The Right to Control Medical Treatment under California's Workmen's Compensation Law

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THE RIGHT TO CONTROL MEDICAL TREATMENT UNDER CALIFORNIA'S WORKMEN'S COMPENSATION LAW

One of the basic policies underlying the law of workmen's compensation is that the employee, injured while in the service of an employer, is entitled to have his medical care provided at the expense of that employer. Most workmen's compensation statutes so provide. Early in the law of workmen's compensation, however, a heated controversy arose over who should choose the doctor or hospital to render the actual treatment. On one side were those who subscribed to the "free choice" theory, i.e., that the employee should be allowed a free rein in choosing his own doctor, all costs to be borne by the employer. Proponents of this theory argued that the confidence which an injured employee would presumably have in a physician of his own choosing would help speed recovery, to the benefit of all concerned. Opposing this theory were the "rehabilitationists," who argued that a doctor chosen by the employer, being more highly motivated to return the injured employee to his job, would utilize the best possible medical treatment in order to minimize the effects of the injury and better control malingering by the employee. They also feared that allowing the employee to choose his own physician, solely at the expense of the employer, would encourage unnecessary medical treatment.

This problem is only today being resolved. As is true with most controversies, the most common solution has been to strike a balance between the extremes. Only five states, New York, Massachusetts, Washington, Wisconsin, and Rhode Island, still adhere to a pure

1. See 1 A. LARSON, THE LAW OF WORKMEN'S COMPENSATION § 1.10 (1968) [hereinafter cited as LARSON].
2. 2 LARSON § 61.12, at 88.233.
3. See 2 LARSON § 61.12, at 88.235.
4. 10 W. SCHNEIDER, WORKMEN'S COMPENSATION TEXT § 2001, at 13-14 (1953) [hereinafter cited as SCHNEIDER].
7. N.Y. WORKMEN'S COMP. LAW § 13-a (McKinney 1965) (employee may choose doctor approved by the workmen's compensation board).
10. WIS. STAT. ANN. § 102.42 (1957) (employee may choose from a panel provided by the employer).
free choice theory. In most states, the compromise has taken the form of giving the employer the initial choice of physician, but allowing the employee under certain circumstances to procure his own treatment either initially or at a later date.\textsuperscript{12}

The California statute\textsuperscript{13} is typical. It allows the employer to specify the physician in the first instance, giving the employee the right of reimbursement for self-procured care in cases where the employer refuses or neglects to provide adequate treatment. Although the original California workmen's compensation law was otherwise,\textsuperscript{14} there is today in California no statutory time limit upon the employer's liability for medical care.\textsuperscript{15} Nor does California put a financial limit on the employer's liability for such care.\textsuperscript{16} In the event the employee is dissatisfied with the care provided by the employer's first doctor, he may request a change and choose another physician from a panel tendered by the employer.\textsuperscript{17}

Whether the employee will be reimbursed for his self-procured care will often depend upon whether adequate notice of the need for medical treatment has been given the employer. In order to protect the employer's right to control medical care, the courts will usually deny reimbursement for self-procured care that is undertaken without adequate notice having been given.\textsuperscript{18} The point at which notice need no longer be given usually coincides with the point at which control of medical treatment is held to have passed from the employer to the employee.\textsuperscript{19} The exact point at which this control is transferred (notice

\begin{itemize}
\item \textsuperscript{12} 10 SCHNEIDER § 2001, at 8-10.
\item \textsuperscript{13} CAL. LABOR CODE § 4600, which provides in part:

Medical, surgical, and hospital treatment . . . which is reasonably required to cure or relieve from the effects of the injury shall be provided by the employer.

In the case of his neglect or refusal seasonably to do so, the employer is liable for the reasonable expense incurred by or on behalf of the employee in providing treatment.

\item \textsuperscript{14} Cal. Stats. 1911, ch. 399, § 8(1), at 798.
\item \textsuperscript{15} See note 57 \textit{infra}. Many jurisdictions have such time limits. \textit{E.g.}, OKLA. STAT. ANN. tit. 85, § 14 (Supp. 1968) (sixty-day time limit on liability, with extension at the discretion of the board).
\item \textsuperscript{16} See note 57 \textit{infra}. Many other jurisdictions also have financial limits on employer liability. \textit{E.g.}, GA. CODE ANN. § 114.501 (Supp. 1968).
\item \textsuperscript{17} CAL. LABOR CODE § 4601.
thereby becoming unnecessary), as well as the right of the employer to regain it once it has been transferred, has been greatly clarified by two recent California Supreme Court decisions.

