

Analyzing Senate Bill 899: CSOMA, CAOMA Evaluate Impact of New Law

Editorial Staff

On April 19, California Governor Arnold Schwarzenegger signed into law Senate Bill 899, which introduced a series of reforms into the state's existing workers' compensation system. In the wake of the bill's passing, both the Council of Acupuncture and Oriental Medicine Associations (CAOMA) and the California State Oriental Medical Association (CSOMA) published brief reports detailing the impact of the bill on the acupuncture and Oriental medicine profession. *Acupuncture Today* has contacted both organizations and obtained permission to reprint their reports in this issue and on acupuncturetoday.com. The CAOMA analysis is written by Brian Fennen; the CSOMA analysis, by Connie Taylor.

Legislative Update

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Senate Bill 899, authored by Sen. Poochigan, and which "reforms" workers' compensation, was signed into law on Monday, April 19, by Gov. Arnold Schwarzenegger in Long Beach, and went into effect immediately.

SB 899 passed both houses on Friday, April 16, just in time to avoid the deadline for filing a statewide ballot initiative to reform workers' compensation. Fear of the initiative was used to coerce reluctant Democrats to vote in favor of SB 899. A statewide public vote on the anti-labor, pro-insurance workers' compensation initiative would have been determined by a high-dollar advertising campaign, rather than by reason. So, SB 899 was revised - behind closed doors - by a few people, resulting in a unique "compromise" that insurance companies, some employers and some physicians will like. Labor unions, employees and treating practitioners remain concerned.

The Assembly passed the bill 77-3, followed by a Senate vote of 33-3. Three senators and three assembly members voted against the bill. In the Assembly, Democrats Lori Hancock of Berkeley, Jackie Goldberg of Los Angeles and Hanna-Beth Jackson of Santa Barbara voted against the bill. In the Senate, Democrats Joseph Dunn of Garden Grove, Martha Escutia of Norwalk and Richard Alarcon of Van Nuys voted against SB 899.

The licensed acupuncturist profession, through the efforts of CAOMA and its supporters, managed to get its concerns noticed, and was minimally impacted ... for the time being. Acupuncture is not limited to 24 treatments, as was recommended by Sen. Jackie Speier. Acupuncturists were not removed from participation as WC "physicians" or as qualified medical evaluators, as some in our profession had feared. However, a worker's right to "pre-designate" a "personal acupuncturist" or "personal chiropractor" was taken away.

Last year's SB 228 (Alarcon) created our biggest problems by referencing the American College of Occupational and Environmental Medicine's (ACOEM) *Occupational Medicine Practice Guidelines*. SB 899 adds multiple references to these guidelines. The administrative director (AD) of the Division of Workers' Compensation will be required to adopt a new medical treatment utilization schedule, utilizing "evidence-based, peer-reviewed, nationally recognized standards of care" that "address, at a minimum, the frequency, duration, intensity, and appropriateness of all treatment procedures and modalities commonly performed in workers' compensation."

Since ACOEM is the only referenced set of practice guidelines being recognized under workers' compensation, we have begun to develop treatment guidelines for the application of acupuncture and Oriental medicine procedures to work-related injuries, which can then be referenced by the AD in the final treatment guidelines to be adopted by the end of this year.

The core components of SB 899 that are expected to reduce WC claims and premiums are: 1) repeated reference to the conservatively written ACOEM Occupational Medicine Practice Guidelines; 2) an increased burden of proof for the employee of a work-related injury; 3) proportionment of disabilities to employment and non-employment causation and other reductions in disability findings and payments; and 4) expansion of competition for workers' compensation insurance carriers by allowing employers to contract with private "medical provider networks," for which existing HMOs and PPOs may apply, and are likely to become dominant players.

Here, at the least, are the following specific sections of the California Labor Code that will impact our profession:

Section 139.2 remains intact, including acupuncturists as qualified medical evaluators.

Section 3209 remains intact, including acupuncturists as "physicians" within the workers' compensation system.

Section 4062.1 revises and streamlines QME appointment procedures for unrepresented employees, and makes it more difficult for employees to evade QME evaluations without "good cause."

Section 4062.2 revises and clarifies QME/AME procedures for attorney-represented employees.

Section 4062.3 revises and clarifies QME/AME procedures regarding medical records, communications and information.

Section 4600 references general medical evaluation and treatment guidelines for occupational injuries, which has already caused serious problems for acupuncturists due to SB 228.

Section 4600(b) states: "As used in this division and notwithstanding any other provision of law, medical treatment that is reasonably required to cure or relieve the injured worker from the effects of his or her injury means treatment that is based upon the guidelines adopted by the administrative director pursuant to Section 5307.27 or, prior to the adoption of those guidelines, the updated American College of Occupational and Environmental Medicine's Occupational Medicine Practice Guidelines."

Section 4600(c) still allows, after 30 days from the date the injury is reported, for

employees to be treated by a "physician [including an acupuncturist] of his or her own choice or at a facility of his or her own choice within a reasonable geographic area ... Unless the employer or the employer's insurer has established a medical provider network as provided for in Section 4616" (which most will likely do eventually).

Section 4600(d)(2)(A) limits predesignated physicians to licensed physicians and surgeons only, eliminating existing predesignation of chiropractors and acupuncturists.

Section 4604.5(d) limits injured employees to 24 chiropractic, 24 occupational therapy, and 24 physical therapy visits per industrial injury, but places no limits on acupuncture treatment. (Unfortunately, some claims adjusters have been known to categorize acupuncture as physical therapy, and this practice may increase.)

