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CALIFORNIA COMPENSATION CASES  
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Lake Tahoe Unified School District, Schools Insurance Authority, Petitioners v. Workers'  
Compensation Appeals Board, **Toni L. Kelly**, Respondents

Civil No. C054039--

Court of Appeal, Third Appellate District

*72 Cal. Comp. Cas 138; 2006 Cal. Wrk. Comp. LEXIS 446*

December 14, 2006

**PRIOR HISTORY:** [\*\*1]

*Prior History:* W.C.A.B. No. SAC 0267242--WCJ Joseph S. Samuel (SAC); WCAB Panel: Commissioners Caplane, Brass, Murray (concurring, but not signing)

**DISPOSITION:** *Disposition:* Petition for writ of review denied

**HEADNOTE:** **Medical Treatment--ACOEM Guidelines--WCAB held that applicant with 4/22/96 industrial neck and back injuries was entitled to chiropractic treatment under Chapter 6 of ACOEM Guidelines even though treatments did not cure her condition, when chiropractic treatment temporarily relieved applicant's pain and restored her functional capacity; WCAB found that, even if chiropractic treatment was not recommended under ACOEM Guidelines, Guidelines were rebutted by preponderance of evidence, including applicant's testimony and qualified medical examiner's opinion, that established that variance [\*139] from Guidelines was reasonably required to cure and relieve from effects of applicant's injury under Labor Code § 4604.5(c).** [See generally Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d § 22.05[6][b].]

Applicant sustained industrial injuries to her back and neck on 4/22/96 in an automobile accident, while working as a school psychologist [\*\*2] for Defendant Lake Tahoe Unified School District. On 6/9/98, a Stipulated Award was issued, under which Applicant was awarded 17-percent PD and the need for medical treatment. Applicant received treatment from chiropractor Dr. David Borges. After conducting utilization review, Defendant stopped paying for Applicant's chiropractic treatment. However, Applicant continued to treat with Dr. Borges, and Dr. Borges filed a lien.

The matter proceeded to an expedited hearing on 7/11/2006, at which time Applicant testified that, when her pain flares up, she has trouble walking, sitting, and going up and down stairs. Applicant obtained treatment from only Dr. Borges when she was unable to manage her pain flare-ups. Applicant stated that she believed she did a good job of managing her chronic back and neck pain and was rigorous in her day-to-day management so that she could function. On cross-examination, Applicant testified that she had pain flare-ups a few times a month. If the flare-ups were not bad, she used ice, heat, and massage to try to manage the pain. Applicant stated that, depending on her pain, she sometimes saw Dr. Borges a couple of times per month and some months not at all.

[\*\*3]

The utilization review report upon which Defendant relied to stop chiropractic payments stated that Applicant's chiropractic treatments on an "as needed" basis were not supported by the ACOEM Guidelines because the treatments did not provide any meaningful long-term improvement in Applicant's condition and failed to cure or relieve the effects of her industrial injury. The report further stated that, in accordance with the ACOEM Guidelines, medical treatment

must focus on functional improvement, not the abolishment of pain.

In response to the utilization review report, Applicant obtained a QME evaluation with chiropractor Dr. Lee Kinney, who reported on 8/30/2005 that Applicant was highly motivated in performing daily routines to control her pain, and sought chiropractic treatment on only an as-needed basis when her pain could not be controlled by her home therapies. Dr. Kinney noted that Applicant had reduced ranges of motion when the pain in her neck increased to a level at which she needed chiropractic care. He recommended physical therapy and chiropractic treatment up to four times per year for flare-ups, with a maximum of three chiropractic visits per flare-up.

[\*\*4] On 7/19/2006, the WCJ issued an F&O in which he found that, based on Applicant's testimony and Dr. Kinney's report, the chiropractic treatment provided by Dr. Borges was reasonably required to cure or relieve from the effects of Applicant's injury and ordered Defendant to provide treatment and reimburse Dr. Borges' lien. Defendant filed a Petition for Reconsideration, contending in relevant part that the WCJ erred in ordering the chiropractic treatment because Applicant failed to rebut [\*140] the presumption of correctness of the ACOEM Guidelines. The WCJ recommended that reconsideration be granted, based on Defendant's contention. The WCJ agreed that the presumption of correctness of the ACOEM Guidelines was not rebutted by evidence-based medicine.

