

INTER-OFFICE MEMORANDUM

TO: ALL ATTORNEYS

FROM: W. JOSEPH TRUCE

DATE: October 10, 2005

RE: DO ACOEM GUIDELINES APPLY TO CHRONIC
CONDITIONS?

As of January 1, 2004, the State Legislature decreed that all medical treatment in Workers' Compensation cases would be subject to review by medical protocols, and that until the Administrative Director issued regulations with regards to Utilization Review, the medical protocols of the American College of Occupational and Environmental Medicine (ACOEM) would apply.

As you might guess, this legislative limitation on unbridled medical treatment was not met with tears from the applicant's attorneys and their doctors.

Therefore, applicant's attorneys have lost no time in mounting legal challenges to the ACOEM Guidelines and, in a WCAB panel decision entitled Hamilton v. State Comp Insurance Fund (2004), 32 CWCR 250, argued that the ACOEM Guidelines do not apply to a condition that is chronic.

In Hamilton, the Workers' Compensation judge found that the Utilization Review report was not persuasive evidence "because applicant's condition was no longer acute. . . ." In a decision after reconsideration, a panel of the Appeals Board affirmed the decision of the Workers' Compensation Judge (WCJ) and, as the case has now been reported in the *California Workers' Compensation Reporter (CWCR)*, the case is now citable.

Ever since Hamilton, applicant's attorneys have been arguing that chronic conditions are exempt from the medical protocols of the American College of Occupational and Environmental Medicine. We have always felt that this argument was somewhat absurd as almost all cases making their way into the Workers' Compensation system deal with conditions that are no longer acute and/or subacute and are now chronic. A chronic condition can be defined as ongoing subjective complaints for more than a period of sixty days.

We have recently received in our Long Beach office an excellent decision after reconsideration by another panel of the Appeals Board entitled Robin Uthus v. Mission Hospital designated AHM 0119905; AHM 0119906; AHM 0126822.

In Uthus, the applicant's primary treating doctor recommended a two-level disk replacement surgery. On behalf of our client, this procedure was denied by way of Utilization Review and we

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also requested a second opinion by a state panel QME pursuant to the new procedures in Labor Code 4062.

Both Utilization Review and the state panel QME recommended against the surgery as proposed by the applicant's treating physician.

However, the Workers' Compensation judge awarded the applicant medical treatment in the form of the surgical procedure as recommended by the applicant's primary treating physician.

On reconsideration, we argued as follows:

1. That the WCJ "should have followed the opinion of Dr. Mudiyam, a neutral panel Qualified Medical Examiner, who was selected by the Administrative Director through the Labor Code Section 4062(b) second-opinion process _____ surgery;"
2. That disk-replacement surgery has not been approved by the United States Food and Drug Administration;
3. That the medical report of Dr. Mudiyam is more persuasive than that of the primary treating physician's.

In his opposition to our Petition for Reconsideration, applicant's attorney argued, in part, that the Utilization Review process did not apply as the applicant's condition was chronic and the ACOEM protocols do not apply to a chronic condition. In response, the Board stated in relevant part as follows:

"The opinion in *Hamilton, supra*, does not represent the overall consensus of the Appeals Board, and there has not yet been a published decision concluding that the guidelines do not apply to the treatment of a chronic condition"

In overturning the decision of the Workers' Compensation judge, the Board held that the opinion of the state panel QME was more persuasive than that of the applicant's primary treating physician.

The *Uthus* case can be cited as evidence that the *Hamilton* case does not represent a consensus of the Appeals Board, and whether or not the ACOEM protocols apply to a chronic condition is still an open question.¹

The *Uthus* case can entered into evidence pursuant to Labor Code Section 5703(g) which provides in relevant part as follows: "The Appeals Board may receive as evidence . . . prior decisions of the

¹The full text of the *Robin Uthus* is attached.

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Appeals Board upon similar issues”

WJT/jrh/ib

1 WORKERS' COMPENSATION APPEALS BOARD

2 STATE OF CALIFORNIA

3
4 ROBIN UTHUS,

5 *Applicant,*

6 vs.