Recent Decisions

McCoy v. Industrial Accident Commission,20 involved an employee who suffered an industrial back injury and was given unsuccessful physiotherapy by the carrier's doctors. Approximately six months after the accident, she filed a petition with the Industrial Accident Commission to determine the liability of the carrier for further medical treatment. The carrier's doctors, as well as an independent physician appointed by the commission, were of the opinion that no further treatment was necessary, and the commission so found. During the next three months, however, the employee continued to complain of pain and was again examined by the carrier's physicians. They were still of the opinion that no further treatment was indicated, and this time the carrier formally declined to provide any further care. Another hearing was held, but no evidence was taken, the parties requesting more time for medical investigation. Immediately thereafter, the employee's counsel wrote to the carrier, requesting certain medical records and indicating that she was soon to be seen by a private specialist. The specialist diagnosed her condition as a ruptured disc and confined her to the hospital for further tests. While these tests were being conducted, the employee was ordered by the carrier to report to its doctor for further examination. She failed to respond to this order and instead underwent a successful laminectomy and fusion at the hands of her self-procured specialist. The commission denied reimbursement, holding that the employee had not given the carrier the requisite notice of need for surgery.21

Several previous appellate cases22 had been decided on the theory that notice of need for further medical treatment should be excused only when the demand for care would be a futile one. On review before the supreme court, the commission contended that, had a demand for needed surgery been made, the carrier could have provided it, and notice therefore would not have been futile. The court, in reversing the order of the commission, held that even though the carrier might have been able to provide the needed surgery upon demand, employer control over medical treatment had been terminated at the time of the employer's refusal to extend further care, and thus the employee was

under no further duty to look to the carrier for her treatment. In other words, the court held that the employer's right to control treatment is surrendered when he is given the opportunity to provide medical service, and refuses. Since he no longer has the right to control treatment, neither does he have the right to be notified of the employee's intention to seek his own care. The court added, however, that in order for the employee to retain control, his condition must remain substantially the same as it was at the time of refusal, and that his private care must begin within a reasonable time following refusal. If these conditions are not fulfilled, presumably the employer will get a “fresh” right and may regain control through an adequate tender of treatment.

In Zeeb v. Workmen's Compensation Appeals Board, the supreme court turned its attention to this right of the employer to regain control. An employer, in good faith, had refused treatment to an employee who had contracted industrial dermatitis, so the employee sought self-procured medical treatment, for which he was reimbursed pursuant to the later order of the Industrial Accident Commission. Following this order, the employer tendered the services of its physician, but the employee refused and sought an order from the commission allowing him to continue treatment by his self-procured doctor at the employer's expense. The commission denied this request. On review, the supreme court reversed the commission and allowed reimbursement for the continuing private care. In so doing, it cited with approval the language of the McCoy case to the effect that upon refusal the employer immediately relinquishes his right of control to the employee. However, the court also placed considerable emphasis on the fact that the doctor-patient relationship is a significant factor in affecting a cure, and for this reason should not be disturbed by a change of physicians.

23. 64 Cal. 2d at 89, 410 P.2d at 366, 48 Cal. Rptr. at 862.
25. 64 Cal. 2d at 89, 410 P.2d at 367, 48 Cal. Rptr. at 863.
28. 67 Cal. 2d at 502, 432 P.2d at 364, 62 Cal. Rptr. at 756.
29. Id. at 502, 432 P.2d at 365, 62 Cal. Rptr. at 757.
Read together, the holdings of Zeeb and McCoy\footnote{60} would appear to state a general rule that once the employer has refused to provide treatment and the employee reasonably soon thereafter makes arrangements for private care, the employer loses control of the case. Having relinquished control to the employee, he will then be held liable for all medical services reasonably procured by the employee. If private treatment is already in progress, this rule seems desirable and justified in view of the beneficial aspects of a continued doctor-patient relationship. Where the employee has not yet commenced private care,\footnote{31} however, the rule may in some cases produce a harsh result. An employer, after a good faith refusal, may reconsider and make a tender of adequate care the next day. If the language of McCoy is read strictly, the employee in this situation could refuse with impunity the tender of the employer even though he has not yet embarked on a course of treatment by his own physician in reliance on the employer's refusal, because the employer, by refusing to treat, has relinquished for all time his right to control treatment.\footnote{32}

A more equitable approach is suggested by the reasoning behind the Zeeb holding. Where the employee has already undertaken, or made substantial arrangements for private care, he should be allowed to follow through with it.\footnote{33} If he has made no such commitment to private care, however, he should not be allowed to take advantage of a good faith mistake of the employer in refusing treatment, and should be required to accept an adequate tender if made. This would insure both that the employee would be allowed to retain his beneficial private treatment and that the employer would not be unjustly penalized for a mistaken refusal.

