INTER-OFFICE MEMORANDUM

TO: Attorneys & Clients

FROM: Joe Truce

DATE: June 25, 2006

RE: **Do the ACOEM Guidelines apply to an existing award of medical treatment?**

From the Lobby Bar at the Hyatt:

I had been waiting for George the bartender for more than an hour when he finally appeared. George told me that years ago he obtained a lifetime award of chiropractic treatment due to a repetitive trauma injury caused by mixing my martinis and that he felt like celebrating as he had just received treatment number five thousand (5000) and felt great. Only after receiving my martini did I advise George that the insurance company for the Hyatt would probably cut off his ongoing chiropractic treatments as his ongoing treatment exceeds the presumptively correct medical guidelines of the American College of Occupational and Environment Medicine (ACOEM). George was aghast but finally said that these guidelines do not apply to an award of future medical treatment. I advised George that I had some bad news for him. In a panel decision entitled *Daniel Clark v Coachella Valley Water District,* State Compensation Insurance Fund, case number SBR 0116131, filed 5/8/06, a three member panel of the WCAB held that the ACOEM guidelines apply to an existing award thereby entitling the defendant carrier or employer to conduct utilization review pursuant to L.C. 4610. Even though this decision is not an en banc decision and binding on all judges -- this decision can still be entered into evidence in a specific case pursuant to L.C. 5710(g) which allows as evidence decisions of the Board on similar issues. Happy litigating!!!

Aw....come on George -- no hard feelings -- make mine a double.

Joe Truce

WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

DANIEL A. CLARK,

Applicant,

vs.

COACHELLA VALLEY WATER DISTRICT, STATE COMPENSATION INSURANCE FUND,

Defendant(s).

Case No. SBR 0116131

OPINION AND DECISION AFTER RECONSIDERATION

We previously granted defendant's petition for reconsideration to further study the factual and legal issues in this case. This is our Opinion and Decision After Reconsideration. Defendant sought reconsideration of the Findings and Award filed on July 18, 2005, wherein the workers' compensation administrative law judge ("WCJ") found that applicant sustained industrial injury to his left ankle and left foot on October 19, 1985, while employed as a crew supervisor, that his "need for a rigid polypro ankle-foot orthoses is both reasonable and necessary following his ankle fusion," that applicant's attorney is entitled to a Labor Code section 5814.5 fee "to enforce the prior awards of future medical care in the amount of $1,237.50," and that applicant is entitled to a Labor Code section 5814 penalty of 25% of the cost of the foot brace.

Defendant contended that it reasonably denied the request for the brace, based on its utilization review; that the American College of Occupational and Environmental Medicine's Occupational Medicine Practice Guidelines ("ACOEM Guidelines") are entitled to a presumption of correctness and that, since its utilization review is consistent with the ACOEM Guidelines, it too is entitled to the presumption of correctness; that applicant has not rebutted the presumption; and that the WCJ erred in assessing a §5814 penalty and §5814.5 attorney's fees because defendant's refusal to provide treatment was reasonable.

We have considered the Petition for Reconsideration, applicant's Answer, and the WCJ's Report and Recommendation of Workers' Compensation Administrative Law Judge on Petition for Reconsideration ("Report").

For the reasons discussed below, we will affirm the award of the foot brace and defer the issues of the penalty and attorney's fees.

BACKGROUND

Applicant sustained an industrial injury to his left ankle and left foot on October 19, 1985. His claim was resolved by Stipulations with Request for Award and Award of June 17, 1987, with a provision for medical treatment to cure or relieve from the effects of the injury "upon demand."

On May 28, 2004, applicant filed a Declaration of Readiness to Proceed to Expedited Hearing ("DOR"), on the issue of entitlement to medical treatment. At the June 28, 2004 hearing, the WCJ issued an Order, by agreement of the parties, stating that applicant "is entitled to receive medical care to cure and relieve from his injury of 10/19/05 to his left ankle & left foot, upon demand."

Defendant authorized ankle fusion surgery and applicant underwent the surgery on September 9, 2004. On April 5, 2005, applicant's treating podiatrist Dr. McClure prescribed a rigid polypro ankle-foot brace for post-operative pain. Dr. McClure stated that applicant will need the brace until the pain is resolved.