7 MISSION HOSPITAL; SEDGWICK CLAIMS
8 MANAGEMENT SERVICES,

9 *Defendants.*
10

Case No. AHM 0119905
AHM 0119906
AHM 0126822

11
12 OPINION AND ORDER
13 GRANTING RECONSIDERATION
14 AND DECISION AFTER
15 RECONSIDERATION
16

17 Defendant, Mission Hospital, by and through its insurer, Hartford Insurance, seeks
18 reconsideration of the Findings and Award, issued June 30, 2005, in which a workers'
19 compensation administrative law judge (WCJ) awarded applicant medical treatment in the form of
20 a surgical procedure, a two-level disc replacement, as recommended by her primary treating
21 physician, Dr. Alvin Yee.

22 Defendant contends the WCJ erred in determining that applicant is entitled to the two-level
23 disc replacement procedure. Defendant argues that it is an experimental procedure not approved by
24 the U.S. Food and Drug Administration for two-level surgery and advised against by the product's
25 manufacturer. Defendant contends that the WCJ should have followed the opinion of Dr.
26 Mudiyam, a neutral Panel Qualified Medical Examiner, who was selected by the Administrative
27 Director through the Labor Code section 4062(b) second opinion process for spinal surgery, who
advised against the procedure and recommended continued conservative treatment. Defendant
further argues that the WCJ's summary of evidence is in error in two respects and contends that the
report of Dr. Rick Delamarter should not have been admitted into evidence.

Applicant has filed an answer to the defendant's petition, and the WCJ has prepared a

1 Report and Recommendation on Petition for Reconsideration.

2 Following our review of the record, and for the reasons set forth below, we believe the
3 WCJ should have followed the opinion of Dr. Mudiyam, the Panel QME, and shall grant
4 reconsideration to amend the Findings and Award.

5 Background

6 Applicant, Robin Uthus, sustained an admitted injury to her back and neck on January 5,
7 2003, while employed as a nurse by Mission Hospital. Her claims for a second industrial injury on
8 December 11, 2003, and for an industrial cumulative trauma injury from January 5, 2003 through
9 March 1, 2004, have been denied by defendant.

10 Applicant filed a request for an expedited hearing for resolution of defendant's denial of her
11 request for authorization for spinal surgery, as recommended by Dr. Alvin Yee, her primary
12 treating physician.

13 According to the September 21, 2004 progress report of Dr. Yee, applicant was
14 complaining of constant moderate to severe pain in her lower back. She was receiving chiropractic
15 treatment, including ultrasound, myofascial release, interferential therapy, neuromuscular
16 reeducation/stretching exercises and work conditioning exercises. She has also received epidural
17 injections and facet blocks, without relief. She had been referred for opinions on her surgical
18 options. Dr. Propst recommended that she have a two-level fusion, while Dr. Palmer recommended
19 that she first undergo an IDET procedure with annuloplasty, with fusion as an option in the event
20 the IDET procedure failed. Dr. Yee indicated that authorization for the IDET was requested, but
21 that he also recommended a referral to Dr. Ergener for consideration of artificial disc replacement.

22 Dr. Ergener evaluated applicant on October 8, 2004. He reported that applicant's MRI
23 revealed changes at L4-5 and L5-S1, with narrowing and disk desiccation and mild foraminal
24 stenosis. He noted that applicant "is quite incapacitated and overwhelmed by this condition. Her
25 activities of daily living are significantly affected, as well as her quality of life. She is unable to
26 work as she used to. She is a motivated individual, but still cannot overcome this injury." While he
27 recommended continued conservative treatment, he found "a high likelihood of the need for

1 surgical intervention; however, this would be a major undertaking with two disks involved." He
2 indicated that fusion was the recommended procedure, but that applicant was apprehensive about
3 it. However, he noted that applicant was "quite optimistic" about disk replacement surgery. Dr.
4 Ergener stated that this procedure was not yet approved by the FDA, and would re-evaluate this
5 option with applicant after reviewing the details of the study, including the risks and benefits.
6 Applicant declined the fusion surgery and indicated that she would wait for 4 to 6 months for the
7 FDA approval.

