WORKERS' COMPENSATION APPEALS BOARD

Terri

STATE OF CALIFORNIA

New Phone # 772-6392

ELSIE CASILLAS,

Applicant,

vs.

COUNTY OF SAN LUIS OBISPO permissibly self-insured, OCTAGON RISK SERVICES, INC. adjusting agent,

Defendants.

Case No. GRO 24818

OPINION AND ORDER GRANTING RECONSIDERATION AND DECISION AFTER RECONSIDERATION

Applicant, in pro per, seeks reconsideration of the Findings of Fact of June 9, 2005, wherein the workers' compensation administrative law judge (WCJ) found that applicant is not entitled to further chiropractic care pursuant to Labor Code section 4600.[1] The parties previously stipulated that applicant sustained industrial injury to "multiple body parts" on March 1, 2000, while employed as an Intermediate Typist Clerk by the County of San Luis Obispo, resulting in permanent disability of 25%, and a need for future medical care.

Applicant contends that continued chiropractic care is reasonably required pursuant to section 4600 to cure or relieve the effects of her industrial injury.

An answer was received.

For the reasons discussed below, we will grant the Petition for Reconsideration, rescind the Findings of Fact of June 9, 2005, and enter a new finding allowing chiropractic care when reasonably necessary to address acute exacerbations of applicant's condition.

On March 1, 2000, applicant was opening the bottom drawer of a file cabinet at work when the cabinet fell over, striking her on the right arm and back. Applicant received conservative treatment for her injuries from the accident, and was able to continue working. However, she has

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

chronic pain in her right hand, back and shoulder that worsens at times for various reasons, including work activity. Over the years she has used the services of four chiropractors for treatment of her symptoms, and has received over 100 chiropractic treatments.

On January 29, 2001, applicant filed an Application for Adjudication of Claim in pro per. In a report dated May 20, 2001, applicant's treating physician at the time, Deborah Sampley, D.C., reported applicant's condition to be permanent and stationary. Dr. Sampley reported a need for future medical treatment, "Patient may necessiate (sic) future care for right upper extremity/thoracic spine on an as needed basis. This should include occasional chiropractic care, physical therapy if neccesary (sic) and orthopedic referral. Replacement of soft hand support when needed." Based on the permanent and stationary report of Dr. Sampley, the parties on May 15, 2002 entered into a Stipulation with Request for Award referencing industrial injury to "Multiple Body Parts" causing 25% permanent disability and a "need for medical treatment to cure or relieve from the effects of said injury."[2] On June 24, 2002, the WCJ approved the stipulation and entered the award as requested.

In November of 2004, defendant requested a utilization review of applicant's chiropractic treatment. In a report dated November 8, 2004, Guy Smith, D.C., answered four questions posed by defendant:

> "Ongoing treatments with spinal manipulation and physical modalities are not supported by ACOEM [American College of Occupational and Environmental Medicine Practice] guidelines at this stage post-injury...
>
> Continued chiropractic treatment with spinal manipulation and physical modalities is not effective in treating this type of injury at this stage after the date of injury...

[2] Applicant sustained an industrial injury to her right shoulder in 1994 while working for the same employer. The right shoulder injury required decompression surgery in January of 1996. Medical reports by Dr. Sampley state that the 1994 injury was found in a workers' compensation proceeding to have caused 30% permanent disability, and future medical treatment was awarded. The reports in this case include complaints by applicant of pain in and around her right shoulder following the accident on March 1, 2000. There are also multiple references to right shoulder pain and treatment of that body part in the medical reports. Although applicant's Application for Adjudication of Claim in this case does not identify any specific body parts claimed to be injured, it does reference March 1, 2000 as the date of injury. We proceed with the understanding that issues concerning treatment to cure or relieve applicant's 1994 right shoulder injury are not part of this proceeding, and that any award of future medical treatment in the case involving the 1994 shoulder injury is unaffected by our decision in this case.

> Evidence-based guidelines report, 'Repeated use of passive treatment/care normally designed to manage acute conditions should be avoided as it tends to promote physician dependence and chronicity...
>
> ACOEM guidelines state, 'Instruction in proper exercise technique is important, and a physical therapist can serve to educate the patient about an effective exercise program.'"