The Successful Treatment Rule

Once the employer has been guilty of either refusal or neglect, the employee, under most statutes, is entitled to seek his own medical care, at the expense of the employer.\footnote{34} In order to protect the employer and to promote expeditious treatment, most states require that self-procured medical treatment, to be reimbursable, must be reasonably necessary to

\begin{footnotes}
30. 64 Cal. 2d 82, 410 P.2d 362, 48 Cal. Rptr. 868 (1966); see text accompanying notes 18-23 \textit{supra}.
31. In both McCoy and Zeeb, the employee had already undergone private care before the action was brought.
32. In this situation, according to McCoy, the employer would have immediately lost the right to control the employee's medical care when he refused to provide service, regardless of reliance by the employee. See text accompanying notes 21-23 \textit{supra}.
33. \textit{See} text accompanying note 28 \textit{supra}.
34. 10 \textsc{Schneider} § 2001, at 8-10.
\end{footnotes}
alleviate effects of the industrial injury.\textsuperscript{35} This is apparent from an analysis of the statutes and decisions of other jurisdictions.

\textit{Self-Procured Medical Treatment in Other States}

The New Jersey statute\textsuperscript{36} provides for an initial choice of doctor by the employer, but affords the employee to the right to procure treatment on his own in cases where the employer neglects or refuses to do so. Like the California statute,\textsuperscript{37} it also provides for unlimited medical treatment, subject only to the requirement that the injured employee file a petition for all necessary services in excess of $50. As is also true in California,\textsuperscript{38} it reimburses only such self-procured medical treatment as is necessary.\textsuperscript{39}

In \textit{Ducasse v. Walworth Manufacturing Co.},\textsuperscript{40} the New Jersey court was faced with construing this statute. The employee had suffered a back injury in the course of his employment. After unsuccessful treatment by several doctors, he underwent a laminectomy by a private physician, which not only proved fruitless, but actually \textit{increased} his disability. The court, in granting an award which included compensation for the increased disability, observed that the employee, having been in constant pain and discomfort, acted in a reasonable and justifiable manner in seeking the ill-fated surgery, and noted further that "[t]he fact that the operation was unsuccessful and resulted in increased disability does not, under the law, deprive a conscientious and deserving employee from the benefits of the statute."\textsuperscript{41} Although the court in this case did not expressly pass on the issue of reimbursement for the costs of the unsuccessful operation, the reasoning behind its holding would seem to apply equally to the award of such expenses.

Such a result was subsequently reached in \textit{Monaco v. Albert Maund, Inc.},\textsuperscript{42} where the employee suffered a brain concussion and spinal injuries, which caused the employer's doctors to later discharge him from their care as beyond cure. He procured a private surgeon and underwent an operation which improved his condition only very

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  \item \textsuperscript{35} SCHNEIDER § 2005, at 43.
  \item \textsuperscript{36} N.J. STAT. ANN. § 34:15-15 (1959).
  \item \textsuperscript{37} CAL. LABOR CODE § 4600; see note 12 supra.
  \item \textsuperscript{38} CAL. LABOR CODE § 4600; see note 12 supra.
  \item \textsuperscript{39} The New Jersey statute would seem to be more strict than that of California, since it provides for reimbursement only for self-procured treatment "necessary" to cure the injury; section 4600 of the Labor Code allows for reimbursement of private care such as is "reasonably required" to cure. However, the New Jersey Supreme Court has construed "necessary" to mean "reasonably necessary." See text accompanying note 41 infra.
  \item \textsuperscript{40} 1 N.J. Super. 77, 62 A.2d 480 (App. Div. 1948).
  \item \textsuperscript{41} Id. at 83, 62 A.2d at 482.
  \item \textsuperscript{42} 17 N.J. Super. 425, 86 A.2d 279 (App. Div. 1952).
\end{itemize}
slightly. In granting reimbursement for the unsuccessful treatment, the court said: “If the treatment obtained by appellant seemed reasonably necessary and if the charges were fair, the respondent is liable.”43 From these cases, it can be seen that New Jersey subscribes to the view that if the self-procured medical treatment seems reasonable, the employer should be liable for the expenses incurred therein, regardless of the success or failure of the actual procedure.