8 Dr. Ergener re-evaluated applicant on February 1, 2005, and noted that she was
9 apprehensive about fusion surgery, but encouraged by the FDA approval of the disk replacement
10 device. However, applicant then chose not to pursue surgery due to Dr. Ergener's indication that
11 such replacement surgery was not being approved in the workers' compensation system.

12 Applicant was examined by Dr. Propst on March 10, 2005, and indicated that she was ready
13 to undergo surgery. "She feels her symptoms are intolerable and wants to move forward with
14 surgery. She has had an extensive nonsurgical treatment program. We have had a long discussion
15 regarding artificial disc replacement today and this is the surgery she wants. She understands two
16 level ADR is an 'off label' application. Her symptoms are so severe she is unable to work."

17 In response to Dr. Propst's report, Dr. Yee stated in a March 8, 2005 progress report: "I also
18 concur with Dr. Propst's recommendation to proceed with the surgery, an artificial disc
19 replacement at two level, and I am now formally requesting authorization of this surgery on behalf
20 of this patient."

21 Defendant objected to Dr. Propst's recommendation for disk replacement surgery and
22 referred it to Dr. Matian, the Medical Director of Sedgwick CMS, defendant's third party
23 administrator, for Utilization Review. Dr. Matian denied authorization for this procedure. He
24 indicated that the procedure was considered experimental under the American College of
25 Occupational and Environmental Medicine ("ACOEM") Guidelines, noting the FDA's approval
26 was only for single level disk replacement, and that the device manufacturer's literature indicated
27 that the replacement device was not intended to treat patients with disk disease at more than one

1 level.

2 Applicant objected to defendant's Utilization Review denial on March 24, 2005. In the
3 absence of agreement upon an Agreed Medical Examiner, Dr. Ram Mudiyam was selected by the
4 Administrative Director as the Spinal Surgery Second Opinion Physician, pursuant to Section
5 4062(b).

6 Dr. Mudiyam issued his report on May 20, 2005. He obtained a history of applicant's
7 injury, her long term conservative treatment and her current symptoms, which was consistent with
8 the medical reports in evidence. His review of applicant's x-ray showed mild degenerative disc
9 disease, and her MRI scans from 2003 and 2005 showed "mild disc degeneration with slight loss of
10 hydration. Although the disc height appears to be well preserved and there is still reasonably good
11 hydration in both discs as noted on the MRI scan. Additionally, the MRI scan was read by the
12 radiologist as showing mild disc desiccation and possibly very mild loss of disc height." He then
13 recommended against proceeding with the disc replacement surgery, stating:

14 "Based on the history, physical findings and review of her MRIs
15 from 2003 and 2005, it appears that the patient's degenerative
16 condition in the lumbosacral spine is mild. The desiccation and loss
17 of disc height are mild and she does not have significant
18 radiculopathy in the lower extremities. In my opinion, I do not feel
19 that the patient is a candidate for either fusion or disc replacement at
20 this time, notwithstanding the positive CT discogram. I do not feel
21 that there is sufficient morphological change to warrant a major
22 surgical procedure, such as a fusion or disc replacement. The patient
23 is aware that the disc replacements have only been approved for
24 single-level by the F.D.A. Surgeons have performed 2-level disc
25 replacements as an off-label procedure in selective cases in the U.S.
26 and in Europe. Although the ideal indication for a Charite disc
27 replacement is a single-level, L4-5 or L5-S1, pathology. There may
be select situations where the patient has significant 2-level
pathology that may necessitate a disc replacement at both levels. In
general, tall discs that are reasonably well hydrated are not
considered good candidates for either fusion or disc replacement
surgery.

"I realize that the patient has had prolonged conservative and
minimally invasive measures to alleviate her symptoms. However, in
my opinion, failure to respond to these measures alone is not an

1 indication to proceed with fusion or disc replacement in the absence
2 of significant pathology.