The WCAB denied reconsideration. In its Opinion and Decision Denying Reconsideration, the WCAB noted that, pursuant to *Labor Code § 4604.5(c)*, the presumption of correctness of the ACOEM Guidelines may be rebutted by evidence establishing that a variance from the Guidelines is reasonably required to cure and relieve an employee from the effects of an industrial injury, in accordance with [\*\*5] *Labor Code § 4600*. Pursuant to the WCAB's decision in *Grom v. Shasta Wood Products (2004) 69 Cal. Comp. Cases 1567* (Appeals Board Significant Panel Decision), medical treatment that is intended only to relieve, not to cure, the effects of an industrial injury is appropriate under *Labor Code § 4600*, especially in the case of chronic conditions in which a cure is not possible, but relief of symptoms is essential to continued functioning.

The WCAB stated in relevant respects with regard to Applicant's entitlement to chiropractic treatment under the ACOEM Guidelines:

" We disagree with defendant's position that, "The crux of the dispute in this matter, therefore, is whether or not applicant has properly rebutted the presumption that the ACOEM Guidelines are correct." The issues, as stated in the Minutes of Hearing, are whether applicant is entitled to chiropractic treatment under the Award of June 9, 1998, and reimbursement for self-procured treatment, including the lien of Borges Chiropractic. There is no question that the ACOEM Guidelines are presumed correct. (*Lab. Code § 4604.5(c)* [\*\*6] ). The first issue that must be addressed, then, is whether the treatment at issue is justified under the ACOEM Guidelines. If the treatment falls within the Guidelines, then no rebuttal is necessary. Only if the Guidelines recommend against the treatment does the burden fall to applicant to show that a variance is necessary.

In this case, applicant is long past the acute and sub-acute phases of her 1996 injury. The section of the ACOEM Guidelines that most directly addresses her situation is Chapter 6. Chapter 6 (Pain Suffering, and the Restoration of Function) deals with chronic pain and states, at page 107, "Successful pain management hinges on appreciating the dynamics of each patient's case and on proactively managing factors that might delay return to work or restoration of function." Similarly, at page 117, the Guidelines state, "Pain management focuses on functional restoration. Because return to function is essential to return to health, occupational health professionals are concerned with return to function." Chapter 6 does not include a specific recommendation regarding chiropractic care and certainly does not specify frequency of visits, but it does recommend multidisciplinary [\*\*7] approaches. [\*141]

The stated goal of ACOEM is restoration of functional capacity, and the evidence shows that the treatment requested and previously provided contributes to that goal in applicant's case. Moreover, the evidence shows that applicant diligently performs a home exercise program and that, when she seeks chiropractic care for flare-ups, which she does judiciously, the treatment is time limited and goal oriented. The requested treatment in this case is justified under the ACOEM Guidelines.

Even if applicant's treatment could not be justified under ACOEM, Dr. Kinney's report and applicant's testimony would be sufficient to constitute a rebuttal. To rebut ACOEM requires only that the preponderance of the evidence establish that a variance from the guidelines is reasonably required to cure and/or relieve the employee from the effects of his or her injury. (*Lab. Code § 4604.5*, subd. (c); *Grom v. Shasta Wood Products*, *supra*, 69 Cal. Comp. Cases 1567, 1570-1571.) It does not require reference to any guidelines, as described in § 4604.5(e), for injuries not covered by ACOEM. Nor does it require [\*\*8] that the presumption be controverted by "a preponderance of the scientific medical evidence," as provided in subdivision (a), with regard to the utilization schedule to be adopted pursuant to *Labor Code section 5307.27*. "Preponderance of the evidence" means that evidence that, when weighed with that opposed to it, has more convincing force and the greater probability of truth." (*Lab. Code § 3202.5*.) Section 4604.5(c) does not specify the type of evidence that may constitute a preponderance of the evidence.

Despite believing the treatment to be reasonable and necessary, the WCJ said in his Report that he was "constrained to recommend that defendant's Petition for Reconsideration be granted," because the "presumption of correctness of ACOEM Guidelines has not been rebutted by evidence-based medicine." As we have explained herein, no such constraint exists. We find the treatment in question to be justified by Chapter 6 of ACOEM and, even if the evidence were to be weighed, for purposes of rebutting ACOEM, the preponderance of the evidence would establish that a variance is reasonably required [\*\*9] to cure and relieve from the effects of applicant's injury."

Defendant filed a Petition for Writ of Review, contending in relevant portion that the ACOEM Guidelines recommend against manipulative treatment, such as chiropractic, for more than four weeks, and that Dr. Kinney's report was not sufficient to rebut the Guidelines because it did not indicate the scientific medical evidence on which Dr. Kinney relied to reach his conclusions, or whether evidence-based medicine supported the conclusions.

WRIT DENIED December 14, 2006.

**COUNSEL:** *Counsel:* For petitioners--Cuneo, Black, Ward & Missler, by Richard A. Weyuker