

Regents of the University of California, Lawrence Livermore National Laboratory, PSI, Octagon Risk Services, Third Party Administrator, Petitioner vs. Workers' Compensation Appeals Board, Thomas Macari, Respondents

Civil No. A110979--

70 Cal. Comp. Cases 1733, 2005 Cal. Wrk. Comp. LEXIS 338

Court of Appeal, First Appellate District, Division Five

Writ of Review Denied November 3, 2005

Editorial Information: Prior History

Prior History: W.C.A.B. No. OAK 291517--WCJ Valerie Sauban Chapla (OAK); WCAB Panel: Commissioners Brass, O'Brien, Murray (concurring, but not signing)

Editorial Information: Subsequent History

Subsequent History: Review Denied December 21, 2005

Editorial Information: Disposition

Disposition: Petition for writ of review denied

Counsel:

For petitioner--Sedgwick, Detert, Moran & Arnold, by Christina J. Imre, Michael M. Walsh; Laughlin, Falbo, Levy & Moresi, by James R. Wesolowski
For respondent WCAB--Vincent Bausano, Assistant Secretary
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Editorial Information: Headnotes

Medical Treatment--American College of Occupational and Environmental Medicine Guidelines--WCAB relied on opinions of applicant's treating physician, qualified medical examiner, applicant's credible trial testimony, and decision in *Grom v. Shasta Wood Products* (2004) 69 Cal. Comp. Cases 1567 (WCAB significant panel decision) to find that applicant was entitled to 30 chiropractic visits per year for his chronic low back pain, when defendant had denied chiropractic treatment, based on utilization review reports prepared by doctors who had not examined applicant, and had relied on Chapter 12 of the ACOEM Guidelines dealing with acute injury, qualified medical examiner opined that applicant was entitled to chiropractic visits to increase his function and alleviate chronic pain, based on Chapter 6 of the ACOEM Guidelines and other evidence-based guidelines, and WCAB concluded that medical evidence relied on rebutted Labor Code § 4604.5[Deering's] presumption of correctness of ACOEM Guidelines. [See generally *Hanna, Cal. Law of Emp. Inj. and Workers' Comp.* 2d §§ 5.02[1], 22.05[6][b]; *Attorneys' Textbook of Medicine*, Chs. 2, 12, 15A; *Common Diagnostic Procedures*, Chs. 7, 14-16, 23.]

Applicant sustained an industrial injury to his low back on 7/1/97, while employed as a technologist by Defendant Lawrence Livermore National Laboratory. His case was resolved by way of Stipulations with Request for Award approved on 2/20/2004, under which Applicant was awarded 46-percent PD and future medical treatment.

<http://bender.lexisnexis.com/us/lpgateway.dll/180/71/73/d6/10a?f=templates&fn=document...> 3/8/2006

Pursuant to his award, Applicant continued to receive chiropractic treatment from Dr. John Loero. However, after submitting the issue of chiropractic treatment to utilization review, Defendant denied continued treatment on the basis that it was in violation of the ACOEM Guidelines, Chapter 12. Applicant obtained a rebuttal report from QME Dr. Paul Aubin, who opined that chiropractic treatment was reasonable and necessary under Chapter 6 of the ACOEM Guidelines, as well as under other evidence-based studies.

The matter ultimately proceeded to an expedited hearing, at which Applicant credibly testified that his job duties were very physical. When he was permitted to undergo chiropractic treatment on a supportive basis, he remained functional and needed less medication. Applicant stated that he was concerned about taking anti-inflammatory medications on a long-term basis because of their possible side effects. Applicant's testimony indicated that he liked his job and wanted to continue to function in his employment.

Applicant offered into evidence the report of Dr. Aubin in rebuttal of the utilization review. Dr. Aubin noted that, although Applicant had passed the acute and subacute phases of his industrial injury, the injury left Applicant with chronic pain and residual disability. Applicant indicated to Dr. Aubin that, without occasional chiropractic adjustments, his pain and stiffness gradually increased, and his ability to function decreased. Dr. Aubin discussed Chapter 6 of the ACOEM Guidelines, which focuses on functional restoration as the primary means of pain management. According to Dr. Aubin, chiropractic treatments two or three times per month were reasonable and necessary to reduce Applicant's symptoms and increase his function, {1735} consistent with the ACOEM Guidelines, Chapter 6. Moreover, Dr. Aubin noted that his recommended treatment plan was supported by the evidence-based Glennerin (Canadian) Guidelines and the Mercy Guidelines, both of which recognize the value of supportive chiropractic care after maximum medical improvement has been reached, especially in situations in which the patient's condition worsens if he or she does not receive such care. Applicant's treating chiropractor, Dr. Loero, rendered similar opinions.

On 2/18/2005, the WCJ issued an F&A, in which she found that Applicant was entitled to 30 chiropractic treatment visits per year to cure or relieve from the effects of his injury, based on the reports of Dr. Aubin and Dr. Loero. In her Opinion on Decision, the WCJ reasoned in relevant part:

I have observed applicant's manner and demeanor and I find him credible. Applicant has testified that he needs the ongoing chiropractic treatment to stay functional. He has indicated that it relieves his pain and it allows him to continue to function at work. Since the defendant has sent him out for utilization review, and denied continued chiropractic treatment commencing in May of 2004, his condition has deteriorated and he has noted that he has had to increase his intake of Ibuprofen from 400 milligrams up to 2400 milligrams. He is not happy with this because he has been told by his treating physician that Ibuprofen is not good for his body and can do damage to his liver and kidneys. This could cause him other problems in the long run. When he is allowed to receive chiropractic treatment, his medication use is down. And for all these reasons, he wishes further chiropractic care.

