WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

MARGIE DURAZO, ***Applicant,*** **vs.** **SOLOMON DENTAL CORPORATION dba DENTAL WELLNESS; and EMPLOYERS COMPENSATION INSURANCE COMPANY,** ***Defendants.***	**Case No. ADJ8884861** **(Los Angeles District Office)** **OPINION AND DECISION AFTER RECONSIDERATION**

We previously granted reconsideration to further study the factual and legal issues. This is our Decision After Reconsideration.

Defendant, Employers Compensation Insurance Company, seeks reconsideration of the Findings and Award and Orders issued by the workers' compensation administrative law judge (WCJ) on March 15, 2018. In that decision, the WCJ found that applicant, Margie Durazo, sustained an industrial injury to her left knee on August 24, 2012, while employed as a dental assistant by Solomon Dental Corporation dba Dental Wellness. The WCJ also found, among other things, that this injury caused 41% permanent disability and that there was no legal basis for apportionment. In her Opinion on Decision's discussion of apportionment, the WCJ said, in part:

> Per the decision reached in *Hikida v. Workers' Comp Appeals Bd*., (2017) 12 Cal.App.5th 1249 [[82 Cal.Comp.Cases 679] (hereafter, *Hikida*)], an employer is responsible for both medical treatment and permanent disability arising directly from unsuccessful medical intervention without apportionment even in situations where the need for surgery or medical treatment was necessitated by both pre[]existing industrial and non-industrial factors or conditions.
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> Here, the applicant sustained an admitted left knee injury that required multiple knee surgeries. Although the applicant has documented pre-exis[]t[i]ng osteoarthritis, the applicant's disability stems from the poor surgical results obtained after her unicondylar knee replacement.
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> (Opinion on Decision, at pp. 1-2.)

Defendant's petition contends that: (1) the opinion of Michael Tooke, M.D., the panel qualified medical evaluator (PQME), constitutes a substantial medical evidence on the issues of causation and apportionment; (2) the opinion of Richard Rosenberg, M.D., applicant's primary treating physician (PTP), is not substantial evidence and does not support the WCJ's Award; (3) the *Hikida* case does not apply to the facts of the instant matter; and (4) applicant's diagnosis per the AMA Guides requires consideration of Labor Code section 4663 apportionment to pre-existing conditions.[1]

Applicant filed an answer contending that the WCJ's March 15, 2018 decision should be affirmed. In her Report and Recommendation on Petition for Reconsideration (Report), the WCJ also recommends affirming her decision.

We will rescind the WCJ's March 15, 2018 decision and return this matter to the trial level for further proceedings and a new decision that, among other things, take into consideration *County of Santa Clara v. Workers' Comp Appeals Bd*. (*Justice*) (2020) 49 Cal.App.5th 605 [84 Cal.Comp.Cases 467] (hereafter, *Justice*), which distinguishes *Hikida*.

I. BACKGROUND

For purposes of our decision, we will rely on the WCJ's statement of facts in her Report:

> Applicant, [redacted] while working as a dental assistant sustained an admitted injury on August 24, 2012 to her left knee.
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> The applicant treated with Dr. Rosenberg. The applicant was seen on January 5, 2016 at which time she was declared to have reached maximum medical improvement. Dr. Rosenberg found the applicant was limited to sedentary type of work with minimal walking and standing, with a whole person impairment of 15% WPI based on unicondylar knee replacement with good results. Dr. Rosenberg noted the applicant had preexisting oesarthritis [*sic*, osteoarthritis], but indicated the applicant's PD was solely a result of her work related injury without apportionment. (Exhibit 3).
>
> [¶] The applicant was seen for an orthopedic consult by Dr. Sisto on May 23, 2016. He determined the applicant was MMI as of the date of his exam and provided 30% WPI based on a poor result following her left total knee arthroplasty without apportionment. (Exhibit 14)
>
> [¶] Thereafter, the applicant was re-evaluated by Dr. Rosenberg on February 8, 2017 at which time the doctor noted the applicant's condition had worsened (Exhibit 2). He provided additional impairment. He assigned a 30 whole person impairment

[1] All further statutory references are to the Labor Code.

