of permanent disability, he or she cannot issue a conclusory or speculative opinion but must explain his or her opinion on this issue in detail such that the opinion constitutes substantial medical evidence. The WCAB made clear that when addressing apportionment, the doctor must "describe in detail the exact nature of the apportionable disability." The Board goes on to give an example that "If a physician opines that 50% of an employee's back disability is caused by degenerative disc disease, the physician must explain the nature of the degenerative disc disease, how and why it is causing permanent disability *at the time of the evaluation,* and how and why it is responsible for approximately 50% of the disability" *Escobedo* at page 621 (italics added). This standard set forth by the Board demonstrates the amount of detail and explanation that is required by a physician in order for an employer to establish entitlement to apportionment of an injured worker's permanent disability award.

Analyzing the case at hand, there is no medical opinion on apportionment that meets the *Escobedo* standard. The doctor has apportioned 10% of the injured worker's injury to non-industrial activities such as weight lifting. However, there is no evidence explaining how and why the injured worker's non-industrial activities caused approximately 10% of her permanent disability. Furthermore, there is no medical evidence in the record explaining the "exact nature" of the non-industrial causative factors of permanent disability. Finally, there is no medical evidence in the record demonstrating how the injured worker's non-industrial activities are causing a portion of her permanent disability *at the time of the AME's evaluation.* In light of the fact that no doctor provides any discussion regarding the extent of her non-industrial physical activities, the only conclusion that should be drawn by this Court is that any apportionment opinion herein is mere speculation and not substantial medical evidence.

In its Answer to the Petition for Writ of Review, Respondent argues at page 7 that the language in *Escobedo* "appears to require apportionment based on any other 'non-industrial' factor, either pre or post injury." However, it is incorrect to assert that the holding of *Escobedo* requires apportionment of permanent disability in any situation. In fact, the *Escobedo* decision stands for the proposition that defendant is entitled to an apportionment determination only if it has obtained substantial medical evidence from the evaluating physician which explains the exact nature of the apportionable disability in detail and explains how and why the non-industrial factor is causing a portion of the permanent disability at the time of the doctor's evaluation. The WCAB makes clear in *Escobedo* that since defendant reaps the benefits of an apportionment determination, it bears the burden of proof on this issue.

Given Dr. Hasday's opinion that 10% of Ms. Hikida's injury was caused by non-industrial activities, without a detailed description of the extent to which she engaged in such activities and a lack of discussion explaining how those activities are causing a portion of her permanent disability at the time of his evaluation, there was no basis for the WCAB to find apportionment of permanent disability herein. Since defendant has failed to meet its burden of proof on this issue, petitioner is entitled to an unapportioned

award of permanent disability benefits, which in this case equates to 100% permanent total disability.

D. The Trial Judge and WCAB inappropriately conflated the issue of causation of the need for carpal tunnel surgery with the causation of Petitioner's permanent disability

At his deposition in this case, Dr. Hasday testified that the Petitioner's need for the carpal tunnel surgery was 90% work related and 10% non-work related. He further testified that the causation of her injury is 90% industrial and 10% non-industrial. However, he clarified that the causation of her permanent disability is 100% due to CRPS. Since it is the CRPS that has in and of itself taken Petitioner completely out of the open labor market, it follows that she is entitled to an unapportioned award of 100% permanent total disability.

It is long established in California workers' compensation that entitlement to medical treatment is not subject to apportionment. *Granado v. WCAB* (1968) 69 Cal. 2d 399, 33 Cal. Comp. Cases 647. Accordingly, even if the need for a particular modality of medical treatment is only 1% caused by the industrial injury, the employer is responsible for 100% of the reasonable medical costs associated with that treatment modality. On page 8 of its Answer to Petition for Writ of Review, Respondent asserts that Petitioner is not able to cite any case law or statute that would support their contention that the apportionment and causation of the original continuous trauma injury is negated as a result of medical treatment causing further and additional disability. However, there have been multiple decisions from the WCAB holding that if a portion of the injured worker's medical treatment was caused by non-industrial factors, it does not necessarily follow that a portion of the resulting permanent disability should be found to be non-industrial as well. Again, this is premised on the holding in *Escobedo* that in order for apportionment to be valid, the doctor must explain how the non-industrial factor is causing a percentage of the disability "at the time of the evaluation".

The most well-known of these WCAB decisions on this issue is called *Steinkamp v. City of Concord* (2006) Cal. Wrk. Comp. PD LEXIS 24. In *Steinkamp*, the injured worker underwent a total knee replacement on an industrial basis. The injured worker had pre-existing, non-industrial pathology in the knees before the surgery. The Agreed Medical Examiner in the case stated that the patient's need for the surgery was caused by industrial and non-industrial factors. However, the Board held that despite the various causes for the knee replacement surgery, the injured worker's ultimate disability was due to knee replacement surgery itself. Therefore, the WCAB held that there was no basis for apportionment of the injured worker's permanent disability. This is because the result of the surgery itself is what led to the injured worker's resulting disability, and the surgery was done on an industrial basis.

