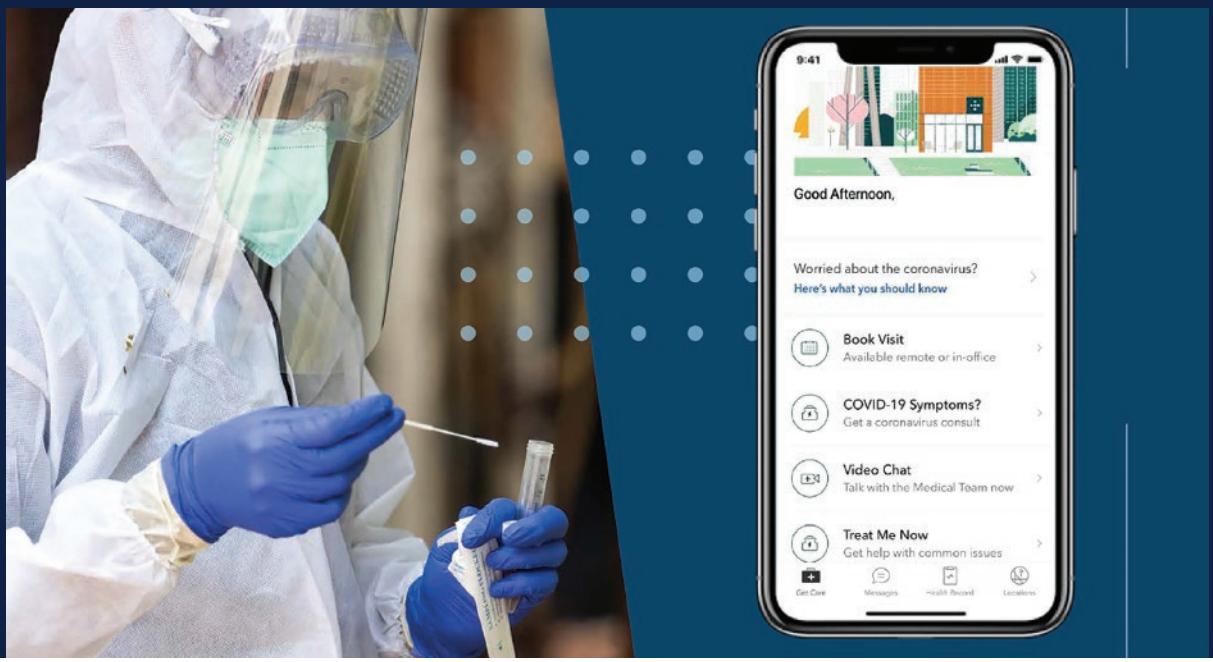
THE EXECUTIVES IN WORKERS' COMPENSATION

EWC NEWSLETTER

Resources to Help with Your Biggest Challenges, Insights from Industry Experts.



Testing, tracking, talking:

Additional strategies in the back to business toolkit

BY ANDREA J. BUHL, MSN, RN, FNP-BC, MANAGING DIRECTOR, CLINICAL OPERATIONS, SEDGWICK AND WILL KIMBROUGH, MD, MSPH, SENIOR MEDICAL DIRECTOR OF CLINICAL SERVICES, ONE MEDICAL

Business owners are asking many questions about how to bring employees back to the workplace in a way that is safe and protective of their health in the weeks and months ahead – but they may not yet have all the right tools in place as they seek to reopen and increase operating capacity. Here are some of the reopening questions we're hearing – and strategies to consider as part of your back to business toolkit.

When is the right time for an employee to return to work?

In looking at how to best bring employees back into the workplace, it is essential to first look at the local COVID-19 dynamics. Every city and local community has undergone a different COVID-19 experience in terms of the number of cases reported, upward and downward trends, testing and treatment options, and patient recoveries. The guidance from these local jurisdictions should be considered when determining how quickly a business should reopen and how it should start bringing employees back.

One of the challenges of COVID-19 is that some people can be asymptomatic and may still spread the virus to others. While it is impossible to achieve zero risk in the workplace,

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Limiting the Scope of *Hikida*

By: Neelu K. Khanuja, Esq., Founding Attorney at Khanuja Law

On May 27, 2020, in *County of Santa Clara v. Workers' Comp. Appeals Bd.(Justice)*, (2020) 85 Cal. Comp. Cases 467, the 6th District Court of Appeal held that permanent disability could be apportioned to nonindustrial factors pursuant to Labor Code Section 4663 following industrial medical or surgical treatment, regardless if it is directly caused by the work-related injury. Under Labor Code Section 4663, when there is unrebutted, substantial medical evidence that a nonindustrial condition was a cause, in part, of the permanent disability, the permanent disability shall be apportioned between the nonindustrial and industrial causes. Here, the Applicant, Barbara Justice, sustained injury to her bilateral knees while working as a claims adjuster for the Defendant, County of Santa Clara. She underwent total knee replacement surgery for her right knee in 2012 and total knee replacement surgery for her left knee in 2013.

Orthopedic AME Dr. Mark Anderson evaluated the Applicant and found that "absent the underlying pre-existing arthritis, it is medically probable that Justice would not have had total knee replacement as she did when she did . . ." Accordingly, AME Dr. Anderson apportioned 50% of Applicant's bilateral knee disability to the extensive pre-existing knee pathology and 50% to Applicant's industrial injury. However, the Workers' Compensation Judge ("WCJ") found that the holding in Hikida was applicable and the post-surgical permanent disability shall not be apportioned. *Hikida v. Workers' Comp. Appeals Bd.* (2017) 82 Cal. Comp. Cases 67: The WCJ provided the following rationale for his decision: "*Hikida* holds that where medical treatment (here, the bilateral knee replacement surgery) results in an increase in permanent disability, permanent disability shall be awarded without apportionment."

The 6th District Court of Appeal found that the facts in *Hikida* differed from the facts in this matter. Here, the Applicant had nonindustrial, pre-existing knee degeneration that caused 50% of the resulting post-surgical permanent disability. The Court provided a narrow interpretation of *Hikida*, finding that it only precludes apportionment when the sole cause of the permanent disability is the industrial medical treatment. In this matter, the industrial medical treatment did not result in a new compensable consequential injury and the permanent disability was not caused solely by the industrial medical treatment.

The holding follows the finding in *Petaluma* which states that when there is unrebutted, substantial medical evidence that nonindustrial factors caused permanent disability, permanent disability shall be apportioned pursuant to the Labor Code. *City of Petaluma v. Workers' Comp. Appeals Bd.* (2018) 83 Cal. Comp. Cases 1869. The Court here found that AME Dr. Anderson's initial report, five supplemental reports and two depositions constituted unrebutted, substantial medical evidence that Applicant's nonindustrial pre-existing knee pathology was a cause of her post-surgical permanent disability.

The Court annulled the Workers' Compensation Appeals Board's decision and remanded the matter to the Board for further proceedings, providing instructions on how to apportion the Applicant's permanent disability. In sum, the Court's interpretation of *Hikida* limits its scope and applicability.