

**WORKERS' COMPENSATION APPEALS BOARD  
STATE OF CALIFORNIA**

**MARIA CASTANEDA, *Applicant***

**vs.**

**ARAMARK;  
ACE AMERICAN INSURANCE COMPANY, administered by SEDGWICK CMS,  
*Defendants***

**Adjudication Number: ADJ9334882  
San Diego District Office**

**OPINION AND DECISION  
AFTER RECONSIDERATION**

We granted reconsideration in order to further study the factual and legal issues in this case. This is our Opinion and Decision After Reconsideration.

Applicant seeks reconsideration of the Opinion and Order Granting Petition for Reconsideration and Decision After Reconsideration (Opinion) issued by the Workers' Compensation Appeals Board on May 20, 2019. By the Opinion, the Appeals Board granted defendant's Petition for Reconsideration and amended the February 22, 2019 Findings and Award (F&A) issued by the workers' compensation administrative law judge (WCJ) as recommended by the WCJ in her Report and Recommendation on Petition for Reconsideration (Report). The amended F&A struck the award for penalties under Labor Code<sup>1</sup> section 5814 and revised a finding of fact to state that defendant's denial of injury to the left shoulder was not unreasonable.

Applicant contends that defendant waived its right to contest injury to the left shoulder and injury to the left shoulder is supported by substantial evidence. Applicant further contends that penalties are mandated because defendant had no factual or legal basis to deny injury to the left shoulder.

We received an answer from defendant.

We have considered the allegations of applicant's Petition for Reconsideration and defendant's answer. Based on our review of the record and for the reasons discussed below, we will affirm the Opinion.

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<sup>1</sup> All further statutory references are to the Labor Code unless otherwise stated.

## FACTUAL BACKGROUND

Applicant claims injury to her bilateral wrists and left shoulder on March 29, 2012 while employed as a custodian/housekeeper by Aramark.

Samir Faragallah, D.C. evaluated applicant as the qualified medical evaluator (QME). In his November 21, 2014 report, his diagnoses were restricted to the bilateral wrists. (Defendant's Exhibit C, November 21, 2014 Report of Samir Faragallah, D.C., p. 11.)

Applicant filed an Amended Application for Adjudication in October 2015 to add the following body parts: both upper extremities, psyche, sleep and internal medicine. On October 12, 2015, defendant sent applicant a Notice of Denial of Workers' Compensation Benefits stating in relevant part:

After careful consideration of all available information, we are denying liability only for your claim of injury to liability to psychiatric, sleep disorder and internal as alleged on the amended application dated 10-1-15 because there is no medical or factual evidence to support industrial injuries to these body parts.

The only accepted body parts remain the bilateral wrists.

(Defendant's Exhibit D, October 12, 2015 denial of the workers' compensation case for psychiatric, sleep disorder, and internal, p. 1.)

In a supplemental report issued in March 2016, Dr. Faragallah's diagnoses included left shoulder sprain/strain. (Defendant's Exhibit B, March 9, 2016 Report of Samir Faragallah, D.C., p. 13.) There is no specific discussion in the report of this diagnosis and no reported symptoms in the left shoulder documented as part of Dr. Faragallah's evaluation. Dr. Faragallah noted normal observation and "full ROM" for the left shoulder, providing 0% whole person impairment for both shoulders due to abnormal motion. (*Id.* at pp. 10-11.) Causation was stated as "Injury at issue 3/26/2012." (*Id.* at p. 17.) Dr. Faragallah opined that "with reasonable medical probability that the industrial incident of 3/26/12 is the cause of the patient's symptoms, pathology and related disability (AOE/COE)." (*Id.* at p. 18.)

Applicant began treating with Thomas Harris, M.D. as her primary treating physician (PTP) in February 2017. (Minutes of Hearing; Summary of Evidence, December 19, 2018, p. 2.) In his April 18, 2017 initial report, Dr. Harris stated that he had been authorized to provide treatment to "her bilateral wrists and left shoulder." (Applicant's Exhibit No. 1, April 18, 2017 Report of Thomas Harris, M.D., p. 1.) His summary of records shows complaints related to the

left shoulder in prior PTP reports from 2016, as well as treatment recommendations for this body part. (*Id.* at pp. 4-5.) Dr. Harris' diagnoses included an impingement syndrome for the left shoulder. (*Id.* at p. 8.) He specified in the initial report that applicant sustained an injury to the left shoulder and bilateral wrists due to the specific injury. (*Id.* at p. 9.) Dr. Harris recommended physical therapy for this shoulder and stated that a formal request for authorization (RFA) would be submitted. (*Id.*)

Defendant requested a replacement QME panel on February 6, 2018 because Dr. Faragallah was no longer a QME. (Defendant's Exhibit F, Request for QME Replacement Panel, February 6, 2018.)