Defendant submitted the request to utilization review and, on April 21, 2005, Dr. Wald recommended denial.[1] Dr. Wald's assessment of the issue is, "This claimant is s/p ankle fusion performed in July 2004. At this time a custom brace has been ordered. However, there is no indication of ankle instability, and the reasons for a custom brace have not been articulated." (Defendant's Exhibit D, Report of Dr. Wald, p. 1.) The supporting rationale for the denial is,

> "Section 4604.5 of the California Labor Code requires that authorized treatment shall be in accordance with evidence based treatment guidelines.

[1] Applicant challenges for the first time in its Answer the timeliness of defendant's utilization review. As this issue was not raised at the trial level, we will not consider it at this time.

> At the present time, no documentation of medical necessity consistent with evidence-based medical guidelines has been received to justify the clinical efficacy of this proposed service to cure or relieve the effects of the injury. Therefore request for authorization of this service is denied for lack of medical justification." (*Ibid.*)

Dr. Wald includes several pages, under the heading "Aetna Policy," that he refers to as "guidelines and comments." The Aetna Policy says, regarding ankle-foot orthoses ("AFOs"),

> "Ankle-foot orthoses (AFO) are considered medically necessary [durable medical equipment] for ambulatory members with weakness or deformity of the foot and ankle, which require stabilization for medical reasons, and have the potential to benefit functionally. Members prescribed custom-made "molded-to-patient-model" AFOs must also meet the criteria set forth in section II.B.3, below. AFOs are not considered medically necessary for ambulatory members who do not meet these medical necessity criteria." (*Id.*, at p. 3.)

Section II.B.3 of the Aetna Policy adds the following criteria: that the "member" could not be fit with a prefabricated (off-the-shelf) AFO; or that the condition necessitating the orthosis is expected to be permanent or last more than six months, that there is need to control the knee, ankle or foot in more than one plane, that the "member" has a documented neurological, circulatory, or orthopedic status that requires custom fabricating over a model to prevent tissue injury, or that the "member" has a healing fracture that lacks normal anatomical integrity or anthropometric proportions. (*Id.*, at p. 4.)

On June 7, 2005, Dr. McClure reported, "It can take a year or more for an ankle to completely fuse, and, Therefore cease to hurt. Daniel still has some pain and the brace will alleviate The pain." (Applicant's Exhibit GG.) The cost of the brace is $728. (Applicant's Exhibit FF.)

Applicant filed another DOR on the issue of entitlement to medical treatment, with the explanation that defendant refused to authorize the brace. Trial was on July 13, 2005. The issues were:

> "1.The reasonableness and necessity of the ankle brace.
>
> 2. Whether or not State Compensation Insurance Fund should be assessed a penalty for unreasonable delay of the ankle brace.

3. Whether or not applicant's attorney is entitled to enforcement of an award for future medical care." (Minutes of Hearing (Trial Calendar) and Summary of Evidence, p. 4.)

Applicant testified that he is a driving supervisor for Combined Transport. He supervises 300 truck drivers, and he must walk across uneven gravelly ground to inspect the trucks two to three times per day. He was off work for three months after his ankle fusion and released to return to work light duty, using a walking cast.

> "When the walking cast was removed he had pain so severe on walking that he could hardly walk. It was recommended that he have a plastic brace to help stabilize his ankle and foot and to reduce the pain. He was told it would take one to two years for the pain to go away. . . Applicant demonstrated his normal walk, which demonstrably showed an antalgic gait. Applicant indicated that he is in constant pain and that it hurts even worse when he has to attempt to stand up." (Minutes of Hearing (Trial Calendar) and Summary of Evidence, p. 5, lines 36-40 and p. 6, lines 5-7.)

The WCJ filed his Findings and Award on July 18, 2005, finding the brace reasonable and necessary. He awarded a fee for applicant's attorney and assessed a penalty under §5814. On August 12, 2005, defendant petitioned for reconsideration.