> based on poor results following her surgery. He added 2% for pain. He did not feel apportionment was warranted. He was aware the applicant had prior knee oestoartritis [*sic*, osteoarthritis].
>
> The applicant was also seen by the Panel QME, Dr. Tooke originally on August 19, 2014 (Exhibit B) and again on May 12, 2016 (Exhibit D) at which time the applicant was deemed to have reached MMI status. Dr. Tooke noted the applicant had a fair to poor result and assigned 25% WPI with 50% apportionment to preexisting factors.

As discussed above, the WCJ found that applicant's August 24, 2012 left knee injury caused 41% permanent disability with no basis for apportionment. In making these determinations, the WCJ relied on the opinions of the PTP, Dr. Rosenberg, and on the Court of Appeal's 2017 decision in *Hikida*.

II. DISCUSSION

In *Hikida*, the employee sustained cumulative injury to multiple body parts, including carpal tunnel syndrome, while employed at Costco from November 1984 to May 2010. Thereafter, she had carpel tunnel surgery. Following the surgery, she developed chronic regional pain syndrome (CRPS), a condition that caused her debilitating pain in her upper extremities. The agreed medical evaluator (AME) found the employee to permanently and totally disabled from the labor market. The AME also found that her permanent total disability was entirely due to the CRPS from her failed carpal tunnel surgery, but concluded that the carpal tunnel condition itself was due 90% to industrial factors and 10% to nonindustrial factors. The WCJ found that the employee's permanent disability was 90% after apportionment, and the Board affirmed. (*Hikida, supra*, 12 Cal.App.5th at p. 1252.) In its discussion of the WCJ's and the Board's decision (*id.*), *Hikida* directly and indirectly recognize that both the WCJ and the Board essentially relied on: (1) the 2004 legislative enactments regarding apportionment of permanent disability that eliminated former section 4750, rewrote section 4663,[2] and added section 4664;[3] and (2) the Supreme Court's decision in *Brodie v. Workers' Comp. Appeals Bd.* (2007) 40 Cal.4th 1313, 1327–1328 [72 Cal.Comp.Cases 565], which stated among other things that "new sections 4663, subdivision (a) and 4664, subdivision (a) eliminate the bar against apportionment based on pathology and

[2] Section 4663(a) now provides: "Apportionment of permanent disability shall be based on causation."

[3] Section 4664(a) now provides: "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."

asymptomatic causes" and that they were intended to usher in a "new regime of apportionment based on causation" and a "new approach to apportionment" that "look[s] at the current disability and parcel[s] out its causative sources—nonindustrial, prior industrial, current industrial—and decide[s] the amount directly caused by the current industrial source."

On appellate review, however, the *Hikida* Court of Appeal concluded that non-industrial apportionment of the employee's CRPS-related permanent disability was not justified because this CRPS-related permanent disability resulted from the unsuccessful surgical intervention for her industrial carpal tunnel syndrome:

> Here, there is no dispute that the disabling carpal tunnel syndrome from which petitioner suffered was largely the result of her many years of clerical employment with Costco. It followed that Costco was required to provide medical treatment to resolve the problem, without apportionment. The surgery went badly, leaving appellant with a far more disabling condition—CRPS—that will never be alleviated. California workers' compensation law relieves Costco of liability for any negligence in the provision of the medical treatment that led to petitioner's CRPS. It does not relieve Costco of the obligation to compensate petitioner for this disability without apportionment.
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> Our 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. Pre-2004 law constraining the application of apportionment in the award of permanent disability benefits was based primarily on the interpretation of former sections 4663 and 4750, which were eliminated or fundamentally altered by the 2004 amendments. The long-standing rule that employers are responsible for all medical treatment necessitated in any part by an industrial injury, including new injuries resulting from that medical treatment, derived not from those statutes, but from (1) the concern that applying apportionment principles to medical care would delay and potentially prevent an injured employee from getting medical care, and (2) the fundamental proposition that workers' compensation should cover all claims between the employee and employer arising from work-related injuries, leaving no potential for an independent suit for negligence against the employer. Nothing in the 2004 legislation had any impact on the reasoning that has long supported the employer's responsibility to compensate for medical treatment and the consequences of medical treatment without apportionment. Accordingly, the WCJ erred in relying on the 2004 amendment to support apportioning petitioner's award, and the Board erred in upholding his decision.
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> (*Hikida, supra*, 12 Cal.App.5th at pp. 1262-1263.)