Dr. Harris noted in his March 6, 2018 report that applicant "has been authorized to undergo a left shoulder MRI." (Applicant's Exhibit No. 5, March 6, 2018 Report of Thomas Harris, M.D., p. 2.) The April 14, 2018 MRI of the left shoulder showed "a full thickness supraspinatus tear with retraction." (Applicant's Exhibit No. 6, April 17, 2018 Report of Thomas Harris, M.D., p. 3.) Dr. Harris reported that applicant "had physical therapy, as well as a Cortisone injection, has been doing a home exercise program and taking Ibuprofen as needed, without improvement in her left shoulder symptoms." (*Id.*) He recommended a left shoulder arthroscopy and post-operative treatment. (*Id.*) An RFA for this treatment was submitted on April 26, 2018. (Applicant's Exhibit No. 7, April 26, 2018 Report of Thomas Harris, M.D.) Defendant issued a utilization review (UR) decision authorizing the surgery and related treatment on May 17, 2018. (Applicant's Exhibit No. 14, UR authorizations for left shoulder treatment, May 17, 2018.) The surgery was scheduled for June 14, 2018. (Applicant's Exhibit No. 8, May 29, 2018 Report of Thomas Harris, M.D., p. 3.)

Stephen Banes, D.C. evaluated applicant on May 8, 2018 as the replacement QME. He issued a report dated May 11, 2018, which was served on the parties on May 16, 2018. (Defendant's Exhibit A, May 11, 2018 Report of Stephen Banes, D.C., p. 24.) In his report, Dr. Banes opined as follows regarding causation for the left shoulder:

The medical documentation does not document any pain of the left shoulder until 2016. Although I do find that the applicant's reported mechanism of injury and repetitive duties from her job could very well have caused her left shoulder symptoms, I find it difficult to relate this injury to her work at Aramark as the left shoulder pain was not documented until 2016 and the applicant had not worked since 2014. Throughout the medical documentation it is noted that the applicant had pain and difficulty performing household chores and activities involving both hands. She was given work and activity restrictions on 11/8/13

which included no repetitive gripping, pushing, pulling, shortening of time intervals for repetitive activities, no heavy equipment or vibrating tools, and no lifting more than 20 pounds. Considering the fact that the pain in the shoulder was not documented until over a year and half after she stopped working, during which time it was reported she had activity restrictions involving both arms, the reported mechanism of injury, the current and subjective examination findings, the available medical documentation and reasonable medical probability, I do not find the left shoulder injury to be industrially related.

*(Id. at p. 20.)*

Dr. Banes noted that this determination was based on the information available at the time of his examination and requested additional records including the recent MRI of the shoulder and treating reports. *(Id. at p. 21.)*

Defendant sent a letter to Dr. Harris dated June 4, 2018 advising that it would no longer authorize any treatment for the left shoulder based on Dr. Banes' May 11, 2018 report. (Applicant's Exhibit No. 13, June 4, 2018 letter from John Hughes.) The next day, June 5, 2018, defendant sent a Notice of Denial of Workers' Compensation Benefits to applicant stating it accepted injury for the bilateral wrists and hands, but was denying liability for the left shoulder per Dr. Banes' report. (Applicant's Exhibit No. 12, Notice of Denial of Claim, June 5, 2018, p. 1.)

The matter proceeded to trial on December 19, 2018. The issues included: parts of the body injured regarding the left shoulder, the need for treatment for the shoulder and applicant's petition for penalties per section 5814 for denial of treatment for the left shoulder. (Minutes of Hearing; Summary of Evidence, December 19, 2018, pp. 2-3.) Defendant contended that the denial of treatment and compensability for the shoulder were not in bad faith or unreasonable since it was based on Dr. Banes' report. *(Id. at p. 3.)*

The WCJ issued the F&A on February 22, 2019. In the F&A, the WCJ found that applicant did sustain injury to her left shoulder and there was a need for treatment to this part including for the recommended surgery. Defendant's denial of injury to the shoulder was found to be unreasonable and an award for penalties was included in an amount to be determined.

Defendant sought reconsideration of the F&A. In her Report in response to defendant's Petition, the WCJ rejected defendant's contentions that the left shoulder condition was not industrially caused. However, she agreed that defendant was not unreasonable in denying treatment and recommended the finding that it was unreasonable and corresponding award for

penalties be rescinded. The Appeals Board granted defendant's Petition, adopted and incorporated the WCJ's Report, and amended the F&A as recommended by the WCJ.

Applicant sought reconsideration of the amended decision as outlined above.

## DISCUSSION

The amended decision issued by the Appeals Board did not disturb the finding of injury to the left shoulder and defendant did not challenge the amended F&A. Therefore, causation for this body part is no longer in dispute and may not be further challenged. The sole issue still in dispute is whether defendant unreasonably denied injury to and treatment for the left shoulder, entitling applicant to penalties for an unreasonable delay in benefits under section 5814.