Section 4616 allows the establishment of "medical provider networks" which "shall include and adequate number and type of physicians, as described in Section 3209.3 [medical doctors, osteopaths, chiropractors, acupuncturists, etc.] or other providers, as described in Section 3209.5" (physical therapists, etc.).

Section 4616 defines acute, chronic and terminal conditions. It also repeatedly refers to the American College of Occupational and Environmental Medicine's *Occupational Medicine Practice Guidelines*.

Section 4616.4 allows injured employees to seek an independent medical review if they disagree with the third physician's diagnosis and/or treatment prescription. It requires the administrative director of the Division of Workers' Compensation to contract with individual physicians and/or independent medical review organizations to perform independent medical reviews (for the medical provider networks), and limits these "independent medical reviewers" to license physicians and surgeons only. HMOs and PPOs can qualify as an "independent medical review organization."

Other sections relate to disability evaluations, for which acupuncturists are restricted, per Section 3209.3(e). Some sections of the new laws are open to interpretation, and adoption of regulations to implement the new laws will take some time. The bottom line is that this bill will make some drastic long-term changes to workers' compensation. In the meantime, acupuncturists after acupuncturists are getting treatment denials based upon the ACOEM practice guidelines, not just from workers' compensation, but from other insurance carriers. Some practitioners have already shut down their practices, unable to cover their overhead.

The following are actions our profession must take:

- Acupuncturists should submit copies of their workers' compensation and private insurance claims denials and EOBs to their membership association or directly to CAOMA (Fax: 800-388-2928). Be sure to black out patient information to protect privacy. CAOMA is setting up meetings with legislators and the administrative director of workers' compensation, and will present these to them as evidence of bias and a request for changes to the system.
- Our profession must develop evidence-based standards of care and treatment guidelines to supplement existing occupational medicine treatment guidelines, and get them adopted for workers' compensation guidelines. This project has begun, and we encourage anyone who is interested in your future to volunteer to participate.
- CAOMA must hire a new lobbyist by the end of 2004 to prepare for the 2005 legislative session. Acupuncturists willing to make direct (non-tax deductible) contributions to our lobbying fund can do so, knowing that 100 percent will go toward the lobbying fund and

nothing else.

- CAOMA must pass legislation to remove the restriction on disability determination. We have been trying to 10 years to remove a section in the labor code that essentially identifies us as second-class practitioners, and causes unnecessary delays and added costs to the system.

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SB 899: Legislative Impact on Acupuncture and Oriental Medicine

Taking effect immediately, SB 899 was signed into law by Governor Arnold Schwarzenegger on April 19, 2004. It changes the workers' compensation system as it pertains to acupuncturists. I'll try to map out some of the pertinent changes as they relate to our profession.

- Firstly, we weren't taken out as physicians as we had feared. Nor was the language changed from cure or relieve to cure and relieve. Labor Code (LC) 4600 is pretty clear in its intent to keep us in the system.
- LC 4600 also refers to Section 5307.27, which hasn't been written yet, and may alter the treatment guidelines that are currently in use by the American College of Occupational and Environmental Medicine (ACOEM).
- These new guidelines are to be in place by January 1, 2005. However, the ACOEM's guidelines have already begun to prevent and/or delay treatment authorization.
- In LC 4616(d), initiating in January 2005, employers are to create medical provider networks (MPNs) to provide treatment to all injured workers. The MPN must include all types of physicians and in numbers great enough to adequately treat injury. After the first visit to the employer's physician, the employee may choose to be treated by any other physician in the network, including acupuncturists [4616.3 (b)].
- Out-of-network referrals are only allowed if there are no qualified physicians in the network. If the employee is not satisfied with the physician's diagnosis or treatment plan, he or she may choose another. If the employee is still dissatisfied, he or she may choose yet another treating physician. If there is still dispute, the worker may request independent medical review (IMR) from a medical doctor or osteopath assigned by the administrative director.
- The IMR physician will conduct a physical exam and/or review clinical records at the employer's discretion [LC 4616.4(e)]. If the IMR agrees with the injured worker, he or she is entitled to pursue treatment from any physician, in or out of network. The new law does not mention what happens if the IMR agrees with the insurer, although the employee may still request opinions of other physicians in-network.
- Should the employer fail to create an MPN, the employee may choose a treating physician of his/her choice after 30 days as stated in the previous workers' compensation laws.
- Another item that didn't change is our QME status (you can access more information about QME/AME procedures in LC 4602).
- What did change is our right to be pre-designated as a "personal physician" to the injured worker [LC 4600 (d)(2)(A)]. Chiropractors and acupuncturists can no longer be pre-designated.
- Per LC 5402, an employer, from the first day after an employee reports an injury, must provide appropriate medical treatment up to \$10,000 or until liability for the claim is accepted or rejected.
- Our biggest hurdle, after rebutting the ACOEM, guidelines is to ensure that we are included in the administrative director's guidelines pursuant to LC5307.27 as mentioned above. These guidelines for treatment of typical work injuries need to be created by our profession.

This is the initial review of the bill. If you find any items that we have not addressed, or matters where you are seeking additional clarification, please send your e-mails (please no phone calls) to legislation@csomaonline.org, as written communication allows us to ascertain the specific nature of your request.

We would like to thank Fred Lerner and Brian Fennen for their input in interpreting this bill. Should you have questions regarding this update, please address your queries to: legislation@csomaonline.org. You can reference the full text of SB 899 at www.leginfo.ca.gov.

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JULY 2004