However, after the Court of Appeal's 2017 decision in *Hikida* and the WCJ's March 15, 2018 decision relying on *Hikida*, another Court of Appeal issued its 2020 opinion in *Justice*. In essence, the Court of Appeal in *Justice* agreed with defendant's contention on appellate review that the principle that a defendant has unapportioned liability for medical treatment, as discussed in *Hikida*, is not a basis to forego statutorily mandated apportionment of permanent disability. (Lab. Code, §§ 4663, 4664.)

In *Justice*, the Appeals Board had affirmed a WCJ's finding that the employee's November 22, 2011 bilateral knee injury caused 48% permanent disability, with no legal basis for apportionment, even though the AME had found 50% non-industrial apportionment due to applicant's pre-existing, degenerative bilateral knee arthritis. The WCJ explained that although the employee's bilateral knee replacement surgery — which the defendant had provided — had significantly increased her ability to walk and engage in weight-bearing activities, the surgery also resulted in substantially higher permanent impairment compared with her pre-surgery condition because "the current PDRS is based not upon functional capacity but upon diagnosis." Further, the WCJ stated that although the AME's 50% non-industrial apportionment determination complied with *Escobedo v. Marshalls* (2005) 70 Cal.Comp.Cases 604 (Appeals Board en banc), he felt constrained to follow the *Hikida* principle that if medical treatment results in increased permanent disability then permanent disability benefits should be awarded without apportionment. (*Justice*, 49 Cal.App.5th at pp. 608-610.)

However, the Court of Appeal in *Justice* explained its disagreement with the application of *Hikida* in this instance:

> The injured worker in *Hikida* suffered from carpal tunnel syndrome and underwent industrial medical treatment as a result. (*Hikida, supra*, 12 Cal.App.5th at p. 1253.) As a consequence of the medical treatment, the injured worker sustained a new "more disabling condition" of CRPS. (*Id.* at p. 1262.) The *Hikida* court reasoned that the employer was responsible for this new consequential injury based on longstanding case law requiring employers to pay for all industrial medical treatment without apportionment. girl(*Hikida*, at p. 1262; see *Boehm & Associates v. Workers' Comp. Appeals Bd.* (2003) 108 Cal.App.4th 137, 142 [133 Cal.Rptr.2d 396] ["Once employment and industrial causation are determined, the employer is responsible for *all* medical expenses incurred."].) The court also determined, again based on longstanding case law, that the consequences of such medical treatment were also within the ambit of the workers' compensation system. (*Hikida*, at pp. 1262–1263; see *Fitzpatrick v. Fidelity & Casualty Co.* (1936) 7 Cal.2d 230, 233 [60 P.2d 276] ["[A]n employee is entitled to compensation for a new or aggravated injury which

results from the medical or surgical treatment of an industrial injury."].)

> Both of these principles are correct statements of the law. However, it does not follow that an employer is responsible for the consequences of medical treatment without apportionment, when that consequence is permanent disability. Sections 4663 and 4664 make clear that permanent disability "shall" be apportioned and that an employer "shall" be liable only for the percentage of the permanent disability "directly caused" by industrial injury. There is no case or statute that stands for the principle that permanent disability that follows medical treatment is not subject to the requirement of determining causation and thus apportionment, and in fact such a principle is flatly contradicted by sections 4663 and 4664.
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> 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. The agreed medical examiner's findings underlined this point, as he determined that the injured worker's "permanent total disability was due *entirely* to the effects of the CRPS that she developed as a result of the failed carpal tunnel surgery." (*Hikida, supra*, 12 Cal.App.5th at p. 1253, italics added.) 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 only where the industrial medical treatment is the sole cause of the permanent disability.
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> In contrast to *Hikida*, the permanent disability in this case was not caused entirely by the industrial medical treatment. The medical treatment did not result in a new, unexpected compensable consequential injury. Rather, the surgery was "quite successful," and it "significantly increase[d]" Justice's "ability to walk and engage in weight-bearing activities." Based on a careful review of Justice's medical history, Dr. Anderson found that the permanent disability was caused 50 percent by industrial factors and 50 percent by nonindustrial factors. Sections 4663 and 4664 plainly require that the permanent disability be apportioned among industrial and nonindustrial factors if unrebutted substantial medical evidence supports an apportionment finding. Here, Dr. Anderson's findings constitute unrebutted substantial medical evidence. It was error for the workers' compensation judge and the Board to ignore unrebutted substantial medical evidence that nonindustrial factors, in part, caused Justice's permanent disability.
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> (*Justice*, 49 Cal.App.5th at pp. 614-616 [Court's italics].)

