

# 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?

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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

1 WORKERS' COMPENSATION APPEALS BOARD

2 STATE OF CALIFORNIA

3 Case No. SBR 0116131

4 DANIEL A. CLARK,

5 *Applicant,*

6 vs.

7  
8 COACHELLA VALLEY WATER DISTRICT,  
9 STATE COMPENSATION INSURANCE  
10 FUND,

11 *Defendant(s).*

OPINION AND DECISION  
AFTER RECONSIDERATION

RECEIVED

MAY 15 2006

RIVERSIDE LEGAL

SAN BERNARDINO LEGAL  
000121 MAY 10 2006

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

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

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

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

#### 6 BACKGROUND

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

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

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

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

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

26  
27 <sup>1</sup> 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.

1 At the present time, no documentation of medical necessity consistent with  
2 evidence-based medical guidelines has been received to justify the clinical  
3 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.*)

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

6 "Ankle-foot orthoses (AFO) are considered medically necessary [durable  
7 medical equipment] for ambulatory members with weakness or deformity  
8 of the foot and ankle, which require stabilization for medical reasons, and  
9 have the potential to benefit functionally. Members prescribed custom-  
10 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.)

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

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

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

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



1 reasonably required to cure and relieve the employee from the effects of his or her injury, in  
2 accordance with Section 4600." (Lab. Code §4604.5, subd. (c).) The words "cure and relieve" in  
3 §4604.5(c) have the same meaning as "cure or relieve" in §4600. (*Grom v. Shasta Wood Products*  
4 (2004) 69 Cal.Comp.Cases 1567, 1570-1572 (Significant Panel Decision).)

5 Pursuant to Labor Code section 4610, every employer is required to establish a utilization  
6 review process to "prospectively, retrospectively, or concurrently review and approve, modify,  
7 delay, or deny, based in whole or in part on medical necessity to cure and relieve, treatment  
8 recommendations by physicians, as defined in Section 3209.3, prior to, retrospectively, or  
9 concurrent with the provision of medical treatment services pursuant to Section 4600." (Lab. Code  
10 §4610, subds. (a), (b).) Prior to adoption of the schedule for medical treatment utilization under  
11 §5307.27, utilization review policies and procedures must ensure that decisions made are  
12 consistent with the ACOEM Guidelines. (Lab. Code §4610, subd. (c).) In addition, the criteria or  
13 guidelines used to determine whether to approve, modify, delay, or deny medical treatment must be  
14 consistent with the ACOEM Guidelines (Lab.Code §4610, subd. (f)(2).)

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

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

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

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

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

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

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

17 "We do not disagree that the amendments depart substantially from prior  
18 legislation on the subject. However, whether a statute is procedural or  
19 substantive does not depend on the degree it changes prior law. The test is  
20 whether the statute imposes a new or additional liability or affects existing  
21 vested or contractual rights on the one hand or merely changes the manner  
22 in which established rights or liabilities are invoked in the future. Thus, a  
23 procedural statute may be applied to pending cases even if the event  
24 underlying the cause of action occurred before the statute took effect.  
25 [Citations.] As our Supreme Court explained more than 50 years ago:  
26 '[P]rocedural statutes may become operative only when and if the  
27 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.)

1 Enactment of §4610 did not impose new or additional liability or affect existing vested or  
2 contractual rights. An employee's right to treatment that cures or relieves the effects of his or her  
3 injury remains intact. Applicant's original medical treatment award and the June 28, 2004 order  
4 remain vital. Defendant's liability is unchanged; it must provide treatment reasonably required to  
5 cure or relieve the effects of applicant's industrial injury. What has changed is that a new  
6 procedure has been added to help determine whether requested treatment is reasonably required.  
7 The new statute is procedural because it addresses how the existing right to medical treatment will  
8 be exercised and reviewed. Like the statutes in *Pebworth* and *Silva*, it becomes operative only  
9 when it is invoked and, thus, it is prospective. Defendant sought utilization review of treatment in  
10 2005, after the effective date of §4610. There is no retroactive effect and, therefore, no concern  
11 about whether the Legislature intended the statute to operate retroactively.

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

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

1 for the reasonableness and necessity of an AFO for treatment of applicant's ankle. The Guidelines  
2 state, at page 107, "Successful pain management hinges on appreciating the dynamics of each  
3 patient's case and on proactively managing factors that might delay return to work or restoration of  
4 function." Similarly, at page 117, the Guidelines state, "Pain management focuses on functional  
5 restoration. Because return to function is essential to a return to health, occupational health  
6 professionals are concerned with return to function." In a discussion of the advantage of  
7 maintaining normal activity, at page 115, we find, "Mobilization, even in the face of some residual  
8 pain or stiffness, should be encouraged, and it should be increased as the healing process  
9 progresses." Thus, if we consider the goals expressed in the ACOEM Guidelines of functional  
10 restoration, return to work, mobilization, and maximizing activities, it appears that the Guidelines  
11 could be read to support Dr. McClure's prescription, which was intended to allow applicant to  
12 walk without pain and, therefore, to work. Essentially, however, the ACOEM Guidelines are silent  
13 as to AFOs and, therefore, do not preclude their use. This silence is not consistent with the Aetna  
14 Policy's detailed criteria.

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

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

26 \_\_\_\_\_  
27 <sup>2</sup> 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.

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

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

14 Finally, we note that, just because defendant had the legal right to seek utilization review,  
15 "there is nothing in section 4610 that requires an employer to use the utilization review process in  
16 every case." (*Sandhagen v. Cox & Cox Construction, Inc.* (2005) 70 Cal.Comp.Cases 208, 212  
17 (Appeals Board en banc).) ("*Sandhagen II*") As explained in *Sandhagen II*, there are  
18 circumstances involving minor treatment issues in which utilization review would result in undue  
19 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

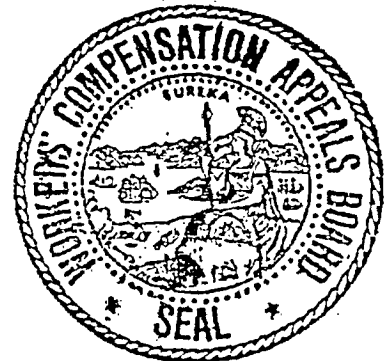
*[Handwritten Signature]*

WILLIAM K. O'BRIEN

I CONCUR,

*[Handwritten Signature]*

MERLE C. RABINE



*[Handwritten Signature]*

RONNIE G. CAPLANE

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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CB/bea

*[Handwritten Signature]*

CLARK, Daniel A.