DISCUSSION

The employer is responsible for providing medical treatment that is reasonably required to cure or relieve the injured worker from the effects of his or her industrial injury. (Lab. Code §4600, subd. (a).) Additionally, in this case, medical treatment is included in the stipulated award and in the Order of June 28, 2004. Until guidelines are adopted by the administrative director pursuant to Labor Code section 5307.27, section 4600, subdivision (b) provides that medical treatment that is reasonably required to cure or relieve the injured worker from the effects of his or her injury means treatment that is based upon the updated ACOEM Guidelines. The ACOEM Guidelines are presumptively correct on the issue of extent and scope of medical treatment. (Lab. Code §4604.5, subd. (c); *Simmons v. State of California, Dept. of Mental Health* (2005) 70 Cal.Comp.Cases 866, 877 (Appeals Board en banc).) "The presumption is rebuttable and may be controverted by a preponderance of the evidence establishing that a variance from the guidelines is

reasonably required to cure and relieve the employee from the effects of his or her injury, in accordance with Section 4600." (Lab. Code §4604.5, subd. (c).) The words "cure and relieve" in §4604.5(c) have the same meaning as "cure or relieve" in §4600. (*Grom v. Shasta Wood Products* (2004) 69 Cal.Comp.Cases 1567, 1570-1572 (Significant Panel Decision).)

Pursuant to Labor Code section 4610, every employer is required to establish a utilization review process to "prospectively, retrospectively, or concurrently review and approve, modify, delay, or deny, based in whole or in part on medical necessity to cure and relieve, treatment recommendations by physicians, as defined in Section 3209.3, prior to, retrospectively, or concurrent with the provision of medical treatment services pursuant to Section 4600." (Lab. Code §4610, subds. (a), (b).) Prior to adoption of the schedule for medical treatment utilization under §5307.27, utilization review policies and procedures must ensure that decisions made are consistent with the ACOEM Guidelines. (Lab. Code §4610, subd. (c).) In addition, the criteria or guidelines used to determine whether to approve, modify, delay, or deny medical treatment must be consistent with the ACOEM Guidelines (Lab.Code §4610, subd. (f)(2).)

Defendant states in its petition that it agrees with the WCJ that applicant is entitled to future medical treatment pursuant to the stipulated award, the order of June 28, 2004, and Labor Code section 4600, but adds that such treatment must be shown to "cure or relieve" the effects of applicant's injury. It denies that its obligation extends beyond treatment that "cures or relieves." It contends, therefore, that it is entitled to conduct utilization review before authorizing treatment, citing *Sandhagen v. Cox & Cox Construction, Inc.* (2004) 69 Cal.Comp.Cases 1452 (Appeals Board en banc) and *Smith v. Churn Creek Construction Co.* (2004) 69 Cal.Comp.Cases 1012.

The WCJ notes in his Report that the cases cited by defendant apply to utilization review prior to an award of medical care. He states, in the Opinion on Decision, "Where there is an Award of future medical care, and particularly, but not necessarily where that award provides for 'upon demand', the defendant may offer the timely UR as evidence of the necessity or reasonableness of the charges but the defendant must first file a Declaration of Readiness (DOR) for Trial on the issue at the same time the UR is offered to deny treatment, or at some reasonable

time (10 days), thereafter." He states further, "Once there is an Order of the Court to provide future medical care the defendant can not solely rely on a UR to deny the treatment. Defendant must also Petition the Court to modify the award of future medical care to exclude the contested care."

Applicant correctly states the issue in its Answer: "whether or not the defendants have the right to challenge medical treatment through utilization review after an applicant has received an award from the Workers' Compensation Appeals Board." Applicant argues that there was no utilization review provision at the time of applicant's injury and medical treatment award, and that the utilization review statute was not intended to be retroactive, so that it would apply in cases where future medical treatment had already been awarded.

Like the parties, we are unaware of any authority on the question of whether an employer may rely on utilization review to deny treatment in a case where a medical treatment award exists. We find instructive, however, the Court of Appeal decisions in *State Comp. Ins. Fund v. Workers' Comp. Appeals Bd. (Silva)* (1977) 71 Cal.App.3d 133 [42 Cal.Comp.Cases 493] and *Pebworth v. Workers' Comp. Appeals Bd.* (2004) 116 Cal.App. 4th 913 [69 Cal.Comp.Cases 199] ("*Pebworth*"). In *Silva*, the court determined that an amendment effective January 1, 1976, giving employees the right to select their own physician, applied to injuries occurring prior to the effective date of the amendment. The court acknowledged the established principle of workers' compensation law that, since the industrial injury is the basis for any compensation award, the law in force at the time of injury is to be taken as the measure of the injured person's right of recovery, and the canon of interpretation that statutes are not to be given a retroactive operation unless it is clearly the legislative intent. (*Silva, supra,* 42 Cal.Comp.Cases at p. 495.) The court considered the distinction between substantive changes in the law that impose a new or additional liability and substantially affect existing rights and obligations, and procedural statutes that are not considered retroactive because they become operative only when the procedure is invoked. Ultimately, the court in *Silva* concluded that "the change effected by the Legislature does not on its face impose a new or additional liability. Although it affects the privilege of the employer and his insurer to

control the employee's medical care it does not do so retroactively." (*Id.* at p. 497.)