Tennessee also has a statute44 similar to that of California, except that it gives the employer the right to specify a panel of three or more physicians from which the employee chooses one to render his initial medical treatment. It provides further that the employer shall be liable for medical expenses only to a maximum amount of $1,800. It has provisions analogous to those of the California statute whereby the employee may be reimbursed for self-procured medical expenses.45 Unlike the California statute, however, it places a $100 limit on the liability of the employer for self-procured care.46

The leading case construing this statute, Atlas Powder Co. v. Grant,47 concerned an employee who suffered a back injury. He was treated without success for three or four months by the employer’s doctors, who refused to perform an operation. He eventually sought his own physician, under whose direction he underwent a laminectomy that proved to be unsuccessful. The Tennessee Supreme Court held that the treatment having been reasonable though unsuccessful, reimbursement was proper.48

The California Rule

The California provision,49 while requiring the employer to procure such medical treatment as is “reasonably required to cure or relieve from the effects of the injury,”50 provides further that should he refuse

43. Id. at 433, 86 A.2d at 282.
44. TENN. CODE ANN. § 50-1004 (Supp. 1968).
45. TENN. CODE ANN. § 50-1004 (Supp. 1968) provides that the employee may procure his own medical care in the case of an “emergency, or on account of the employer's failure or refusal to provide the medical care and services required by this law . . . .”
46. Id. This $100 limit on self-procured treatment has now been all but abrogated by the case of Atlas Powder Co. v. Grimes, 200 Tenn. 206, 292 S.W.2d 13 (1956), wherein the court allowed reimbursement for self-procured medical expenses of over $1000. In so doing, the court noted the rather perceptive statement of counsel that if the limit were allowed to stand, employers would always be able to limit their medical liability for injured employees by simply refusing to render any treatment. Id. at 218, 292 S.W.2d at 18.
47. 200 Tenn. 617, 293 S.W.2d 180 (1956).
49. CAL. LABOR CODE § 4600.
50. Id.
or neglect seasonably to do so, "the employer is liable for the reason-
able expense incurred by or on behalf of the employee in providing
treatment."51 This is a provision common to most workmen's compen-
sation statutes.52 California courts, however, have qualified this pro-
vision by requiring that self-procured medical treatment, to be reimburs-
able, must be successful either in affecting a cure, or at least in providing
substantial improvement.

The rule appears to have its origins in the early workmen's compen-
sation case of Union Iron Works v. Industrial Accident Commission.53
In that case the employee, a sixteen-year old boy, fell from a ladder in
the course of his employment, breaking an arm and both legs. He was
provided medical treatment at the private hospital of the employer,
then was released to return on an outpatient basis. His injuries proved
to be quite serious; he was on crutches for a considerable period of
time, and there was a continuous discharge of fluid from one leg due to
necrosis of the improperly healed bone. This condition persisted for
almost four years, despite treatment by the employer's doctors. At the
end of this period, the employee finally lost confidence and sought a
physician of his own. His doctor recommended immediate surgery.
The employer's physicians were of the opinion that further conservative
treatment was indicated, and refused to perform the surgery. After
waiting nine months, during which time the condition grew progressively
worse, the employee's private physician performed two operations upon
the injured leg. The result was a complete and dramatic recovery; the
leg healed completely, and the injured employee was able to walk
without crutches and returned to work for the first time in four years.
The Industrial Accident Commission awarded the employee the costs
of his self-procured medical care,54 and the employer was granted
certiorari to the supreme court. The supreme court, deciding the case
under section 15(a) of the 1915 act,55 affirmed the award. In so
doing, it held that under the statute the employer is required to furnish
such medical care as will reasonably tend to cure the employee. When
the employer's physicians failed to cure the employee, such care was not
being provided; when they declined to perform the operation, such care
was refused, thereby justifying the resort to self-procured medical care.
The success of the operation demonstrated the reasonableness of the
treatment. Justice Lennon, writing for the court, was then prompted to
state:

. Before the injured employee would be entitled to compensation

51. Id.
52. 2 Larson § 61.12, at 88.238; 10 Schneider § 2005, at 43.
53. 190 Cal. 33, 210 P. 410 (1922).
for expenses incurred in the treatment of him by a physician of his own selection it would have to be shown that the treatment not only was a success but that it was reasonably and seasonably necessary to cure and relieve the injured employee. Moreover, all the circumstances attending the treatment by the employer's physician would have to be weighed by the commission in order to determine whether or not the treatment prescribed by the employer's physicians would, if it had been persisted in, have produced as speedy and as satisfactory a cure as did the treatment of the physicians resorted to by the injured employee. . . . In other words, the injured employee will be permitted, at the peril of medical treatment, to secure the services of physicians other than those provided by his employer, and this peril will attach unless it can be shown from all of the circumstances of the situation, including the success of the operation, that his desire and decision to secure the services of other physicians was warranted.\footnote{56}

The announcement of the rule was not necessary to the decision of the case. Indeed, the circumstances of the case seem so strong from the employee's standpoint that one would have expected a liberal rule concerning reimbursement. Rather, the rule appears to have been the product of judicial overcaution, as the following language may suggest:

It is insisted by the petitioners that the award cannot be allowed to stand without giving to the injured employee not only the absolute right to refuse such medical services as may be tendered and furnished to him by his employers, but the right as well to seek and secure the services of other physicians and surgeons at the expense of the employer if, perchance, a physician or surgeon can be found who will prescribe and advise a treatment different from that prescribed by the physicians furnished by the employer. In other words, it is contended that an employer will be required to pay any and all doctor bills which an employee might at his whim incur.\footnote{57}

The court appears to have overreacted to the loudly voiced fears of industry that the employer would be forced to pay for all medical treatment the employee might have occasion to require, whether or not it was reasonably related to the cure of industrial injury. The sensitive reaction of the court in this case is perhaps also a product of the times in which it was decided. It had been less than 10 years since the passage of California's first compulsory workmen's compensation act,\footnote{58} and

\footnote{56} 190 Cal. at 41, 210 P. at 414.
\footnote{57} Id. at 40, 210 P. at 414.
\footnote{58} The Roseberry Act, Cal. Stats. 1911, ch. 399, at 796, California's first workmen's compensation legislation, which was noncompulsory, contained provisions for employer control and self-procured medical treatment essentially the same as those of the present statute, but with a $100 and 90 day limit on employer liability. The Workmen's Compensation and Safety Act, Cal Stats. 1913, ch. 176, § 15, at 284-87, the first compulsory workmen's compensation act, eliminated the $100 maximum, and the Compensation Act of 1917, Cal. Stats. 1917, ch. 586, § 9(b)(5), at 838, dropped the 90 day limit. The language of the control provision has remained substantially the same since the Roseberry Act.
industry was still understandably apprehensive about the inroads the new law would make into employer control over employees. Whatever the motivating forces behind the rule, it soon became the accepted standard, both before the Industrial Accident Commission and the courts.

In 1944, however, two commission cases were decided that brought into question the status of the rule. The first, *Bawart v. Neal Stratford & Kerr*, concerned an employee who contracted dermatitis from printing solutions with which he was required to work. The employer's doctor, who was of the opinion that the disease was nonindustrial in origin, took the employee as a private patient, but was unable to cure him. A second physician consulted by the employee also treated him without success. A third correctly diagnosed the disease as industrial and was successful in curing him. Although two of the doctors privately consulted by the employee rendered treatment that was admittedly unsuccessful, the Industrial Accident Commission ruled that the employee was entitled to reimbursement for the services of all three of the physicians. The commission found that the employer, having neglected his duty, was liable for the reasonable services of the doctors, "notwithstanding that the treatment was not beneficial as there was no showing, in view of the mistaken diagnosis, that the treatment was not proper under the circumstances since all treatments were intended to relieve and cure the applicant of his dermatitis." Such a decision would seem to deny the existence of the successful treatment rule. Yet another commission case, decided six days later by a different referee, awarded reimbursement after specifically noting the favorable outcome of the self-procured treatment. The commission cited as authority three cases that had established success as a criterion for reimbursement. Five more recent cases have left the law in this area in an even greater state of confusion.


60. *See, e.g.*, County of Los Angeles v. Industrial Acc. Comm'n, 202 Cal. 437, 261 P. 295 (1927), which held that the commission has jurisdiction to order employer to pay employee's self-procured medical expenses, provided treatment is successful; County of Los Angeles v. Industrial Acc. Comm'n, 13 Cal. App. 2d 69, 56 P.2d 577 (1936).

61. 10 Cal. Comp. Cases 76 (1944).

62. *Id.* at 77.

63. *Id.*


In the first of these,66 Pacific Indemnity Co. v. Industrial Accident Commission, the employee was injured on the job, and was treated by the carrier's physicians. After a time, she became dissatisfied with this treatment. Pursuant to the provisions of the California Labor Code,67 the employer tendered a panel of three physicians for her choice. The employee did not respond to this offer, but rather sought self-procured medical treatment, which proved to be ineffectual. The Industrial Accident Commission awarded the employee further temporary disability and reimbursement for these expenses. The carrier petitioned for, and was granted, a writ of review. In its attempt to show before the court that resort to self-procured medical treatment was justified, the commission relied heavily on four cases that allowed reimbursement for self-procured treatment.68 The court discussed each of these cases at some length, and explicitly observed that in each one the self-procured treatment had been successful.69 It noted further that

[o]ne of the tests announced in those cases, to establish [the employer's liability for his employee's] self-procured medical treatment, is that the treatment received from the applicant's own physicians was a success, and that it was reasonably and seasonably necessary. In this connection, there is a total lack of such showing. In fact, the commission concedes that the applicant has not been successfully relieved from her complaints.70

Relying on the unsuccessful outcome of the self-procured treatment71 and the employee's unjustified refusal of the carrier's tender of care, the court reversed the award as to reimbursement.