Applicant disagreed with the report of Dr. Smith and a report was obtained from a qualified medical examiner (QME) Adam J. Orszag, D.C. Dr. Orszag examined applicant and addressed the question of continuing chiropractic care in his report dated January 7, 2005:

> "ACOEM Guidelines allow for treatment with manipulation and physical therapy for acute injuries. This would include acute exacerbations of chronic conditions. Based on the records I find care consistent with the future medical award. Also based on the patient's statement that she received relief with this care and has been able to continue working with the care she has received it appears that she has had functional improvement. Additionally, based on the records the patient has had multidisciplinary care that is consistent with the ACOEM guidelines.
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> The Guidelines for Chiropractic Quality Assurance and Practice Parameters [Mercy Guidelines] states 'supportive care using passive therapy may be necessary if repeated efforts to withdraw treatment/care results in significant deterioration of clinical status.'"

In considering applicant's contentions, we first look to defendant's duty. The California Constitution instructs the Legislature to create a workers' compensation system, which includes "full provision of such medical, surgical, hospital and other remedial treatment as is requisite to cure and relieve from the effects of [an industrial] injury." (Cal. Const. Art. XIV, §4.) The California Supreme Court held in an early case interpreting the statute promulgated under this language that the Legislature intended for an employer to provide medical treatment reasonably required for the relief as well as the cure of the employee's industrial injuries. (*U.S. Fidelity & Guaranty Co. v. Dept. of Indus. Relations (Hardy)* (1929) 207 Cal. 144 [16 I.A.C. 69]; *Grom v Shasta Wood Products* (2004) 69 Cal.Comp.Cases 1567 (significant panel decision).)

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The employer's duty is currently codified in section 4600. As amended April 19, 2004, section 4600(a) requires an employer to provide medical treatment to "cure or relieve" an employee from the effects of an industrial injury.[3] In this case, that duty was acknowledged through an open-ended stipulated award of future medical treatment. No limits on chiropractic or other care were included in the award. Nevertheless, such a precautionary award is valid, even when there is not present manifestation of symptoms. (*Barnes v. Workers' Comp. Appeals Bd.* (2000) 23 Cal.4th 679 [65 Cal.Comp.Cases 780] (*Barnes*).) However, such open awards are inconsistent with the legislative concern for "certainty and finality in the determination of compensation benefit obligations." (*Nickelsberg v. Workers' Comp. Appeals Bd.* (1991) 54 Cal.3d 288 [56 Cal.Comp.Cases 476].) For that reason, the Appeals Board will act to limit burdens on the parties by providing some specification of the treatment to be provided. (*Kauffman v. Workers' Comp. Appeals Bd.* (1969) 273 Cal.App.2d 829 [34 Cal.Comp.Cases 373].)

In this case, the WCJ found that applicant is not entitled to *any* further chiropractic care. The finding is contrary to the open award for treatment stipulated by the parties because it fails to recognize that the May 20, 2001 permanent and stationary report by Dr. Sampley contemplated the need for "occasional chiropractic care" in the future. Dr. Sampley's report is referenced in the parties' Stipulations with Request for Award as providing the basis for their agreement that the industrial injury caused 25% permanent disability.[4] Moreover, defendant acknowledged that occasional chiropractic care was part of the future medical treatment it agreed to by authorizing

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[3] Section 4600(a) and (b) provide in full:
"(a) Medical, surgical, chiropractic, acupuncture, and hospital treatment, including nursing, medicines, medical and surgical supplies, crutches, and apparatus, including orthotic and prosthetic devices and services, that is reasonably required to cure or relieve the injured worker from the effects of his or her injury shall be provided by the employer. In the case of his or her neglect or refusal reasonably to do so, the employer is liable for the reasonable expense incurred by or on behalf of the employee in providing treatment.
(b) As used in this division and notwithstanding any other provision of law, 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 guidelines adopted by the administrative director pursuant to Section 5307.27 or, prior to the adoption of those guidelines, the updated American College of Occupational and Environmental Medicine's Occupational Medicine Practice Guidelines."

[4] The date of the report is incorrectly stated in the stipulation as May 30, 2001, but the report is clearly identified as the report of "Primary Treating Physician Deborah Sampley DC."

such care for nearly five years. "This rule of practical construction is predicated on the common sense concept that 'actions speak louder than words." Words are frequently but an imperfect medium to convey thought and intention. When the parties to a contract perform under it and demonstrate by their conduct that they knew what they were talking about the courts should enforce that intent." (*Crestview Cemetery Assn. v. Dieden* (1960) 54 Cal.2d 744; c.f. *Huston v. Workers' Comp. Appeals Bd.* (1979) 95 Cal.App.3d 856 [44 Cal.Comp.Cases 79 [stipulation becomes executed contract by performance of agreement].)