In *Pebworth,* the court vacated an Appeals Board en banc decision and held that Labor Code section 4646, as amended effective January 1, 2003, applies to dates of injury prior to January 1, 2003, because the amendment was procedural, not substantive. The applicant had sustained a specific industrial injury in 1997 and a cumulative industrial injury from 1985 to August 2003. The parties had settled all issues except vocational rehabilitation by Compromise and Release, and they desired to settle the issue of vocational rehabilitation compensation under the new §4646. They submitted a stipulation on January 23, 2003. The Rehabilitation Unit, the WCJ, and the Appeals Board all concluded that the new statute applies only to injuries occurring after the statute's effective date. The court stated, "Whether the amendments may be applied in this case depends on whether they are procedural or substantive. If the amendments are procedural, there is no bar to applying them here because "'[t]he effect of such statutes is actually prospective in nature since they relate to the procedure to be followed in the future."' (*Tapia v. Superior Court* (1991) 53 Cal.3d 282, 288. . .)" (*Pebworth, supra*, 69 Cal.Comp.Cases at p. 202.) Rejecting the Appeals Board's conclusion that the amendments "'are not procedural because they effect substantial changes to a substantive right,'" the court ruled,

> "We do not disagree that the amendments depart substantially from prior legislation on the subject. However, whether a statute is procedural or substantive does not depend on the degree it changes prior law. The test is whether the statute imposes a new or additional liability or affects existing vested or contractual rights on the one hand or merely changes the manner in which established rights or liabilities are invoked in the future. Thus, a procedural statute may be applied to pending cases even if the event underlying the cause of action occurred before the statute took effect. [Citations.] As our Supreme Court explained more than 50 years ago: '[P]rocedural statutes may become operative only when and if the procedure or remedy is invoked, . . . the statute operates in the future regardless of the time of occurrence of the events giving rise to the cause of action. [Citation.] In such cases the statutory changes are said to apply not because they constitute an exception to the general rule of statutory construction, but because they are not in fact retrospective." (*Id.*, at pp. 202-203.)

Enactment of §4610 did not impose new or additional liability or affect existing vested or contractual rights. An employee's right to treatment that cures or relieves the effects of his or her injury remains intact. Applicant's original medical treatment award and the June 28, 2004 order remain vital. Defendant's liability is unchanged; it must provide treatment reasonably required to cure or relieve the effects of applicant's industrial injury. What has changed is that a new procedure has been added to help determine whether requested treatment is reasonably required. The new statute is procedural because it addresses how the existing right to medical treatment will be exercised and reviewed. Like the statutes in *Pebworth* and *Silva*, it becomes operative only when it is invoked and, thus, it is prospective. Defendant sought utilization review of treatment in 2005, after the effective date of §4610. There is no retroactive effect and, therefore, no concern about whether the Legislature intended the statute to operate retroactively.

We hold, therefore, that an employer may conduct utilization review when the employee has an existing award of medical treatment, even when the award is "upon demand." The employer need not file a DOR before denying treatment and need not petition the court to modify the award to exclude the denied treatment.

Having established that defendant had the right to conduct utilization review of Dr. McClure's prescription for an AFO, we will now consider the effect of that review. Defendant claims that the Aetna Policy, relied on by Dr. Wald in denying the brace, is consistent with ACOEM. Defendant offers no evidence to substantiate that claim, and our examination of the ACOEM Guidelines indicates otherwise. Chapter 14 (Ankle and Foot Complaints) does not address AFOs specifically, although use of a brace is anticipated, at page 371, by the advice that maximizing activities within the limits of symptoms is imperative and that putting joints at rest in a brace or splint should be for as short a time as possible. In the Summary of Recommendations and Evidence for ankle and foot complaints, for the clinical measure "Rest and immobilization (e.g., braces, supports)," it is recommended, "For acute injuries, immobilization and weight bearing as tolerated; taping or bracing later to avoid exacerbation or for prevention." Moreover, if we consider Chapter 6 (Pain Suffering, and the Restoration of Function), we find additional support