3 "I would therefore respectfully disagree with the previous treating
4 physicians' opinions regarding the patient's candidacy for fusion or
5 disc replacement surgery. With regards to treatment alternatives at
6 this time, my recommendation would be for her to continue with
7 nonsurgical management with judicious use of analgesics, anti-
inflammatory and exercise program as well as job modification. I
feel that the risks and uncertainties with regards to outcome from
either fusion or disc replacement surgery would outweigh any
benefits."

8 Applicant obtained an evaluation at her own expense on May 25, 2005 at the Spine Institute
9 at St. John's Health Center. The report of the evaluation was unsigned. The signature line states:
10 "Kevin Robertson, P.A. for Dr. Rick B. Delamarter." The report includes a history of the injury, a
11 physical examination, current x-rays and a review of her MRIs and CT scan. Applicant was
12 considered to be "an excellent candidate for the artificial disc replacement at the L4-L5 and L5-S1
13 as she has failed conservative therapies and continues to require pain medications."

14 At the expedited hearing on June 13, 2005, it was revealed that Dr. Yee referred applicant
15 to Dr. Delamarter, and that applicant had not served the report on defendant prior to the hearing.
16 The WCJ left the record open for defendant to obtain a rebuttal report from Dr. Mudiyam. Dr.
17 Mudiyam reviewed the report on June 17, 2005, and found no reason to alter his previously
18 expressed opinion.¹ He also stated that "in the absence of significant disc pathology, undue
19 reliance on discography would not be clinically appropriate in my opinion. I therefore feel that the
20 patient should pursue conservative, non-surgical care until such a time that the further deterioration
21 of her disc status can be demonstrated by imaging studies."

22 At the hearing, applicant testified that Dr. Delamarter told her that she was a very good
23 candidate for the two level disc replacement surgery and said that he had done 300 of the
24 procedures. She testified that she researched the issue and she believes that the disc replacement
25 procedure is a better option than fusion surgery.

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27 ¹ Dr. Mudiyam's rebuttal report was submitted prior to the WCJ's Findings and Award, but was not ordered admitted
into evidence. We shall order the report entered into the record.

1 The WCJ awarded applicant the two level disc replacement surgery. In his Opinion on
2 Decision, the WCJ indicated that in reaching this determination he relied upon applicant's 20 years
3 of experience as a nurse, her own research into the disc replacement procedure and her belief that
4 this procedure is the most efficacious means of enabling her to return to work. He also noted that
5 applicant was aware of the risks inherent in the procedure and that it is not approved by the FDA.
6 The WCJ further indicated that Dr. Mudiyam's "wait, relieve and see" recommendation was less
7 helpful to applicant's condition. The WCJ also found the utilization review report was not
8 persuasive evidence because applicant's condition was no longer acute, and thus under *Hamilton v.*
9 *State Comp. Ins. Fund* (2004) 32 CWCR 250, the UR rules do not apply.

10 Discussion

11 The issue presented is whether applicant is entitled to a form of medical treatment which is
12 not approved by the FDA to treat her condition and which was found to be unnecessary by the
13 neutral physician selected by the Administrative Director pursuant to Section 4062(b) to offer a
14 second opinion on the disputed surgical recommendation.

15 Defendant argues first that the basis for the Utilization Review denial was valid and
16 justifies a reversal of the WCJ. Defendant notes that under the ACOEM Guidelines, the procedure
17 is experimental and falls outside the scope of the FDA's approval for a single level disc
18 replacement procedure. Additionally, the manufacturer of the artificial disc expressly warns that its
19 product was not intended for use for patients with more than a single degenerative disc. Defendant
20 contends that while applicant may desire an "off-label" procedure, defendant should not be
21 required to subsidize applicant's experimental treatment where defendant bears the risk of life time
22 medical payments and increased permanent disability.

23 In response, applicant asserts that the WCJ was correct in holding the ACOEM Guidelines
24 do not apply because her condition is now chronic, citing a panel opinion published in California
25 Workers' Compensation Reporter. The opinion in *Hamilton, supra*, does not represent the overall
26 consensus of the Appeals Board, and there has not yet been a published decision concluding that
27 the Guidelines do not apply to the treatment of chronic conditions. In any event, our determination

1 in this matter does not turn upon this issue.