As discussed above, the Court of Appeal's 2020 decision in *Justice* issued after the Court of Appeal's 2017 decision in *Hikida* and after the WCJ's March 15, 2018 decision relying on *Hikida*. *Justice* also issued after defendant's petition for reconsideration and applicant's answer in this case.

Accordingly, the parties have not had an opportunity to consider the effect of *Justice*, if any, on the issues of permanent disability and apportionment in this case. Therefore, we will rescind the WCJ's March 15, 2018 decision and return this matter to the trial level for further proceedings — including, in the WCJ's discretion, further briefing — and a new decision. This is because a decision based on different legal theories or issues than those presented by the parties, without affording them a meaningful opportunity to be heard or present evidence, violates due process. (*Gangwish v. Workers' Comp. Appeals Bd*. (2001) 89 Cal.App.4th 1284, 1295 [66 Cal.Comp.Cases 584]; *Rucker v. Workers' Comp. Appeals Bd*. (2000) 82 Cal.App.4th 151, 157–158 [65 Cal.Comp.Cases 805].)

In returning this matter to the WCJ, we will not now express any fixed opinion regarding how this matter should be resolved, consistent with *Gangwish* and *Rucker*.

We will observe, without actually deciding, that *if* a conflict exists between *Justice* and *Hikida*, then the WCAB is free to choose between the conflicting lines of authority until either the Supreme Court resolves the conflict or the Legislature clears up the uncertainty by legislation. (*Auto Equity Sales v. Superior Court* (1962) 57 Cal.2d 450, 456; *People v. Hunter* (2005) 133 Cal.App.4th 371, 382; *Erickson v. Southern Cal. Permanente Med. Grp./Kaiser Permanente* (2006) 72 Cal.Comp.Cases 103, 108 (Appeals Board significant panel decision).)

We will also observe, without actually deciding, that there may be points on which the evidentiary record needs further clarification, including but not necessarily limited to:

- Dr. Sisto's opinions may require further development regarding potential inconsistencies relating to applicant's overall permanent disability; and
- the possible issue that applicant's pre-existing osteoarthritis was eliminated by the knee replacement surgery and that, therefore, the surgery itself could conceivably be considered the sole cause of the permanent disability rating under the AMA Guides.

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For the foregoing reasons,

IT IS ORDERED, as our Decision After Reconsideration, that the Findings and Award and Orders issued by the WCJ on March 15, 2018 is **RESCINDED** and that this matter is **RETURNED** to the trial level for further proceedings and a new decision consistent with this opinion.

WORKERS' COMPENSATION APPEALS BOARD

/s/ ANNE SCHMITZ, DEPUTY COMMISSIONER

I CONCUR,

/s/ MARGUERITE SWEENEY, COMMISSIONER

/s/ JOSÉ H. RAZO, COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

AUGUST 25, 2020

SERVICE MADE ON THE ABOVE DATE ON THE PERSONS LISTED BELOW AT THEIR ADDRESSES SHOWN ON THE CURRENT OFFICIAL ADDRESS RECORD.

MARGIE DURAZO
TOBIN LUCKS
DOMINGUEZ FIRM

NPS/bea

I certify that I affixed the official seal of the Workers' Compensation Appeals Board to this original decision on this date. CS

WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

MARGIE DURAZO, ***Applicant,*** **vs.** **SOLOMON DENTAL CORPORATION dba DENTAL WELLNESS; EMPLOYERS COMPENSATION INSURANCE COMPANY,** ***Defendants.***	**Case No. ADJ8884861** **(Los Angeles District Office)** **OPINION AND ORDER GRANTING PETITION FOR RECONSIDERATION**

Reconsideration has been sought by defendant with regard to the decision filed on March 15, 2018.

Taking into account the statutory time constraints for acting on the petition, and based upon our initial review of the record, we believe reconsideration must be granted to allow sufficient opportunity to further study the factual and legal issues in this case. We believe that this action is necessary to give us a complete understanding of the record and to enable us to issue a just and reasoned decision. Reconsideration will be granted for this purpose and for such further proceedings as we may hereafter determine to be appropriate.

For the foregoing reasons,

IT IS ORDERED that Reconsideration is **GRANTED**.