for the reasonableness and necessity of an AFO for treatment of applicant's ankle. The Guidelines state, 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 a return to health, occupational health professionals are concerned with return to function." In a discussion of the advantage of maintaining normal activity, at page 115, we find, "Mobilization, even in the face of some residual pain or stiffness, should be encouraged, and it should be increased as the healing process progresses." Thus, if we consider the goals expressed in the ACOEM Guidelines of functional restoration, return to work, mobilization, and maximizing activities, it appears that the Guidelines could be read to support Dr. McClure's prescription, which was intended to allow applicant to walk without pain and, therefore, to work. Essentially, however, the ACOEM Guidelines are silent as to AFOs and, therefore, do not preclude their use. This silence is not consistent with the Aetna Policy's detailed criteria.

Defendant's argument that the presumption of correctness accorded the ACOEM Guidelines extends to the Aetna Policy is without merit. The presumption of correctness applies to the ACOEM Guidelines. (Lab. Code §4604.5(c).) Dr. Wald did not rely on the ACOEM Guidelines in recommending denial. Moreover, as defendant has not established that the ACOEM Guidelines recommend against the prescribed treatment, there is no basis for a presumption to arise. No presumption applies to the Aetna Policy.

As to the Aetna Policy, we share the WCJ's doubt that the Policy, whatever it is, actually dictates denial of the request. Furthermore, defendant makes no effort to support its claim that the Aetna Policy is "consistent with the ACOEM Guidelines and other evidence-based medical treatment guidelines generally recognized by the medical community."[2] In fact, with no explanation by defendant, we cannot determine what the Aetna Policy is. It refers repeatedly to

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[2] Because ankle injuries are covered by the ACOEM Guidelines, the guidelines described in Labor Code section 4604.5, subdivision (e) are inapplicable, in any event.

treatment of "members." It appears to be guidelines for Aetna's use as an insurance carrier or as a health care provider. It is presented as support for Dr. Wald's opinion and is entitled to no greater weight than its inherent persuasiveness engenders. Neither Dr. Wald's nor Dr. McClure's opinion was based on the ACOEM Guidelines. The WCJ necessarily made his decision on the evidence before him, with no presumptions operating. The WCJ found the treating doctor's opinion, coupled with applicant's credible testimony, more persuasive than Dr. Wald's opinion. We agree.

The WCJ stated in his Opinion on Decision that he found "defendant's unilateral reliance on the UR in defiance of the two Court Orders to provide future medical care to be unreasonable," and assessed a §5814 penalty and attorney's fees. Since the law in this area was unsettled and we now conclude that defendant was legally entitled to utilization review, we do not find that defendant's refusal was unreasonable, solely on the basis of its decision to seek utilization review. We will defer the issues of the penalty and attorney's fees for the WCJ to revisit the issues and determine whether a penalty and attorney's fees are appropriate on any other basis.

Finally, we note that, just because defendant had the legal right to seek utilization review, "there is nothing in section 4610 that requires an employer to use the utilization review process in every case." (*Sandhagen v. Cox & Cox Construction, Inc.* (2005) 70 Cal.Comp.Cases 208, 212 (Appeals Board en banc).) ("*Sandhagen II*") As explained in *Sandhagen II*, there are circumstances involving minor treatment issues in which utilization review would result in undue costs to the defendant and would delay treatment to the injured employee.

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For the foregoing reasons,

IT IS ORDERED, as the Decision After Reconsideration of the Workers' Compensation Appeals Board, that the Findings and Award filed on July 18, 2005, is AFFIRMED, EXCEPT that it is AMENDED as follows:

Findings of Fact No. 2 and 3 are amended as set forth below:

FINDINGS OF FACT

"2. The issue of attorney's fees is deferred.

3. The issue of a penalty under Labor Code section 5814 is deferred."

The Award is amended as follows: (b) and (c) are stricken.

WORKERS' COMPENSATION APPEALS BOARD

COPY TO CLAIMS

MAY 15 2006

WILLIAM K. O'BRIEN

I CONCUR,

MERLE C. RABINE

RONNIE G. CAPLANE

WORKERS' COMPENSATION APPEALS BOARD EUREKA SEAL

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

MAY 08 2006

SERVICE BY MAIL ON SAID DATE TO THE PARTIES SHOWN BELOW:

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