The Pacific Indemnity case was heavily relied upon two years later by the petitioner in Foremost Dairies v. Industrial Accident Com-

68. Union Iron Works v. Industrial Acc. Comm'n, 190 Cal. 33, 210 P. 410 (1922); Industrial Indemn Co. v. Industrial Acc. Comm'n, 188 Cal. App. 2d 656, 10 Cal. Rptr. 566 (1961); California Union Ins. Co. v. Industrial Acc. Comm'n, 183 Cal. App. 2d 644, 7 Cal. Rptr. 67 (1960) (successful operation by employee's physician following misdiagnosis and refusal of further treatment by carrier's doctors); County of Los Angeles v. Industrial Acc. Comm'n, 13 Cal. App. 2d 69, 56 P.2d 577 (1936). In Industrial Indemnity Co., the carrier's physicians, failing to properly diagnose the employee's back ailment, refused to render further treatment; the employee's own doctor thereafter correctly diagnosed and successfully removed a ruptured disc. 188 Cal. App. 2d at 658, 10 Cal. Rptr. at 567.
69. 220 Cal. App. 2d at 331-33, 33 Cal. Rptr. at 652-53.
70. Id. at 333, 33 Cal. Rptr. at 653.
71. It is interesting to note that the court took it upon itself to invoke the successful treatment rule. In discussing the cases cited by the commission, the carrier distinguished them only on the grounds that they all involved actual neglect or refusal on the part of the employer, and made no mention of the fact that they all involved, or expressly required, successful treatment. Petitioner's Reply to Points and Authorities at 15, Pacific Indemn. Co. v. Industrial Acc. Comm'n, 220 Cal. App. 2d 327, 33 Cal. Rptr. 649 (1963).
mission. There, the employee, a milkman, suffered an injury to his leg caused by bumping into his milk truck. He later developed respiratory and other chest problems and sought the treatment of his family doctor, thinking his symptoms were not industrially caused. He was referred to several other private doctors, who treated him under a number of misdiagnoses. Three months after the initial accident his condition worsened and he was admitted under private care to a hospital, where he died five days later. An autopsy revealed extensive embolization and infarction of the lungs, which the attending physician attributed to the industrial accident.

The Industrial Accident Commission awarded reimbursement for the unsuccessful private care rendered the decedent. The employer, on writ of review, contended, among other things, that the self-procured treatment not having been shown to be successful, the award of reimbursement was improper. It cited the *Pacific Indemnity* case and quoted its language as sole authority for this proposition.

Although many other issues were presented and discussed, the court of appeal was rather explicit in its treatment of the employer's contention:

The test of when an employer may be held liable for self-procured medical help cannot be frozen into one interpretation of a single sentence contained in the opinion in *Pacific Indemnity Co. v. Industrial Accident Commission*. . . . To read that sentence into a mechanistic formula that liability can never attach to an employer unless the medical assistance procured by the employee is successful is to say that an employer may wrongfully deny medical treatment to an injured employee, thus shifting to the employee the burden of bearing his own medical expenses without hope of reimbursement from the employer, unless the self-procured treatment is deemed to be successful. Such a situation would be intolerable and contrary to the compensation act.

Since this decision turned almost entirely on issues of causation and involved a rather unusual factual situation, it should not be interpreted as a complete rejection of the successful treatment rule. The language of the court, however, would seem to be equally persuasive in all cases involving unsuccessful treatment.

In the 1966 California Supreme Court case of *McCoy v. Industrial
Accident Commission, the court was concerned primarily with the question of what conduct of the employer would justify the employee in seeking his own medical treatment. However, its discussion of whether, after neglect by the employer, an employee should be required to give additional notice of need for medical treatment as a condition precedent to reimbursable self-procured treatment is relevant to the continued viability of the successful treatment rule. The court noted:

An employee who claims to be in need of further medical care would be placed at a serious disadvantage if he were compelled, as a condition of reimbursement, to renew his demand for treatment after the employer's initial refusal. While it is true that the employer may then comply with his request, the dilatory process of an additional request and submission to further examination by the employer's doctors could result in delaying necessary medical care. In some cases, such as the present one, it might be impossible to establish until after surgery is completed that it was reasonably required, and the employee would then be required to obtain the treatment from his own doctor, apprehensively hoping that his claim for reimbursement could be proved by a successful result. . . . There is no reason to believe the Legislature intended section 4600 to be interpreted in a manner to impose such a burden on an injured employee.