Following the logic of the WCAB decision in *Steinkamp*, Dr. Hasday has made clear that 100% of Petitioner's CRPS disability is due to the effects of her industrially related carpal tunnel release surgery. It follows that even though the cause of the need of that surgery may have been multi-factorial; the cause of the permanent disability that ultimately resulted at the time of the doctor's medical-legal evaluation is 100% industrial.

Furthermore, there is line of WCAB decisions with facts similar to the present case in which the WCAB awarded 100% permanent disability based upon the injured worker developing a chronic pain syndrome in connection with medical treatment received for the underlying industrial injury. For example, in *Nilsen v. Vista Ford* (2012) Cal. Wrk. Comp. PD LEXIS 528, the injured worker sustained a significant injury to multiple body parts. The evaluating orthopedist opined that there should be non-industrial apportionment of disability with respect to the patient's spine. However, because of the chronic pain from his industrial injury, the injured worker began to develop a dependence on opiate pain medication. The doctor felt that as a result of his pain medication use, he would not be able to participate in vocational rehabilitation.

The WCAB noted that despite the apportionment of some of the permanent impairments, there was no evidence that any of these pre-existing impairments caused a loss of earning capacity. Furthermore, the medical and vocational evidence showed that

his chronic pain resulting from the use of narcotics was in itself enough to result in his total loss of earning capacity. Most importantly, the Board, while noting the industrial injury to the spine, determined that the chronic pain syndrome was a separate and distinct compensable consequence industrial injury. And with no medical evidence of a chronic pain syndrome prior to his industrial injury, apportionment of permanent disability was improper, and a 100% permanent disability award issued.

An analogy to the *Nilsen* case can be made to the facts present herein. As was the case in *Nilsen*, there is no evidence that Ms. Hikida had CRPS at any point prior to her industrial injury. It is clear that the CRPS is a separate compensable consequence of the industrially related carpal tunnel release surgery. Dr. Hasday opined at deposition that the only cause of the CRPS is the effect of the carpal tunnel release surgery. Since the CRPS, according to the vocational expert testimony, in and of itself is enough to completely take Petitioner out of the open labor market, and there is no evidence of any pre-existing cause of the CRPS; apportionment of Ms. Hikida's permanent disability award is not appropriate.

On page 10 of its Answer to Petition for Writ of Review, Respondent attempts to distinguish cases such as *Nilsen* on the grounds that the case involved a pre-existing injury. However, that argument misses the point. The WCAB in *Nilsen* awarded 100% permanent total disability without apportionment because the chronic pain syndrome arose out of the effects of medical treatment for the industrial injury. The defendant in *Nilsen* did not establish any cause of the chronic pain syndrome other than the effects of the industrial medical treatment. Whether the alleged non-industrial factor is a pre-existing injury or part of a continuous trauma, the analysis is the same. If defendant cannot establish that the non-industrial factor is causing a portion of the condition that leads to the injured worker being completely taken out of the open labor market, then a 100% permanent disability award is the appropriate finding.

In the present case, there is no medical evidence explaining how non-industrial activities such as weight lifting by Ms. Hikida led to her development of CRPS. Just as

the WCAB did in *Nilsen*, the Court should consider Ms. Hikida's CRPS to be a separate compensable consequence injury and reverse the WCAB's award herein.

Dr. Hasday set forth that 10% of the need for Ms. Hikida's carpal tunnel release surgery and her initial carpal tunnel injury was caused by non-industrial factors. The trial judge herein incorrectly interpreted this opinion to mean that 10% of the Petitioner's permanent disability from her physical injury was caused by non-industrial factors. Since the analysis of the causation of permanent disability is a separate issue than the causation of injury, and there is no evidence that the CRPS was caused by anything other than the industrial medical treatment, then Ms. Hikida is entitled to an award of 100% permanent total disability.

Conclusion

CAAA respectfully requests that the decision of the WCAB on October 25, 2016 be overturned and that the matter be remanded back with instructions that Petitioner be awarded 100% permanent total disability.

Given the medical evidence that Ms. Hikida has essentially no use of her hands due to the debilitating effects of CRPS, she is entitled to an award of 100% permanent total disability pursuant to Labor Code Section 4662 (a) (2). Since her disability is statutorily presumed to be total in character, it is legally inappropriate for there to be any apportionment finding in this case.

Furthermore, the vocational evidence herein establishes that Ms. Hikida has no residual work capacity as a result of her CRPS in her bilateral hands. In light of her over 25 years of employment with the company with no evidence of any significant pre-existing barriers to the labor market before her industrial injury, the WCAB should be ordered to award her 100% permanent total disability, despite any medical evidence suggesting that a portion of her impairment may have been caused by non-industrial factors.

