

Law & Order



It's the Law

Calif 5th: ACOEM Applies For 1983 Injury Treatment (9/25/07)

A California appellate court agreed with the Workers' Compensation Appeals Board that a stipulated agreement from 1985 doesn't necessarily allow continuous chiropractic care without WCAB oversight in 2006.

In the unpublished decision, *Sutton v. WCAB*, F053104, 09/21/2007, the 5th District Court of Appeal found that current medical guidelines outlined in Labor Code Section 4600 should be considered to determine the reasonableness of the applicant's request for medical treatment, even if the injury happened before Senate Bill 899, the reform bill signed into law April 19, 2004.

William Sutton sustained a work-related injury to his back, elbow, right hip, and right shoulder in 1983. In 1985, Sutton entered into a Stipulations with Request for Award with his employer Schwartz & Lindheim Inc. that assigned a permanent disability rating of 19%.

Part of the stipulated agreement included the following paragraph: "There is/is not/may be need for medical treatment to cure or relieve from the effects of said injury" with the words "may be" circled. Directly underneath was handwritten: "for the back and hip and right shoulder only, and upon reasonable demand." A workers' compensation administrative law judge approved the agreement.

In July 2006, Sutton filed a Declaration of Readiness to Proceed because Schwartz & Lindheim refused to provide Sutton with chiropractic services. At a hearing before a WCJ, Sutton explained the chiropractic visits allow him to function and work and that he "can't get by unless he has one or two treatments a week if he's had a flare-up." Sutton estimated he had about a dozen flare-ups over the past year.

The WCJ issued an interim award of continuing care for six months.

Schwartz & Lindheim petitioned the WCAB for reconsideration, contending Sutton never received an award for future medical care because the 1985 stipulation provided that additional medical care "may be" provided and then only "upon reasonable demand." Schwartz & Lindheim claimed its medical evidence demonstrated Sutton did not require continuing chiropractic care, and moreover, that any such care is limited to 24 visits per year pursuant to the American College of Occupational and Environmental Medicine's Occupational Medicine (ACOEM) Practice Guidelines.

In May 2007, the WCAB granted reconsideration and issued an opinion explaining

Sutton's 1985 award was a "precautionary award" for further medical treatment. The WCAB found the precautionary award was limited to Sutton's back and upon Sutton making "a demand in advance of his need for treatment." The WCAB rescinded the WCJ's interim award ordering six months of chiropractic treatment and said "such treatment must be based upon the ACOEM guidelines."

Sutton appealed that decision. He asked the court to "effectively mandate Schwartz & Lindheim to provide any chiropractic care Sutton seeks without WCAB oversight, the justices said in the ruling.

Sutton claimed that because his 1985 award issued before the ACOEM Guidelines were adopted by the Legislature as part of the 2004 workers' compensation reform, the guidelines have no bearing on his medical treatment.

The court found that Sutton's treatment must be based upon the ACOEM guidelines.

"Section 4604.5, subdivision (c) could not be more clear. Until the administrative director develops a new medical treatment utilization review schedule, the ACOEM Guidelines presumptively establish reasonable medical treatment, 'regardless of the date of injury,'" the court wrote.

"Sutton's reliance on a standard of care reasonable in 1985 at the time the parties adopted the stipulated award does not make the standard reasonable today, especially where the Legislature has mandated otherwise. ... We do not find any grounds to disturb the WCAB's decision remanding the matter for further development of the record and instructing the WCJ to consider the presumptively correct ACOEM Guidelines."

"Like the WCAB, we disagree with Sutton's (overly broad) interpretation of his stipulated award," the appeals court wrote.

In the News

WCAB Further Defines "Sudden and Extraordinary Event (9/24/07)

A fall from construction scaffolding caused by a breaking board is both a "sudden and extraordinary" event qualifying the injured worker for a psychological award under the six-month rule, a California Workers' Compensation Appeals Board ruled.

"Applicant's falling as a result of a broken plank was certainly without previous notice, unexpected, and unforeseen," Commissioner Frank Brass wrote, joined by Commissioners Ronnie Caplane and Alfonso Moresi.

The panel relied on the Webster's Dictionary (3rd International) definitions of the terms "sudden" and "extraordinary," as did the appellate court in the 2006 *Mattea* case.