Although this language of the court is by no means clear, it appears to have affirmed the rule by implication. What the court seems to be saying is that, if notice were to be required, an employee, whose injury was not amenable to diagnosis without surgery, would be forced to make a demand upon the employer for treatment. The employer's physician, unable to properly diagnose the nature or extent of the injury without surgery, would refuse. The employee would then, after this needless delay, be obliged to seek his own treatment, for which he would be held personally liable if such treatment proved unsuccessful.

What the court fails to note is that under the successful treatment rule, the employee will be faced with the dilemma of being held liable for

77. 64 Cal. 2d 82, 410 P.2d 362, 48 Cal. Rptr. 858 (1966).
78. See text accompanying notes 18-19 supra for a discussion of this phase of the case.
79. 64 Cal. 2d at 89, 410 P.2d at 367, 48 Cal. Rptr. at 863.
80. But see 2 W. HANNA, CALIFORNIA LAW OF EMPLOYEE INJURIES AND WORKMEN'S COMPENSATION, § 16.05(4)(d) (1968), where McCoy is cited for the proposition that successful treatment is not required. The case, however, was not concerned with the successful treatment rule, but with notice and employer control. The treatment was admittedly successful, and neither side raised any issue concerning it. It seems highly unlikely that the court would choose such a situation to challenge a rule so totally unrelated to the case. In addition, had the court wished to refute the rule, it presumably would have cited the Foremost case, which had done so in more limited circumstances less than a year before. Although Foremost is cited in support of other holdings in the McCoy decision, it is nowhere mentioned in connection with the successful treatment rule. 64 Cal. 2d at 91, 410 P.2d at 368, 48 Cal. Rptr. at 864.
unsuccessful treatment anytime he undertakes self-procured care, regardless of whether notice has been given to the employer.

Two later Workmen's Compensation Appeals Board cases have further muddied the water. Wilson v. Workmen's Compensation Appeals Board81 concerned an employee who, after sustaining an industrial neck injury, was treated by the employer's physicians for a period of about four years. Unable to gain relief from the employer's treatment, she subsequently underwent self-procured surgery, which produced some, but not substantial improvement. The referee, in denying reimbursement, noted that "'[i]nasmuch as there has been some improvement noted but no substantial improvement, it does not appear that the surgery by Dr. McIvor actually was required by reason of the injury herein... The expense of self-procured medical treatment... will be denied....'"82 In seeking a writ of review, the employee contended that a specified quantitative level of success is not a prerequisite to reimbursement for self-procured treatment. The court of appeal, however, noting with approval the language of the referee, denied the writ. Hearing was also denied by the supreme court. This would seem to imply that at least substantial improvement is required.

However, California Casualty Indemnity Exchange v. Workmen's Compensation Appeals Board,83 a case decided a year later, seemed to go to the other extreme. There, medical care was furnished by the employer to an employee with a back injury; the employer later terminated this treatment and refused to provide further services. The employee, unsecured by the treatment of the employer's doctors, sought his own physician. After failing to cure the employee with one course of treatment, the self-procured doctor performed a diagnostic spinal injection which produced convulsions and death the same day. The carrier produced medical witnesses who testified that this procedure amounted to malpractice. The board awarded both death benefits and reimbursement for the grossly unsuccessful self-procured medical treatment.84

Irrationality of the California Rule

The confused state in which these cases leave the law on reimbursability of self-procured medical treatment is greatly in need of judicial clarification. The employee, at present, cannot know until his claim is finally adjudicated, whether the successful treatment rule will apply. Furthermore, the rule itself is undesirable. The employee, for all practical purposes, is forced to gamble with his health. When the

82. Id. at 329.
84. Id.
employer's doctors have failed to cure him, he has two choices: He may either continue to suffer with the employer's ineffectual treatment, or he may elect to seek his own care. If he chooses the latter course, he does so entirely at his own risk. Should the treatment fail, reasonable though it may be, he will be personally liable.

The California legislature has already recognized and dealt with a similar problem presented by another aspect of section 4600 of the Labor Code. This section deals not only with medical expenses incurred to cure the effects of injury, but also with those incurred incident to litigation over the injury. The second paragraph of the statute covers medical expenses that are incurred in the effort to prove a claim. These expenses normally involve medical examination and testimony, which are needed as evidence in the applicant's effort to prove his claim. Prior to 1959, it was provided that reimbursement for such expenses could be made only to successful claimants. In 1959, the legislature, realizing the inherent unfairness of a provision that forced the employee to gamble medical expenses on the outcome of his case, amended the statute to eliminate the requirement of success as a condition precedent to reimbursement. The provision as it now stands requires only that the expenses be reasonably and necessarily incurred in the effort to prove the claim. The California Supreme Court, in discussing this amendment, said:

The [petitioner] also argues that allowing such awards to be made to unsuccessful claimants might result in the filing of frivolous claims since an employee, regardless of the merit of his claim, would be entitled to receive a free medical examination. However, the requirement in section 4600 that the expenses be "reasonably" and "necessarily" incurred is a safeguard against such abuse.