Thus, the WCJ's finding is contrary to the parties' understanding and intention at the time of the June 24, 2002 award that future medical treatment includes occasional chiropractic care. However, this conclusion does not end our inquiry because the question remains; how much chiropractic care is to be provided pursuant to the award?[5]

In this regard, defendant points to the report of its utilization review physician that the ACOEM Guidelines do not support any additional chiropractic care at this stage of applicant's injury. By contrast, applicant refers to the report of the QME who found such care to be appropriate to treat "acute exacerbations of chronic conditions." In resolving this disagreement, we consider the utilization review process and the weight to be accorded to the ACOEM Guidelines in light of the other medical evidence, applicant's use of chiropractic care, and the parties' earlier agreement concerning future medical treatment to be provided.

From 1991 through 2003, sections 4061 and 4062 provided an established procedure for resolving medical-legal disputes in workers' compensation cases.[6] Under that procedure, if objection was made to a treating physician's determination, the parties either referred the dispute to an agreed medical examiner (AME), or the objecting party was allowed to obtain a QME report.

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[5] The Findings of Fact by the WCJ issued on June 9, 2005, more than five years after the date of injury. Section 5804 generally provides that no award shall be altered "after five years from the date of the injury..." As such, there is a question whether the WCJ had jurisdiction to find that applicant is not entitled to further chiropractic care. However, we need not further address that issue in light of our conclusion that the award provides for chiropractic care, but there is an issue of enforcement regarding the limits of the chiropractic care to be provided. (*Barnes, Kauffman*, supra.; c.f. Lab. Code §5803.)

[6] We do not address the special provisions concerning spinal surgery because that is not an issue in this case.

Effective April 19, 2004, former section 4062 was amended by Senate Bill 899 (SB 899). Section 4062(a) now provides that for applicants who are not represented by an attorney, "the employer shall immediately provide the employee with a form prescribed by the medical director with which to request assignment of a panel of three qualified medical evaluators, the evaluation shall be obtained as provided in section 4062.1, and no other medical evaluation shall be obtained." In addressing the procedure that is to apply under the current statutes, we held that section 4610 requires that disputes following a utilization review be resolved pursuant to section 4062. (*Willette v. Au Electric Corporation* (2004) 69 Cal.Comp.Cases 1298 (Appeals Board en banc).)[7]

In this case, applicant obtained an opinion from an examining QME pursuant to section 4062 that supports her averment in her Petition for Reconsideration that chiropractic care relieves her from the effects of her industrial injury and is an appropriate treatment for her when she experiences acute exacerbations of her symptoms. This medical and testimonial evidence must be weighed against the opinion of the utilization review physician, which is based primarily on his reading of the ACOEM guidelines, and not upon a physical examination of the applicant.[8]

In this regard, the legislature addressed in section 4604.5(c) the weight to be accorded the ACOEM Guidelines:

> "[T]he recommended guidelines set forth in the [ACOEM Guidelines] shall be presumptively correct on the issue of extent and scope of medical treatment, regardless of date of injury. 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. The presumption created is one affecting the burden of proof."[9]

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[7] Appeals Board en banc decisions are binding precedent on all Appeals Board panels and WCJs. (Cal. Code Regs., tit.8., §10341; *Gee v. Workers' Comp. Appeals Bd.* (2002) 96 Cal.App.4th 1418 [67 Cal.Comp.Cases 236].)

[8] The record reflects that Dr. Smith also reviewed medical records. However, those materials included records of individuals other than the applicant.

[9] The weight afforded the rebuttable presumption is reflected in section 4604.5(d), which establishes a specific limit on chiropractic visits and physical therapy visits for injuries occurring after January 1, 2004, "notwithstanding" the ACOEM Guidelines.

"The effect of a presumption affecting the burden of proof is to impose upon the party against whom it operates the burden of proof as to the nonexistence of the presumed fact." (Evid. Code, §606.)

One difficulty in this case is determining what the ACOEM Guidelines provide concerning chiropractic treatment. Dr. Smith asserts that the ACOEM Guidelines "do not support" chiropractic care. However, in addressing initial treatment, the guidelines state, "Manipulation has been compared to various treatments, but not placebo or nontreatment, for patients with neck pain in nearly twenty randomized clinical trials. More than half favored manipulation..." (Occupational Practice Guidelines (2nd ed. 2004), ch. 8, Neck and Upper Back Complaints, p. 173.) Dr. Orszag reads the ACOEM Guidelines to allow for treatment with manipulation and physical therapy for acute injuries. In the absence of a specific discussion in the guidelines concerning continuing chiropractic care, he reasonably extrapolates the discussion concerning initial care to apply to "acute exacerbations" of chronic conditions.