IT IS FURTHER ORDERED that pending the issuance of a Decision After Reconsideration in the above case, all further correspondence, objections, motions, requests and communications *relating to the petition* shall be filed only with the Office of the Commissioners of the Workers' Compensation Appeals Board at either its street address (455 Golden Gate Avenue, 9th Floor, San Francisco, CA 94102) or its Post Office Box address (P.O. Box 429459, San Francisco, CA 94142-9459), and shall <u>not</u> be submitted to the district office from which the WCJ's decision issued or to any other district office of

the Workers' Compensation Appeals Board, and shall *not* be e-filed in the Electronic Adjudication Management System (EAMS). Any documents relating to the petition for reconsideration lodged in violation of this order shall neither be accepted for filing nor deemed filed.

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All trial level documents not related to the petition for reconsideration shall continue to be e-filed through EAMS or, to the extent permitted by the Rules of the Administrative Director, filed in paper form.[1] If, however, a proposed settlement is being filed, the petitioner for reconsideration should promptly notify the Appeals Board because a WCJ cannot act on a settlement while a case is pending before the Appeals Board on a grant of reconsideration. (Cal. Code Regs., tit. 8, § 10859.)

WORKERS' COMPENSATION APPEALS BOARD

MARGUERITE SWEENEY

I CONCUR,

JOSE H. RAZO

CONCURRING, BUT NOT SIGNING

ANNE SCHMITZ DEPUTY

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA
MAY 08 2018

SERVICE MADE ON THE ABOVE DATE ON THE PERSONS LISTED BELOW AT THEIR ADDRESSES SHOWN ON THE CURRENT OFFICIAL ADDRESS RECORD.

LAW OFFICES OF TOBIN LUCKS
MARGIE DURAZO
DOMINGUEZ LAW FIRM

ebc

[1] Such trial level documents include, but are not limited to, declarations of readiness, lien claims, trial level petitions (e.g., petitions for penalties, deposition attorney's fees), stipulations with request for award, compromise and release agreements, etc.)

STATE OF CALIFORNIA
Division of Workers' Compensation
Workers' Compensation Appeals Board

CASE NUMBER: ADJ8884861

MARGIE DURAZO	**-vs.-**	**DENTAL WELLNESS; EMPLOYERS COMP NEWBURY PARK, EMPLOYERS COMP GLENDALE,**
WORKERS' COMPENSATION ADMINISTRATIVE LAW JUDGE:		**PENNY BARBOSA**
DATE OF INJURY:		**AUGUST 24, 2018**

REPORT AND RECOMMENDATION ON PETITION FOR RECONSIDERATION

I.

INTRODUCTION

Defendant, by and through their attorneys of record, has filed a timely verified Petition for Reconsideration challenging the Findings and Award issued on March 15, 2108, in which it was found the applicant is entitled to PD in the amount of 41% without apportionment based on the substantial medical findings of the PTP, Dr. Rosenberg. It is from this decision defendant has filed their Petition for Reconsideration contending Dr. Rosenberg's report does not amount to substantial medical evidence and apportionment to a preexisting condition is warranted.

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II.

FACTS

Applicant, [redacted] while working as a dental assistant sustained an admitted injury on August 24, 2012 to her left knee.

The applicant treated with Dr. Rosenberg. The applicant was seen on January 5, 2016 at which time she was declared to have reached maximum medical improvement. Dr. Rosenberg found the applicant was limited to sedentary type of work with minimal walking and standing, with a whole person impairment of 15% WPI based on unicondylar knee replacement with good results. Dr. Rosenberg noted the applicant had preexisting oesarthritis, but indicated the applicant's PD was solely a result of her work related injury without apportionment. (Exhibit 3). The applicant was seen for an orthopedic consult by Dr. Sisto on May 23, 2016. He determined the applicant was MMI as of the date of his exam and provided 30% WPI based on a poor result following her left total knee arthroplasty without apportionment. (Exhibit 14) Thereafter, the applicant was re-evaluated by Dr. Rosenberg on February 8, 2017 at which time the doctor noted the applicant's condition had worsened (Exhibit 2). He provided additional impairment. He assigned a 30 whole person impairment based on poor results following her surgery. He added 2% for pain. He did not feel apportionment was warranted. He was aware the applicant had prior knee oestoartritis.

The applicant was also seen by the Panel QME, Dr. Tooke originally on August 19, 2014 (Exhibit B) and again on May 12, 2016 (Exhibit D) at which time the applicant was deemed to have reached MMI status. Dr. Tooke noted the applicant had a fair to poor result and assigned 25% WPI with 50% apportionment to preexisting factors.

