

affirmed the WCJ's findings, granting reconsideration only to adjust some dollar amounts, as requested by defendant and recommended by the judge.

On review, applicant argues that case law clearly supports entitlement to retroactive VR benefits despite lack of prima facie medical support, where the worker is ultimately found eligible for VR, and that unreasonable failure to pay PD and medical treatment before and after the stipulated award gives rise to four penalties. Defendant responds that since there was no prior demand for VR and no breach of a duty to give notice, the Board correctly denied VR benefits during the period in question, and the failure to pay PD and for medical treatment did not give rise to four penalties because the same benefits were delayed both before and after the stipulated award. Oral argument is scheduled for November 30, 2004 at 9 a.m. in Los Angeles, unless waived. *Green v. WCAB*.

Court of Appeal, 2d App. Dist., Div. 8, Sept. 17, 2004, No. B171921.

Editor's Note: Before granting the writ, the court of appeal requested input from the parties on the effect of SB 899, which substantially alters the penalty situation on the issues here. Applicant and an amicus brief by the California Applicants' Attorneys Association argue that since there had been a final award of penalty, the more liberal pre-SB 899 version must be applied. Defendant and an amicus brief by the California Workers' Compensation Institute contend, on the other hand, that there has been no final adjudication of the penalty issue, and that applicant has no vested right to a penalty. Accordingly, the amended version of §5814 should apply, substantially reducing the penalty. Since oral argument is set for November 30, a judicial pronouncement on this timely issue is likely in the near future.

WCAB DECISIONS

WCJ Awards Gym Membership to Worker Injured in 2003, as Primary Treater Recommended; Panel Denies Reconsideration

ACOEM Guidelines Apply Only to Acute Injuries, Not to Chronic Disability

[*Hamilton v. State Comp. Ins. Fund*, STK 189211, Sept. 16, 2004, Order Denying Reconsideration]

A Board panel has denied reconsideration of a trial judge's award of medical treatment that was alleged to be contrary to the American College of Occupational and Environmental Medicine's Occupational Medicine Practice Guidelines. The applicant's condition was chronic, the trial judge said, and the ACOEM guidelines apply only to the treatment of acute injuries. The requirement that medical evidence meet the same scientific standards as the ACOEM guidelines applies only to evidence offered to rebut the presumption of their correctness.

Relevant Facts and Proceedings

Applicant Lisa Hamilton sustained multiple injuries in the course of her employment by Goodwill Industries on February 13, 2003. Defendant State Compensation Insurance Fund, the employer's insurer, accepted liability for the claim and provided benefits. About one year after the injury, applicant's treating physicians recommended that she be provided membership in a gymnasium for therapy.

Although the gym membership had been recommended in several medical reports, SCIF declined to approve it. Applicant sought a hearing on the issue, which was held before Workers' Compensation Administrative Law Judge Alvin R. Webber on June 9, 2004. SCIF contended that the gym membership was not set forth in the American College of Occupational and Environmental Medicine's Occupational Medicine Practice Guidelines.

On July 12, the WCJ awarded the gym membership. In his opinion on decision he wrote:

No analysis is necessary regarding the question of whether the ACOEM guidelines and the presumption of correctness that attaches thereto [have] been rebutted as the ACOEM guidelines themselves, in the opinion of this WCJ, clearly provide for applicability only during the first 90 days following the industrial injury. Acknowledging that the precise interpretation of the "acute injury" reference made in the ACOEM guidelines is as yet unsettled, this is how this WCJ so interprets the guidelines in question. As today's hearing is obviously more than 90 days post-injury, the interpretation set forth above can only allow for a finding that the ACOEM guidelines are no longer applicable, and the guidelines are the only basis for the denial of care in question. The opinions recommending the gym membership are multiple and substantial, and based thereon an award of care will issue.

Defendant petitioned for reconsideration, contending that (1) applicant had the burden of proving the necessity for the treatment by a preponderance of the scientific medical evidence, (2) this evidence must meet the same scientific standards as the ACOEM guidelines, and (3) applicant had not sustained that burden.

WCJ Report and Panel Decision

In his report on reconsideration, WCJ Webber quoted his opinion on decision and iterated that the ACOEM guidelines expressly apply to the treatment of acute injuries. Having occurred over 90 days previously, applicant's injury was no longer acute. *Labor Code §4604.5* requires scientific medical evidence to rebut the presumption that the ACOEM guidelines are correct on the issue of extent and scope of medical treatment. Here, however, the guidelines are inapplicable according to the terms of the

REPORTER SEEKS WCAB DECISIONS FROM READERS

Readers are urged to send the *Reporter* a copy of any WCAB panel decision that is believed to be of interest to the workers' compensation community. A copy of the petition for reconsideration, the answer to the petition, and the report and recommendation on reconsideration should also be sent if important to an understanding of the case. The address is CWCR, P.O. Box 975, Berkeley, CA 94701.