Moreover, section 4604.5(e) provides, "For all injuries not covered by the [ACOEM] Guidelines... authorized treatment shall be in accordance with other evidence based medical treatment guidelines generally recognized by the national medical community and that are scientifically based." Dr. Smith refers to the Guidelines for Chiropractic Quality Assurance and Practice Parameters: Proceedings of the Mercy Center Consensus Conference, 1999 (Mercy Guidelines) as such other evidence in support of his opinion. However, Dr. Orszag notes that the Mercy Guidelines provide, "supportive care using passive therapy may be necessary if repeated efforts to withdraw treatment/care results in significant deterioration of clinical status."

In short, we do not find the ACOEM Guidelines to specifically preclude continuing chiropractic care for acute exacerbations of applicant's symptoms. As such, no presumption is clearly established pursuant to section 4604.5(c). But even if such a presumption is said to exist, arguendo, we find in this case that the presumption would be rebutted by the reasoned opinion of

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the examining QME, the Mercy Guidelines, and applicant's experience in obtaining relief from acute exacerbations of her symptoms through the use of chiropractic care.

To reject the findings of the WCJ and enter its own findings on reconsideration, the Appeals Board must support its decision by substantial evidence in light of the entire record. (*Lamb v. Workers' Comp. Appeals Bd.* (1974) 11 Cal.3d 274 [39 Cal.Comp.Cases 310]; *LeVesque v. Workers' Comp. Appeals Bd.* (1970) 1 Cal.3d 627 [35 Cal.Comp.Cases 16] (*LeVesque*).) To be "substantial" means that the evidence is of ponderable legal significance; it is reasonable in nature, credible, and of solid value. It is more than a scintilla, and means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. (*Braewood Convalescent Hospital v. Workers' Comp. Appeals Bd.* (*Bolton*) (1983) 34 Cal.3d 159 [48 Cal.Comp.Cases 566]; *People v. Bassett* (1968) 69 Cal.2d 122.)

The relevant and considered opinion of one physician, though inconsistent with other medical opinions, may constitute substantial evidence. (*LeVesque*; *Smith v. Workers' Comp. Appeals Bd.* (1969) 71 Cal.2d 588 [34 Cal.Comp.Cases 424].) The Appeals Board is empowered to choose among conflicting medical reports and rely on that which it deems most persuasive. (*Jones v. Workmen's Comp. Appeals Bd.* (1986) 68 Cal.2d 476 [33 Cal.Comp.Cases 221].)

We find the opinion of Dr. Orszag to be substantial evidence in support of applicant's contention that continued chiropractic care is reasonably required pursuant to section 4600 to cure or relieve the effects of her industrial injury. However, consistent with the limitation described by Dr. Orszag, we will specify that future chiropractic care is to be provided when reasonably necessary to treat acute exacerbations of applicant's symptoms.

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For the foregoing reasons,

IT IS ORDERED that the applicant's Petition for Reconsideration of the Findings of Fact of June 9, 2005, is **GRANTED**.

IT IS FURTHER ORDERED as the Decision After Reconsideration of the Appeals Board that the Findings of Fact of June 9, 2005, be, and hereby is **STRICKEN**, and the following is **SUBSTITUTED** in its place:

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FINDINGS OF FACT

(1) Applicant, Elsie Casillas, born 20 October 1949, while employed by defendant/employer as an intermediate typist clerk on 1 March 2000, sustained injury arising out of in the course of employment to multiple parts of her body resulting in a permanent disability award of 25% and a finding that applicant was in need of future medical care.

(2) Applicant is entitled to further chiropractic care when reasonably necessary to treat acute exacerbations of her symptoms.

WORKERS' COMPENSATION APPEALS BOARD

WILLIAM K. O'BRIEN

I CONCUR,

RONNIE G. CAPLANE

FRANK M. BRASS

WORKERS' COMPENSATION APPEALS BOARD EUREKA SEAL

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA
AUG 12 2005

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

Elsie Casillas, 770-C Peach, San Luis Obispo, CA 93401
Goldman, Magdalin & Krikes, 290 Station Way, Ste. A, Arroyo Grande, CA 93420

JFS/ara

CASILLAS, Elsie