There can be no finding of apportionment of permanent disability on this record given defendant's failure to meet its burden of proof on the issue. There is no substantial

medical evidence regarding the exact nature of a non-industrial condition supporting apportionment and no evidence of how and why 10% of Petitioner's permanent disability in existence at the time of the AME examination was caused by non-industrial factors. Accordingly, there should be no apportionment of permanent disability herein, and the WCAB should award Petitioner 100% permanent total disability.

Finally, it is a cornerstone of workers' compensation law that medical treatment is not subject to apportionment. Given Dr. Hasday's clear testimony that 100% of the patient's CRPS was directly caused by the effects of the carpal tunnel surgery, this CRPS should be considered a separate compensable consequence of the original industrial injury. Since there is no evidence in the record that the patient had CRPS prior to her industrial injury, and there is no medical evidence that Petitioner's non-industrial activities caused CRPS in any way, she should be awarded 100% permanent total disability without apportionment. To hold otherwise would improperly conflate the concept of causation of the need for medical treatment with the issue of causation of permanent disability. Labor Code Section 4663 and *Escobedo* make clear that defendant must establish non-industrial causation of permanent disability in order to reduce an injured worker's permanent disability award. The employer has clearly failed to meet this burden in Ms. Hikida's case.

Date: March 16, 2017

RESPECTFULLY SUBMITTED

Justin C. Sonnicksen
Attorney for Amicus Curiae
California Applicants' Attorneys Association

STATE OF CALIFORNIA)
) SS
COUNTY OF CONTRA COSTA)

I, the undersigned, say that I am the attorney of record for the California Applicants' Attorneys Association, in the matter of. I have read the foregoing **Application to File Amicus Curiae Brief and Amicus Curiae Brief** in the matter of Maureen Hikida v. Workers' Compensation Appeals Board of the State of California; Costco Wholesales Corporation; adjusted by Helmsman Management Services, Case No.: B279412 and know of the contents thereof, and that the same is true of my own knowledge, except as to the matters which are therein stated upon my information or belief, and as to those matters that I believe it to be true.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on March 16, 2017 at Pleasant Hill, California.

Justin C. Sonnicksen
Attorney for Amicus Curiae
California Applicants' Attorney Association

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief has been prepared using 13 point Times New Roman typeface. According to the Word Count in my Microsoft Word for Windows software, this brief contains 7152 words up to and including the signature lines that follow the brief's conclusion.

I declare under penalty of perjury that this Certificate of Compliance is true and correct and that this declaration was executed on March 16, 2017.

Justin C. Sonnicksen
Attorney for Amicus Curiae
California Applicants' Attorney Association

Case No.: B279412

COURT OF APPEAL OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT, DIVISION FOUR

MAUREEN HIKIDA,
Petitioner,
v.
WORKERS' COMPENSATION APPEALS BOARD OF THE STATE OF CALIFORNIA; COSTCO WHOLESALES CORPORATION; adjusted by HELMSMAN MANAGEMENT SERVICES
Respondents,

WCAB Case Nos.: ADJ7721810 and ADJ7721392
HONORABLE V. MITCHELL BUSHIN, WCJ

ORDER GRANTING APPLICATION FOR CALIFORNIA APPLICANTS' ATTORNEYS ASSOCIATION TO FILE AMICUS CURIAE BRIEF

The Application filed by the California Applicants' Attorneys Association herein on March 16, 2017 requesting permission to file an Amicus Curiae brief in support of Petitioner, Maureen Hikida, is hereby GRANTED

Date: _____ _____
Presiding Justice

PROOF OF SERVICE

STATE OF CALIFORNIA)
) ss
COUNTY OF CONTRA COSTA)

I, the undersigned, say: I am and always was at all times herein mentioned, a citizen of the United States and employed in the County of Contra Costa, over the age of eighteen years and not a party to the within action or proceedings; that my business address is: 367 Civic Drive, Suite 17, P.O. Box 23588, Pleasant Hill, CA 94523, and that I served the within document:

Application to File Amicus Curiae Brief and Amicus Curiae Brief

Re: Maureen Hikida v. Workers' Compensation Appeals Board of the State of California; Costco Wholesale Corporation; adjusted by Helmsman Management Services

by depositing the original and true copies thereof enclosed in a sealed envelope with postage thereon fully prepaid, in a mailbox regularly maintained by the Government of the United States in Pleasant Hill, California, addressed as follows:

Second Appellate District
Court of Appeal
300 S. Spring Street
2nd Floor, North Tower
Los Angeles, CA 90013

(via e-file & 3 copies
UPS Delivery)

Workers' Compensation Appeals Board
PO Box 429459
San Francisco, CA 94142

(2 copies)

Alan Zane Gurvey
Rowen, Gurvey & Win
5900 Sepulveda Blvd, Ste. 500
Sherman Oaks, CA 91411

Jay Cohen
Mullen & Filippi
5990 Sepulveda Blvd. Ste. 200
Van Nuys, CA 91411

I certify and declare under penalty of perjury that the foregoing is true and correct.

Executed on this 16th day of March 2017

T. Bowlin

Tami Bowlin