Here, . . . the guidelines are inapplicable according to the terms of the guidelines themselves. Scientific evidence is required only when seeking to rebut an ACOEM standard.

guidelines themselves. The scientific evidence is required only when seeking to rebut an ACOEM standard. Since there was nothing to rebut, the issue did not exist.

A panel of Commissioners O'Brien and Brass, with Commissioner Murray concurring but not signing, adopted the WCJ's reasoning and summarily denied reconsideration.

Editor's Note: A week previously, a panel of Commissioners O'Brien and Murray and Chairman Rabine had denied reconsideration in a similar case decided by WCJ Webber. Taylor v. State Comp. Ins. Fund, STK 183276, Sept. 10, 2004 (Order Denying Reconsideration). In Taylor, which involved a 2002 low back injury, SCIF made the additional argument that the ACOEM guidelines applied to treatment over three months after the injury. In response to that argument, WCJ Webber quoted the second paragraph on page 287 of the guidelines as follows:

Recommendations on assessing and treating adults with potentially work-related low back problems (i.e., activity limitations due to symptoms in the low back of less than three months duration) are presented in this clinical practice guideline.

The panel agreed that this language did not allow an interpretation other than that the guidelines apply only to injuries of fewer than three months' duration.

The decisions in Hamilton and Taylor will come as no surprise to readers of The Bulletin of The California Society of Industrial Medicine and Surgery. In Brakensiek, Some Thoughts on Medical Utilization and Treatment Guidelines, CSIMS Bulletin, Vol. 25, No. 1, p. 1, the author said at page ten that the first and second editions of the ACOEM guidelines were focused primarily on acute and subacute injuries. Acute is defined as "around the time of an injury." Chronic means beyond either the period of tissue recovery or some agreed period, such as

three months. Subacute is the period between acute and chronic.

Brakensiek explained that roughly 90 percent of medical costs in workers' compensation cases are incurred for chronic injuries for which the ACOEM guidelines are largely inapplicable. He added, however, that insurance industry representatives claimed that the ACOEM guidelines cover two-thirds of all workers' compensation treatment. If that is industry's position, it explains the argument made by SCIF in Taylor and suggests that litigation of the issue is not likely to end with WCJ Webber's decisions.

In a subsequent article, Feinberg, Surviving U.R.—Part 2, CSIMS Bulletin, Vol. 25, No. 4, p. 1, Dr. Steven Feinberg provides advice to PTPs on how to avert and deal with noncertification of requested tests and treatment by utilization review physicians. He suggests that a collegial peer-to-peer discussion with the review physician will frequently resolve questions about properly justified requests. He warns, however, that

if the claims examiner and the UR physician are not going to listen to reasonable and cogent arguments in favor of [the] recommendation, there is not much [the PTP] can do short of referring the issue to the applicant attorney.

It can be safely predicted that utilization review will be a continuing source of litigation.

WCJ Holds CIGA Not Liable for Sanctions Imposed Against Insolvent Insurer

WCAB Rescinds; Sanction Award Is "Covered Claim"; No Applicable Exception

[Rasmussen v. Paula Ins. Co., SAC 234289, Aug. 20, 2004, Order Granting Reconsideration and Decision After Reconsideration]

A Board panel has rescinded a trial judge's finding that the California Insurance Guarantee Association is not liable for sanctions imposed against an insolvent insurer pursuant to *Labor Code* §5813 because payment of expenses under that section is not a "covered claim" provided in *Insurance Code* §1063.1. Although §1063.1(c)(8) provides that "covered claims" include neither amounts awarded as punitive or exemplary damages nor any amounts awarded pursuant to §5814 or §5814.5 because of delay by the insolvent insurer, the panel said, that paragraph does not exclude expenses ordered paid under §5813.

Relevant Facts and Proceedings

Applicant Betty Rasmussen was injured in the course of her employment by J & J Maintenance, Inc. During 2001, applicant's attorney and defendant Paula Insurance Company, the employer's insurer, agreed on a physician to examine applicant and prepare a comprehensive medical report resolving medical issues then in dispute. On September 24, 2001, Paula withdrew from the agreement.