The WCAB panel reversed the decision of a Los Angeles workers' compensation judge to deny a permanent disability psyche award to plasterer Michael Chapman. The 30-year tradesman was granted a 71% permanent disability for his physical injuries.

Chapman's attorney, Jamey Teitell, argued that the trial court erred when it decided Chapman's psychiatric injury wasn't caused by a "sudden and extraordinary" employment condition. Chapman testified at trial that in 30 years in his trade he'd never heard of a fall caused by a snapped plank.

Employers run the risk of losing on a six-month rule case if they fail to put on credible evidence showing that a workplace event wasn't "sudden and extraordinary," according

to the panel's decision.

The WCAB panel noted the employer showed no evidence to rebut Chapman's assertion that the plank snapping qualified as an exception to the six-month employment rule for collecting a psyche award.

Attorney Teitell said the decision was encouraging for the applicants' bar and instructive for the defense side.

"This case gives new hope to applicants who are fighting what some consider to be a losing battle against the appellate system and that we can, in our psyche cases, find a way around the six-month rule, both procedurally and factually," he said Friday.

Teitell said it was noteworthy that Commissioner Moresi, a defense attorney and the swing vote on the *Pendergrass* and *Bagione* cases earlier this year, concurred with the other two commissioners.

The case was *Chapman v. Curran's Custom Plastering*, LAO 0778727, 09/18/2007.

In the Making

Chamber Urges Governor to Sign AB 338 (9/18/07)

The California Chamber of Commerce on Monday called on Gov. Arnold Schwarzenegger to sign a temporary disability benefits bill that the chamber originally labeled a "job killer."

The chamber, which negotiated changes in Assembly Bill 338 by Joe Coto, D-San Jose, asked its members to contact the governor's office and ask him to sign the bill. The measure would extend the window for collecting temporary disability from a single accident to five years, but keep the 104-week cap on total benefits.

To appease business interests, Coto stripped away a provision from AB 338 that would have paid injured workers 156 weeks of temporary disability benefits. The chamber placed the earlier version of Coto's bill on its "job killer" list.

The chamber said Monday it believes the new version of AB 338 represents a "balanced approach to resolving a real and tangible problem in the **Workers' Compensation** system." The measure easily passed both chambers of the Legislature earlier this month and is on its way to the governor's desk.

Both employers and labor advocates sought a fix to the 104-week cap on temporary disability benefits put into law by SB 899 in 2004. The problem is that workers who return to work but have to take time off later for further treatment still lose their right to temporary disability benefits after 104 weeks.

The **Workers' Compensation** Appeals Board added another wrinkle in June when it ruled en banc in *Hawkins v. State Fund* that the 104 weeks of temporary disability begins with the first payment of benefit, not the date of injury. That means insurers or employers that contest a claim and don't immediately begin payment of temporary disability benefits after an industrial accident could end up paying more than 104 weeks.

Coto's amended bill would start the eligibility clock at the date of injury instead of the date of first payment.

"The solution under AB 338 promotes return to work in an equitable way by allowing 104 weeks of aggregate benefits within five years of the date of injury," the chamber said Monday.

The Association of California Insurance Companies also changed its position from opposed to neutral after the bill was amended late in the session.

Coto's bill gives injured workers adequate time to obtain needed treatment, including surgery if necessary, and return to work after recovery, the chamber said. The approach maintains the 104-week cap that has proved effective in improving returns to work, the chamber said.

Mark Rakich, the chief consultant to the Assembly Insurance Committee, said that negotiations on Coto's bill heated up in late August after the summer recess. The chamber, manufacturers and public-sector employers participated in the discussions, he said.

"We believe it's a reasonable, signable bill. We believe the governor will come to recognize that," Rakich said.

The governor's office was kept informed about the negotiations, but gave no assurances Schwarzenegger would sign the bill the Legislature approved last week, Rakich said.

Schwarzenegger told business leaders in May that he wouldn't sign any "rollback" bills that eroded the cost-saving benefits of SB 899.

Rakich said the negotiations between employers and labor involved discussions about trade-offs that might have increased benefits to injured workers, but that the sides couldn't agree.