2 Second, defendant argues that the opinion of Dr. Mudiyam should have been accorded
3 greater weight than that accorded to a Qualified Medical Evaluator. Rather, defendant asserts that
4 his opinion should be given consideration equivalent to the opinion of an Agreed Medical
5 Examiner. Defendant notes that had Dr. Mudiyam recommended the surgical treatment, it would
6 have been required to authorize it without any further recourse. Defendant further argues that the
7 WCJ should not be free to disregard the opinion of a neutral QME which is adverse to applicant
8 without good cause, since an opinion favoring applicant's surgical request is final and cannot be
9 challenged.

10 Applicant questions whether the process by which Dr. Mudiyam's opinion was obtained is
11 "even germane to a case with a date of injury in 2003." This new evaluation procedure was
12 implemented by reform legislation adopted in 2003, SB 228. As a procedural change which does
13 not affect the substantive rights of the parties, it applies to any request for spinal surgery made after
14 the effective date of the implementing legislation, which was prior to the 2005 request by
15 applicant's primary treating physician. (See *Kleeman v. Workers' Comp. Appeals Bd.* (2005) 127
16 Cal.App.4th 274 [70 Cal.Comp.Cases 133, 140 n. 24.] Therefore, Dr. Mudiyam's opinion was
17 appropriately obtained and is pertinent to the matter at hand.

18 Finally, defendant challenges the admission into evidence of the May 25, 2005 unsigned
19 report of Dr. Delamarter, which was prepared by a physician's assistant and not the evaluating
20 physician. Defendant was not served until the day of the hearing and was subsequently permitted
21 the opportunity to obtain a rebuttal report from Dr. Mudiyam. However, defendant argues that the
22 inadmissibility of the report was not cured. The report was not a medical-legal report obtained
23 pursuant to Section 4062, nor was it a secondary treating physician's report incorporated by the
24 primary treating physician into his own report.

25 Applicant argues that Dr. Delamarter's report is not only admissible, but any defect is cured
26 by a subsequent narrative report issued on June 21, 2005, which applicant asserts was filed at the
27 request of the WCJ. There is no record of a request for, let alone an order admitting, a

1 supplemental report by Dr. Delamarter. The Minutes of Hearing from the expedited hearing on
2 June 13, 2005 provided for the admission of a rebuttal report by Dr. Mudiyam to counter
3 applicant's surprise service of the May 25, 2005 report from Dr. Delamarter. There is no reference
4 to a request for a supplemental report by Dr. Delamarter in the Minutes of Hearing, and the WCJ's
5 Report and Recommendation on Petition for Reconsideration fails to corroborate applicant's
6 assertion.

7 We need not resolve the issue of the evidentiary weight to be assigned to a report obtained
8 pursuant to Section 4062(b). We believe that the medical evidence in this record does not justify
9 the WCJ's determination that the surgical procedure is reasonable and necessary at this time. It is
10 well settled that the Appeals Board has the power to choose from among conflicting medical
11 reports, those which are deemed most appropriate (*Jones v. Workers' Comp. Appeals Bd.* (1968) 86
12 Cal.2d 476), and the relevant and considered opinion of one doctor may constitute substantial
13 evidence even though inconsistent with other reports in the record. (*Place v. Workers' Comp.*
14 *Appeals Bd.* (1970) 3 Cal.3d 372, 378 [35 Cal.Comp.Cases 525]; *Smith v. Workers' Comp. Appeals*
15 *Bd.* (1969) 71 Cal.2d 588, 592 [34 Cal.Comp.Cases 424]; *Patterson v. Workers' Comp. Appeals*
16 *Bd.* (1975) 53 Cal.App.3d 916, 921 [40 Cal.Comp.Cases 799].)