The matter proceed to trial and was submitted on January 31, 2018. The issues tried were permanent disability, apportionment need for further medical treatment, liability for self-procured medical treatment, attorney fees, whether the PTP and PQME reports amount to substantial medical evidence.

A Findings and Award were issued on March 15, 2108 in which it was determined based on the PTP report of Dr. Rosenberg, the applicant's injury resulted in 41% PD without apportionment. It is from this decision that defendant has filed their Petition for Reconsideration.

III.

DISCUSSION

Based on the facts of this case, apportionment was not warranted despite the applicant's pre-existing knee condition.

The Petition for Reconsideration should be denied as apportionment pursuant to current case law is prohibited when medical treatment and disability arise directly from unsuccessful medical intervention. *Hikiada v. Workers' Comp. Appeals Bd., (2017)* 12 Cal.App.5gh 1249.

In this case, there is no dispute the applicant had a pre-existing diagnosis of osteoarthritis in her knee. The issue is whether or not apportionment for the pre-existing condition is warranted when the applicant's permanent disability is a result of her surgery and not the underlying osteoarthritis. The court in Hikiada framed issue as "....whether an employer is responsible for both the medical treatment and disability arising directly from unsuccessful medical intervention, without apportionment." The court found an employer is

liable for both the medical treatment and the permanent disability in such a situation. In Hikiada, the permanent disability arose directly from the unsuccessful medical intervention.

In the present case, like Hikiada the applicant's permanent disability arose as a result of the poor result from her unicondylar knee replacement. Both the PTP and the PQME found the applicant's surgery resulted in poor result. The permanent disability given by both the PQME and PTP was based on the outcome of the surgery and not the underlying osteoarthritis.

The PTP reports of Dr. Rosenberg amounts to substantial medical evidence.

The medical findings of Dr. Rosenberg were found to be better reasoned, more persuasive, and amounted to substantial medical evidence. For a report to amount to substantial medical evidence it must use a correct legal theory, the opinion must not be based on "surmise, speculation, conjecture or guess," and the report must not be based upon inadequate medical history or examination. *Zemke v. WCAB* (1968) 68 Cal.2d 794, 33 Cal. Comp. Cases 358; See *Garza v. WCAB* (1970) 3 Cal.3d 312, 35 Cal. Comp. Cases 500; *West v. IAC* (1947) 79 Cal. App. 2d 711.

Dr. Rosenberg took a medical history, conducted a thorough exam and based in opinion the AME guides. Dr. Rosenberg did change his opinion regarding WPI, but as his report noted her condition worsened. This was supported by the medical evidence and the consulting physician, Dr. Sisto's finidngs as well the PQME's findings.

Although the PQME notes mediocre to poor results his analysis indicates the applicant had a poor result. Dr. Tooke's analysis is flawed. Dr. Tooke using the AMA Guides table 17-33 notes the applicant is closer to 49 points than 84 points. Anything less than 50 is consider a poor result. Here the applicant pursuant to Dr. Tooke's own findings

sustained a poor result from surgery, but he did not provide PD based on poor results. His conclusions are not supported by his own findings.

> "A "fair" result is within a point spread of 50 to 84 points and is assigned a WPI of 20%, A "poor" result is <50 points and is assigned a WPI of 30Yo. The claimant is much closer to 49 points (difference of 5 points) that to 84 points (difference of 30 points). Certainly from the perspective of a clinical assessment, not scored, she has a 'fair' to 'poor' result. Although by strictly adhering to the AMA Guides she would be assigned a WPI of 20Yo, the reasonable medical probability is that a more accurate evaluation would result if the WPI percentage was interpolated to reflect how close to a "poor" result she has. Therefore I believe that the reasonable medical probability isthat.21Yo WPI reflects her permanent impairment. No additional WPI for pain is warranted, in view of the fact that pain is a parameter which is considered in scoring of her total knee result in Table 17-35. The WPI attributable to the work injury is 50% of 25% WPI = 3%WPI." (Exhibit D, pg. 7)

IV.

RECOMMENDATION

It is recommended that the Petition for Reconsideration be denied.

DATE: 04/16/2018

Penny Barbosa

PENNY BARBOSA
WORKERS' COMPENSATION
ADMINISTRATIVE LAW JUDGE

Served by US Mail 04/16/2018
on interested parties as shown
on the Official Address Record

By: Linda Simien Linda Simien