

Facts and Myths about Acupuncture and Workers'

Compensation

By Della Welch

Now that acupuncturists have been permanently recognized by the California Labor Code as physicians and the sunset provision has been removed, one wonders what is fact and what is myth about acupuncture and workers' compensation.

Myth #1: Acupuncturists can treat injured workers forever, and their bills will be paid by the insurance carrier.

Fact: Under Labor Code 4600, the employer has a duty to provide treatment, including all medical, surgical, chiropractic, **acupuncture ... reasonably required** (emphasis added) to "cure or relieve" from the effects of an industrial injury. If there is no injury, or if an injury or condition is not caused or aggravated by employment, there is no right to treatment under Labor Code 4600. If treatment is **not** reasonably required, payment may be denied.

Furthermore, "treatment is not adequate ... if it does not include a correct diagnosis and all measures indicated to cure or relieve." (*Industrial Indem. Co. v. I.A.C. Estill* [1961], 188CA 2d 656, 10CR 566, 26 CCC 12).

Myth #2: Workers' compensation insurance carriers will not question whether acupuncture treatment is excessive and will continue to pay treatment bills.

Fact: At some point, the workers' comp carrier may question the goals of modalities that appear to continue forever. Certain conditions may raise "red flags" for the insurance company, especially conditions that the medical community is unclear as to the type of medical treatment needed.

The following are some questions you might be asked in deposition by an insurance carrier questioning treatment deemed to be excessive:

A. You can only speculate on a treatment plan under these circumstances, isn't this correct? Has the treatment plan you are recommending been shown consistently to cure or relieve the symptoms of this disease?

B. What is the likelihood the employee will experience lasting relief from the treatment you are recommending? How do you know that?

C. Where is the research data that shows this treatment will cure or relieve the employee's complaints?

D. Is it possible some of the treatment modalities listed in your report will not be effective? Will the modalities be harmful?

E. Some treatment recommendations are lifelong or indefinite. How can you determine the length of the treatment modality if you do not know whether it will be effective? You are not sure, isn't that correct?

Myth #3: Acupuncturists in the state of California can perform QME disability evaluations and determine disability.

Fact: This is not correct. QME experts in California prepare medical-legal reports that help resolve disputed cases. Even those some acupuncturists are QMEs in California, state law does not permit them to perform disability evaluations in their capacity as QMEs. Further, acupuncturists can also perform evaluations in the role of treatment physicians, but they cannot determine disability or apportionment for compensation purposes.

In 1988, acupuncturists in California were temporarily granted "physician" status in the workers' compensation system pursuant to Labor Code 3209.3(a). Nevertheless, the legislature added restrictive language in LC 3209.3(e) stating that "Nothing in this section shall be construed to authorize acupuncturists to determine disability." Additionally, this law had a "sunset" provision that would remove acupuncturists in four years as physicians. In 1997, this sunset provision was finally removed and acupuncturists were permanently granted "physician" status, but they were not given the authority to determine disability.

Myth #4: Acupuncturists cannot associate with chiropractors or other physicians to obtain the disability and apportionment issues needed for a complete QME report.

Fact: Acupuncturists must associate with qualified medical doctors, chiropractors or other approved professionals who can address the issues of disability and apportionment. Logically, the costs for insurance carriers may increase if an acupuncturist performs a QME evaluation or functions as a primary treating physician, because when disability must be addressed, the acupuncturist must refer these issues out to a qualified physician or chiropractor to address disability issues. Thus, the bill to the carrier may increase to pay for the additional experts needed for a complete evaluation.

Myth #5: Employers and employees can ignore alternative medicine.

Fact: Atkinson explained that "Americans spend huge sums of money on complementary and alternative medicine ... an estimated \$27 to \$33 billion in 1997" (Atkinson 1999, 24). Furthermore, Atkinson clarified that the "National Institutes of Health created the Office of Alternative Medicine in 1992 with \$2 million in federal funds. Funding for 1998 topped \$20 million. In 1999, NIH turned the office into the Center for Complementary and Alternative Medicine, with an allocation of \$50 million" (Ibid).

Medical schools are joining the movement. Atkinson clarified that "last year, 75 of the nation's 123 medical schools, including Columbia, Johns Hopkins and Stanford, offered courses in alternative medicine, compared with just 15 in 1993" (Ibid).

Myth #6: An employee cannot predesignate an acupuncturist a "primary treating physician."

Fact: California law provides that an injured worker can predesignate a primary treating physician. If the employee does not so predesignate, the employer has control for the first 30 days from the date of the injury and may send the employee to an industrial clinic. Specifically, Labor Code 4600.3 states: "The employee may choose to be treated by a personal physician, personal chiropractor, or **personal acupuncturist** that he or she has designated prior to the injury ..." (emphasis added). Thus, there is no doubt an acupuncturist can be a predesignated physician.

If the employee fails to predesignate a primary treating doctor, the injured worker can do so 30 days after the date of their injury. Therefore, there is an increasing need for acupuncturists to be familiar with the workers' compensation system. A phone call to a local law library in California may be helpful to learn what books are available on workers' compensation laws. Books by authors such as Herlick, Hanna,

Swezey and O'Brien are good starting points. Furthermore, Nolo Press has a book written by Christopher Ball, Esq. that simplifies workers' compensation laws, is easy to understand, and is full of cartoons to make reading fun. This book is available at most local bookstores in California.

Myth #7: There will be no new developments in acupuncture and workers' compensation in California.

Fact: Without a crystal ball, it is difficult to know what will occur. Perhaps with the appropriate legislative presentation, the disability evaluation restriction of LC 3209.3 as this applies to acupuncture will be removed. This may mean that additional training may be required of acupuncturists to prepare disability evaluations. Acupuncture has already improved its position in the California workers' compensation system by placing its first member on the Industrial Medical Council.

Reference

1. Atkinson W. The next big benefit boom: complementary and alternative medicine. Medical and Economics Company, Inc. *Business and Health* September 1, 1999;17(8):24.
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