Review of the utilization reports from Dr. Appel and Dr. Jeppsen show that they are relying on Chapter 12 of the ACOEM Guidelines for their conclusion that chiropractic treatment is no longer necessary in this case. However, applicant's treating physician, Dr. Loero, and the panel QME in this case, Dr. Aubin, both point out that Chapter 12 deals with acute injury and that the only chapter in the ACOEM Guidelines that deals with chronic pain is Chapter 6. Both Dr. Aubin and Dr. Loero point to Chapter 6 for authority that ongoing treatment to increase function in chronic pain patients is appropriate. I have reviewed Chapter 6, and I agree that that is what Chapter 6 says. Furthermore, a recent case has come down from the Appeals Board which has been designated a significant panel decision. The case is *Kenneth Grom vs. Shasta Wood Products* [(2004) 69 Cal. Comp. Cases 1567 (WCAB significant panel decision)]. That case holds that even with the changes in the law, medical treatment is to cure and/or relieve from the effects of the injury. In this case, the Appeals Board has made a strong statement that the need to relieve injured workers from their pain still remains a major mission of medical treatment and I believe, based on applicant's testi-

{1736} mony, the reports of Dr. Aubin and Dr. Loero, that applicant is entitled to that relief.

In short, I am concluding that Chapter 6 of the ACOEM Guidelines rebuts [sic] Chapter 12. Dr. Aubin indicates that applicant should be allowed to treat at a frequency of two to three times per month. At twice a month, that would be 24 visits a year; at three times a month, that would be 36 visits a year. A mid-point would be 30 visits a year. Therefore, I hereby award applicant entitlement to chiropractic treatment at a frequency of 30 visits a year. When applicant exceeds that number, he will be required to pay for that treatment himself.

Defendant filed a Petition for Reconsideration, contending in relevant respects that: (1) the WCJ's award of chiropractic treatment was excessive and not supported by substantial evidence; (2) the ACOEM Guidelines are presumably correct under Labor Code § 4604.5[Deering's], and there was no evidence or finding that they were rebutted; and (3) the WCJ erred in concluding that Chapter 6 rebuts Chapter 12 of the ACOEM Guidelines insofar as a close reading of Chapter 6 shows that the WCJ's award contradicts the recommendations regarding treatment for chronic pain and contravenes the purpose of the rules.

The WCAB granted reconsideration in order to obtain and review the WCJ's report on reconsideration, which it had not yet obtained because the WCJ was on vacation. In the meantime, the WCAB rescinded the WCJ's decision and found that Applicant was not entitled to continued chiropractic care. On 6/8/2005, the WCJ issued a report, in which she recommended that reconsideration be denied. The WCJ incorporated her Opinion on Decision and also noted that she found Dr. Aubin's analysis regarding Applicant's need for chiropractic treatment to be very persuasive. The WCJ concluded that the other studies relied on by Dr. Aubin, including the Glenerin (Canadian) Guidelines and the Mercy Guidelines, rebutted Chapter 12 of the ACOEM Guidelines. She also noted that the only rebuttal to Dr. Aubin's reports was from the utilization review doctor, who did not examine Applicant and was not aware of Applicant's credible testimony that his function deteriorated without chiropractic treatment. After receiving the WCJ's report, the WCAB issued an Opinion and Decision After Reconsideration, in which it reinstated the WCJ's 2/18/2005 decision entitling Applicant to further chiropractic care, and adopted and incorporated the WCJ's report, without further comment on the issues.

Defendant filed a Petition for Writ of Review, substantially contending that: (1) the ACOEM Guidelines are presumptively correct under Labor Code § 4604.5[Deering's] and may be rebutted by only a preponderance of the evidence showing that variance from the Guidelines is reasonably required to cure and relieve the employee from the effects of the injury; (2) the ACOEM Guidelines expressly control the treatment of chronic injuries, and there was no reason for the WCAB to deviate from the Guidelines; and (3) the unrestricted treatment of chronic injuries is contrary to {1737} statutory reform rejecting the old standard of medical care and to the ACOEM Guidelines. The WCAB filed a letter response stating that Defendant denied chiropractic care based on the utilization reviews of doctors who did not examine Applicant, whereas the WCJ relied on physicians who examined Applicant and opined that chiropractic treatment was reasonable, necessary, and consistent with Chapter 6 of the ACOEM Guidelines. The WCAB further stated that the medical evidence relied on by the WCJ, in conjunction with Applicant's credible testimony, rebutted the ACOEM Guidelines in accordance with Labor Code § 4604.5 [Deering's].

Defendant replied to the WCAB's letter response, contending in relevant part that the WCAB intended to disregard the utilization review process in favor of the opinions of treating/examining physicians.

WRIT DENIED November 3, 2005.

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