

Dear Subscriber,

Court Declines to Apply 11% Apportionment to Pre-Existing Disability in Spite of Medical Support

The Fifth District Court of Appeal, in *E & J Gallo Winery v. WCAB (Rubio)* [cite pending], an unpublished opinion, held that a defendant failed to meet their burden of proof in establishing apportionment to a pre-existing disability.

In *Rubio*, the applicant sustained an admitted left shoulder injury. The matter was ultimately submitted for trial determination without testimony based only on three Agreed Medical Evaluation reports from the orthopedic AME authored in 2007, and a QME report relating to a prior back injury authored in 2000.

In his opinion, the WCJ held that the defendant had failed to meet their burden of proof in establishing apportionment. Based thereon, the WCJ denied any finding of apportionment and Defendant appealed.

In denying the defendant's petition for writ of review, the Fifth District Court of Appeal held that the defendant had failed to prove that the applicant had any prior disability or that there was an award for same. The Court continued, noting that even if the applicant did have the pre-existing disability, the defendant had failed to prove that any of the pre-existing spine disability overlapped with the current left shoulder disability.

Increased Medical and Medical-Legal Mileage Reimbursement Rate Announced

On July 8, 2008, the DWC issued a notice increasing the amount to be reimbursed for applicant travel expenses from 50.5 cents per mile to 58.5 cents per mile for all medical and medical-legal travel. The DWC Bulletin also confirms

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that the new rate of 58.5 cents per mile is effective for all medical and medical-legal travel occurring on or after July 1, 2008, regardless of date of injury.

The full text of the DWC Bulletin can be read below:

Bulletin No. 42-08 - July 8, 2008

Mileage rate for medical and medical-legal travel expenses increased July 1, 2008

The mileage rate for medical and medical-legal travel expenses increased to 58.5 cents per mile effective July 1, 2008. This rate must be paid for travel on or after July 1, 2008 regardless of the date of injury. Labor Code section 4600, in conjunction with Government Code section 19820 and the Department of Personnel Administration regulations, establishes the rate payable for mileage reimbursement for medical and medical-legal expenses and ties it to the Internal Revenue Service (IRS) published mileage reimbursement rate.

The mileage rate from Jan. 1, 2008 to June 30, 2008 was 50.5 cents per mile. The rate was 48.5 cents per mile in 2007 and was 44.5 cents per mile between July 1, 2006 and Dec. 31, 2006. Prior to that the rate had been 34 cents per mile since 2001. The updated mileage reimbursement form is posted on the DWC Web site at:
<http://www.dir.ca.gov/dwc/forms.html>.

First District Court of Appeal Holds that the 24 Treatment Limitation on Chiropractic Care is Constitutional in *Facundo-Guerrero v. WCAB*.

In a published decision, *Facundo-Guerrero v. WCAB*, (2008) [cite pending], the First District Court of Appeal has held that the 24 treatment limitation on chiropractic care enacted in 2003 and set forth in *Labor Code section 4604.5(d)* under *Senate Bill 228* is constitutional.

In *Facundo-Guerrero*, the applicant sought payment for some 76 treatment visits with a chiropractor after sustaining an industrial injury. When ongoing authorization for the chiropractic care was denied by the carrier, the applicant filed for an expedited hearing on the issue of entitlement to ongoing chiropractic care. After a final trial determination that the applicant could continue to see the chiropractor for purposes of managing the applicant's care, but no ongoing chiropractic treatment, the applicant filed a petition for reconsideration asserting, in part, that the limitation on

easy reference.

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chiropractic care was unconstitutional on both California and Federal grounds.

On the petition for Reconsideration, the WCAB adopted the trial decision and reaffirmed that the WCAB lacks the power to determine issues arising under the Constitution of the State of California or the Federal Constitution. Applicant filed a petition for writ of review.

In holding that the limit on chiropractic care was constitutional, the First District Court of Appeal conducted a thorough review of other California cases challenging the constitutionality of various measures enacted in the Labor Code. In doing so, the Court noted that the California Supreme Court has previously held that the legislative power granted under the Constitution is for the purpose of ensuring full and proper medical care, not unlimited care. On this basis, the legislature acted reasonably and properly under the constitution in limiting chiropractic care. The Court continued, finding that the applicants due process and equal protection arguments under the constitution were also without merit.

In sum, the First District Court of Appeal has upheld the constitutionality of the limitation on chiropractic care to 24-treatment visits. It is expected that this decision will be further appealed.

Again, we thank you for your interest in FS&K Work Comp News and look forward to keeping you informed on the Workers' Compensation issues that most affect you.

Sincerely,

The FSK Newsletter Team

Jason C. Hilfrink
(Chief Legal Editor)

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