Section 4600 requires defendant to provide reasonable medical treatment to cure or relieve from the effects of an industrial injury. (Lab. Code, § 4600(a).) Medical treatment is considered part of compensation and subject to penalties under section 5814. (See Lab. Code, § 3207; see also *Mote v. Workers' Comp. Appeals Bd.* (1997) 56 Cal.App.4th 902 [62 Cal.Comp.Cases 891]; *Davison v. Industrial Acc. Com.* (1966) 21 Cal.App.2d 15 [31 Cal. Comp. Cases 77].) Section 5814 provides for penalties as follows:

When payment of compensation has been unreasonably delayed or refused, either prior to or subsequent to the issuance of an award, the amount of the payment unreasonably delayed or refused shall be increased up to 25 percent or up to ten thousand dollars (\$10,000), whichever is less. In any proceeding under this section, the appeals board shall use its discretion to accomplish a fair balance and substantial justice between the parties.

(Lab. Code, § 5814(a).)

The burden is on applicant to show a delay in the provision of benefits. (Lab. Code, § 5705 [the burden of proof is on the party holding the affirmative of the issue].) Once applicant establishes a delay in the provision of benefits, the burden shifts to defendant to prove that the delay was reasonable. (*Kerley v. Workers' Comp. Appeals Bd.* (1971) 4 Cal.3d 223, 230 [36 Cal.Comp.Cases 152]; see also *Kamel v. West Cliff Medical* (2001) 66 Cal.Comp.Cases 1521, 1523 (Appeals Board en banc); *Berry v. Workmen's Comp. Appeals Bd.* (1969) 276 Cal.App.2d 381, 383 [34 Cal.Comp.Cases 507] ["Once delay is shown, a satisfactory explanation must be made by the employer"].) The Court of Appeal has held that in the event of a delay of benefits, the "only satisfactory excuse...is genuine doubt from a medical or legal standpoint as to liability

for benefits, and that the burden is on the employer or his carrier to present substantial evidence on which a finding of such doubt may be based.” (*Kerley, supra*, at p. 227.)

Whether a delay in delivery of benefits is unreasonable is a question of fact to be resolved by the Appeals Board. (See *Gallamore v. Workers’ Comp. Appeals Bd.* (1979) 23 Cal.3d 815 [44 Cal.Comp.Cases 321].) Determining “whether a delay is reasonable or unreasonable depends on more than the number of days payment was delayed. Many factors are to be considered.” (*Kampner v. Workers’ Comp. Appeals Bd.* (1978) 86 Cal.App.3d 376, 382 [43 Cal.Comp.Cases 1198].) “[D]elays become ‘unreasonable’ for purposes of Labor Code Section 5814 only when they are excessive.” (*Id.* at 380.) The Appeals Board “is required to determine whether the delay . . . was egregious in the light of the legitimate needs to administering workers’ compensation insurance.” (*Id.*)

In this matter, treatment for the left shoulder had apparently been provided to applicant by defendant until receipt of Dr. Banes’ report. Defendant authorized the left shoulder surgery per its May 17, 2018 UR decision. Upon receipt of Dr. Banes’ report, defendant advised Dr. Harris that it would no longer authorize any treatment for the left shoulder due to the new QME’s opinion that this body part was not industrially related.

We are unpersuaded that defendant’s denial of treatment for this body part was unreasonable under the circumstances in this case. The proof of service for Dr. Banes’ report shows that it was served on the parties the day before the surgery was authorized on May 17, 2018. Accounting for at least five days for mailing,<sup>2</sup> it may be presumed that defendant received Dr. Banes’ report shortly after its UR decision issued. Dr. Banes’ conclusion that applicant’s left shoulder condition was not industrially related created a genuine doubt as to defendant’s liability for benefits for this body part. Defendant’s delay in providing treatment following receipt of Dr. Banes’ report was not without a reasonable basis such that penalties are warranted.

Therefore, we will affirm the Opinion.

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<sup>2</sup> See Cal. Code Regs., tit. 8, former § 10507(a), now § 10605(a) (eff. Jan. 1, 2020).

For the foregoing reasons,

**IT IS ORDERED** as the Decision After Reconsideration of the Workers' Compensation Appeals Board that the Opinion and Order Granting Petition for Reconsideration and Decision After Reconsideration issued by the Workers' Compensation Appeals Board on May 20, 2019 is **AFFIRMED**.

**WORKERS' COMPENSATION APPEALS BOARD**

**/s/ DEIDRA E. LOWE, COMMISSIONER**

**I CONCUR,**

**/s/ CRAIG SNELLINGS, COMMISSIONER**

**MARGUERITE SWEENEY, COMMISSIONER**  
**PARTICIPATING NOT SIGNING**



**DATED AND FILED AT SAN FRANCISCO, CALIFORNIA**

**April 16, 2021**

**SERVICE MADE ON THE ABOVE DATE ON THE PERSONS LISTED BELOW AT THEIR ADDRESSES SHOWN ON THE CURRENT OFFICIAL ADDRESS RECORD.**

**BRADFORD & BARTHEL  
LAW OFFICE OF PHILLIP COHEN  
MARIA CASTANEDA**

***AI/pc***

I certify that I affixed the official seal of the Workers' Compensation Appeals Board to this original decision on this date. *abs*