We are of the view that the statute provides that a claimant, whether successful or not, is entitled to be reimbursed for expenses reasonably and necessarily incurred for the specified medical services. This construction is in accord with the policy . . . that workmen's compensation laws be liberally construed in favor of extending their benefits.

This language would seem to be equally applicable to the rule requiring success in self-procured treatment. If it is unfair to condition reimbursement of necessary medico-legal expenses on the success of the applicant's claim, it is certainly more unjust to condition the reimbursement

85. Cal. Stats. 1949, ch. 751, § 1, at 1373.
86. Cal. Stats. 1959, ch. 1189, § 9, at 3278.
87. CAL. LABOR CODE § 4601.
89. Id. at 844, 382 P.2d at 598, 31 Cal. Rptr. at 478.
90. See text accompanying note 87 supra.
of necessary medical treatment upon the success of that treatment. In
the former case, the expenses are incurred in an effort to secure a dis-
ability award against the employer, while in the latter case the expense
is incurred to restore the employee's health. Thus, the successful treat-
ment rule would seem to contravene the policies behind the law of work-
men's compensation.

The rule requiring successful treatment also puts the employer in a
particularly advantageous position. When faced with a demand by an
injured employee for medical treatment for which he is legally respon-
sible, he may simply refuse, or at best undertake half-hearted treat-
ment, thereby forcing the employee to seek his own care. If the self-
procured treatment is unsuccessful, the employer is not required to pay;
if it is successful and he is forced to reimburse the employee, he is out nothing, as he would presumably have been required to pro-
vide such care at the hands of his own physicians anyway.

The private physician whom the injured employee has chosen is
also placed in somewhat of a dilemma, in that if his treatment of the
employee fails, he will have only the personal liability of his patient to
which he may look for payment for his services. This factor would
seem to discourage the self-procured physician from undertaking any
liberal treatment, and very possibly might prevent him from taking the
employee's case at all.

A more satisfactory approach would seem to be that adopted by
New Jersey and Tennessee, discussed above, and that suggested by the
Foremost case. Under this view, the injured employee would be reim-
bursed for justifiably procured private treatment, provided only that it
was reasonable. The reasonableness of the treatment procured would
be a factual question to be resolved in the individual case. The em-
ployee should be required to use ordinary diligence in the selection of a
private physician, taking into account the seriousness of his injury and
the effectiveness, or lack thereof, of the treatment given him by the
employer. In many situations, competent doctors may differ in their
views on what treatment is necessary; therefore, the fact that the care
rendered is not that which a majority of doctors would prescribe should

92. See, e.g., Union Iron Works v. Industrial Acc. Comm'n, 190 Cal. 33, 210
P. 410 (1922). This will probably be true even if the unsuccessful treatment is
reasonable. Thus, by denying reimbursement for unsuccessful treatment, the rule
permits the employer to escape liability for reasonable medical care, contrary to section
4600 of the Labor Code.
93. In this way, the employer also avoids the burden of undertaking an unsuccess-
ful operation by his own doctors, at his expense.
94. See text accompanying notes 34-47 supra.
95. 237 Cal. App. 2d 560, 47 Cal. Rptr. 173 (1965); see text accompanying
notes 74-76 supra.
not be determinative. Rather, the only requirement should be that it was such treatment as a competent doctor, after taking into account all the circumstances of the case, could reasonably prescribe. Success or failure might here be brought in as evidence of reasonableness or lack thereof, but should not be the sole determinative factor.  

A problem might be presented by private treatment that not only is unsuccessful, but actually worsens the condition of the employee. Providing that the procedure undertaken was a reasonable one, reimbursement should be allowed. In addition, other jurisdictions in this situation have held the employer liable for the increased disability caused by the unsuccessful treatment of the employee's physician. This result seems justified. It is, after all, the employer who has through his neglect or refusal forced the employee to seek the unsuccessful treatment. Holding the employer liable for unsuccessful or harmful treatment that is reasonably procured by the employee would encourage more diligent treatment on the part of the employer. 

In short, an "ordinary, reasonable man" approach would be a far more satisfactory solution to the problem of self-procured medical care than the "successful treatment" rule now in force. It would allow the employee who had either been provided inadequate care by the employer or refused any care whatsoever, to undertake, in good faith, reasonable procedures for the cure of his injury. It would likewise require the employer, who is responsible for the care, to protect himself by upgrading his standards of treatment, so that an employee would not have to seek his cure elsewhere.

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96. This is the position taken by Hanna, but he is unfortunately not supported by the cases. See note 80, supra.


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