17 We are persuaded that Dr. Mudiyam's opinion constitutes the most persuasive opinion on
18 the question of applicant's entitlement to the surgical procedure. Dr. Mudiyam's conclusion is
19 based upon his evaluation of the objective evidence of applicant's condition, the relatively mild
20 state of her discs at L4-5 and L5-S1. "In general, tall discs that are reasonably well hydrated are not
21 considered good candidates for either fusion or disc replacement surgery." He has provided an
22 alternative solution, specifically conservative care prior to a surgery decision, which appears to be
23 justified particularly in view of the serious and questionable nature of the alternative surgery being
24 requested and recommended by the treating physician. Thus, in this particular case, and having
25 been given no reason to reject the panel QME's opinion, which is consistent with the utilization
26 review physician's opinion, the matter should initially be returned for a trial of conservative care,
27 with the applicant being allowed to re-raise the issue of the alternative surgery. We noted here that

1 there was a minimal amount of neurological symptomology to justify "extreme surgery," which
2 favors reliance upon the panel QME's opinion.

3 In contrast to the opinion of the neutral panel QME, applicant obtained a report from Dr.
4 Delamarter which does not comply with relevant requirements of WCAB Rule 10606, such as a
5 review of applicant's prior medical treatment or the results of the Utilization Review or the opinion
6 of the panel QME. The conclusion that applicant is an "excellent candidate" for the surgical
7 procedure is not substantial evidence to justify the WCJ's result.

8 Accordingly, we shall grant defendant's petition and reverse the determination that
9 applicant is entitled at this time to the medical treatment sought.

10 For the foregoing reasons,

11 **IT IS ORDERED** that the June 17, 2005 report by Dr. Mudiyam be entered into the
12 record.

13 **IT IS FURTHER ORDERED** that the July 20, 2005 Petition for Reconsideration be, and
14 hereby is, **GRANTED**, and as our Decision After Reconsideration, the June 30, 2005 Findings and
15 Award is **AMENDED** as follows:

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FINDINGS OF FACT

1. Applicant is in need of further medical treatment consistent with the recommendations of Dr. Ram Mudiyam.

AWARD

AWARD IS MADE in favor of applicant, Robin Uthus, as follows:

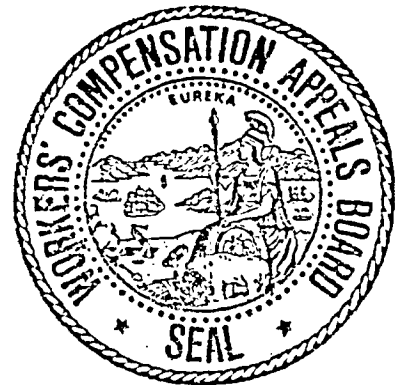
a) Applicant is awarded medical treatment consistent with the opinion of Dr. Ram Mudiyam.

WORKERS' COMPENSATION APPEALS BOARD

WILLIAM K. O'BRIEN

I CONCUR,

FRANK M. BRASS



JAMES C. CUNEO

DATED AND FILED IN SAN FRANCISCO, CALIFORNIA

SEP 16 2005

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SV/rrm

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WORKERS' COMPENSATION APPEALS BOARD

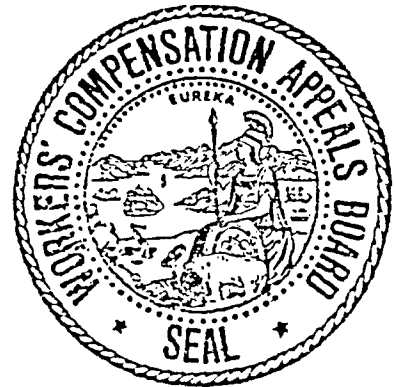
[Handwritten signature of William K. O'Brien]

WILLIAM K. O'BRIEN

I CONCUR,

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FRANK M. BRASS



[Handwritten signature of James C. Cuneo]

JAMES C. CUNEO

DATED AND FILED IN SAN FRANCISCO, CALIFORNIA

SEP 16 2005

SERVICE BY MAIL ON SAID DATE TO ALL PARTIES LISTED ON THE OFFICIAL ADDRESS RECORD, EXCEPT LIEN CLAIMANTS.

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