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# The Changed Nature of the Stress Claim in California: Workers' Compensation and Pitfalls to Avoid

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According to California workers' compensation laws, this is the best of times for acupuncturists. For example, the term "physician" now includes acupuncturists, pursuant to Labor Code 3209.3(a) (although acupuncturists are not authorized to determine disability). Moreover, in any "serious" case, the employee is entitled to choose, at the expense of the employer, the services of a consulting acupuncturist pursuant to Labor Code 4601(a).

What could dampen all this good news for acupuncturists? What about a "stress claim"? Have you ever worried that any of your acupuncture staff employees may file a workers' compensation stress claim? Are things not always going well in Acupunctureville? Have you heard stories of workers with poor work histories, job dissatisfaction, or recent disciplinary actions who feel inclined to file a "stress" claim to obtain early retirement from work?

Are you treating injured workers for stress-related conditions, and do you question whether the stress claim is legitimate? Sometimes physicians may minimize noncompensable stressors and maximize compensable stressors as the cause of the applicant's conditions. Many times the applicant never mentioned important noncompensable factors. All too often, the physicians fail to ask the applicant about these non-industrial stressors (personal problems that might be causing the stress, such as divorce, a death in the family, family problems, etc.).

Sometimes the doctors do not know the applicant's current level of activity, or there is information that shows a claimant doing activities that exceed the information provided to the doctor. Differences in functional abilities may often be hidden in records -- for example, in comments regarding hobbies or activities during a vacation. One wonders how a claimant who claims to have disabling stress can restore old cars, garden, vacuum, or engage in any number of demanding tasks.

Stress claims might raise issues of secondary gain, and might not be compensable under current California workers' compensation laws, which received a major overhaul in 1993. Everyone knows the world is less than perfect. Many workers have ill-defined aches and pains and do not like to "get up" for work in the morning. Before the revisions to California's workers' compensation stress claim law were made, many people criticized the California system as being too permissive to the point that healthy people with normal everyday stresses were filing stress claims at an enormous cost to employers. The lawmakers got the message, and many changes were made.

The following might be some pitfalls to avoid to ensure you are "in step" with the revised laws in California:

1. Has the required stress "threshold" been met? Labor Code 3208.3 requires "actual events" of employment to be 51% responsible for the condition (see also *Cristobal v. WCAB* (Burns International Sec. Services, Inc.) (1996) 61CCC65 (writ denied). Prior to 1993, the percentage had been 10%, which might appear to be an easy threshold to reach, and might have been as easy to meet as getting up in the morning to go to work. Additionally, "actual events" of employment might not include "fear of actual events of employment." For example, suppose a worker claims she is stressed because she "fears asbestos" might be in the office building. One might argue that fear of asbestos is not an actual event of asbestos exposure to qualify for a valid stress claim.

The enactment of this statute in California was intended to provide a "new and higher" threshold for stress claims. This was intended to address the issue raised in *Albertson's Inc. v. WCAB* (Bradley) (1982) 131 CA3d 308, 47CCC460, where in an employee claimed subjective stress and obtained a compensable stress claim.

2. Is the stress claim a "post-termination" stress claim? If so, effective July 16, 1993, such claims are not compensable (see Labor Code 3208.3(e)). Specifically, claims for psychiatric injuries that occurred before the notice of termination or layoff, but were filed after the notice of termination, are not compensable unless the employee can show some exception to this rule. Such an exception might include a sudden and extraordinary event; the employer having notice of the injury prior to layoff; or the employee's medical records before the layoff containing evidence of psychiatric treatment or other exceptions.

3. Did work play an "active" or "passive" role in developing the stress condition? California law requires that work play an "active role" in the development of the psychological condition in order to have a compensable injury. Labor Code 3600(a)(6) requires "the employment itself must be a 'positive' factor influencing the course of the disease." (See also *Georgia Pacific Corp v. WCAB* (Byrne) 144 CA3d 72 (1983) 48CCC443.)

Moreover, a medical report which does not state specifically how the employment has influenced the development of the alleged stress condition is insufficient, especially when the physician admits he/she does not know of any specific employment role (*Twentieth Century Fox Film Corp v. WCAB* [Conway], 1983, 141 CA3d 778). Where the alleged employment stress was found to be simply a product of the employee's underlying psychiatric problem projecting itself upon his/her employment environment, no compensable injury was found (*Hanna v. WCAB*, 1980, 45CCC1174).

4. How long was the employee working for the acupuncture practice? A short-term employee may find that they have not worked the required six months to qualify for a stress claim under Labor Code 3208.3(d). Accordingly, if an employee has worked for only five months and is absent a "sudden and extraordinary employment condition" (Labor Code 3208.3(e)(1) or other exception, the employee might not be able to maintain a valid stress claim. One important caveat is in order: Labor Code 3208.3(d) does not apply when psychiatric injury is a compensable consequence of a physical injury pursuant to *Liberty Mutual Ins. Co. v. WCAB* (Garcia) (1998) 63CCC315 (writ denied) and *Rebelo v. Washington* (1999) 27CWCR159 (WCAB panel).

5. Is the employee claiming the stress of litigation as the basis of the stress claim as the

major source of stress? According to the case of *Rodriguez v. Jerseymaid* (1994) 21 Cal App. 4th 1747, the stress of litigation is not compensable in the state of California.

Conclusions

Stress claims might raise issues of secondary gain and might not be compensable under current California workers' compensation laws, which received a major overhaul in 1993. Prior to the revisions to California's workers' compensation stress claim law, many people criticized the California system as being too permissive such that healthy people with normal, everyday stresses filed stress claims at an immense cost to employers. The lawmakers finally got the message, and changes were made.

There are serious pitfalls to avoid to ensure that a stress claim fits within the newly revised parameters for compensable stress claims. In other words, not every statement from an employee that "I'm feeling stressed" is compensable under California workers' compensation laws. With the new code sections expanding the use of acupuncturists in California workers' compensation, acupuncturists may be more involved in stress claims and other claims in workers' compensation as a treating doctor. Additionally, knowledge of the changes in laws pertaining to stress claims may help the acupuncturist defend such claims as an employer.

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*Note:* The above conclusions are my own personal views, and do not represent the opinions of any organization or school.

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