

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

MARTHA CORREA, *Applicant*

vs.

**VOLT SERVICES GROUP;
GALLAGHER BASSETT SERVICES, *Defendants***

**Adjudication Number: ADJ10755478
Oxnard District Office**

**OPINION AND ORDER
DENYING PETITION FOR
RECONSIDERATION**

We have considered the allegations of the Petition for Reconsideration and the contents of the report of the workers' compensation administrative law judge (WCJ) with respect thereto. Based on our review of the record, and for the reasons stated in the WCJ's report, which we adopt and incorporate, we will deny reconsideration.

We also admonish defense attorney Rachel P. Delgado with Llarena, Murdock, Lopez, & Azizad for attaching documents that are already part of the record in violation of WCAB Rule 10945. (Cal. Code Regs., tit. 8, former § 10842(c), now § 10945(c)(1)-(2) (eff. Jan. 1, 2020).) Failure to comply with the WCAB's rules in the future may result in the imposition of sanctions.

For the foregoing reasons,

IT IS ORDERED that the Petition for Reconsideration is **DENIED**.

WORKERS' COMPENSATION APPEALS BOARD

/s/ DEIDRA E. LOWE, COMMISSIONER

I CONCUR,

/s/ ANNE SCHMITZ, DEPUTY COMMISSIONER

/s/ PATRICIA A. GARCIA, DEPUTY COMMISSIONER



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

April 26, 2021

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

**MARTHA CORREA
GHITTERMAN GHITTERMAN & FELD
LLARENA, MURDOCK & LOPEZ**

abs

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

**REPORT AND RECOMMENDATION
ON PETITION FOR RECONSIDERATION**

**I.
INTRODUCTION**

1. Date of Injury: 10/24/2015 – 10/24/2016
Applicant's age: 46
Occupation: Sub Assembler
Body Parts Injured: Left Shoulder

2. Identity of Petitioner: Defendant
Timeliness: The Petition was timely filed on 2/25/2021
Verification: The Petition is verified

3. Date of Finding and Award: February 5, 2021

4. The Petitioner Contends that: the evidence does not justify the findings of facts and the findings of fact do not support the decision/award. More specifically:
Defendant claims that the court should have found the applicant MMI and not TTD.

**II.
FACTUAL BACKGROUND**

Applicant suffered an admitted injury to her left shoulder while employed during the period 10/24/2015 through 10/24/2016. She also alleged a derivative injury to the right shoulder, which is not before this court at this time. Although she initially treated with a Dr. Pomerantz at Central Coast Industrial Care, as pointed out by the Defense's Petition that information is not relevant to the current issue. She subsequently began treatment with Dr. Behrman, an authorized PTP, after the PQME Dr. Lundeen, felt she needed additional treatment. As noted in the Petition, Dr. Behrman began treatment on 10/29/2018. Dr. Lundeen again evaluated the applicant on 5/8/2019, wherein he found her to be MMI. TTD was terminated on 5/27/2019, requesting credit for overpayment of the TTD after 5/8/2019.

Dr. Behrman continued to be the applicant's PTP. Dr. Behrman's deposition was taken on 11/5/2019, wherein he clearly stated that he disagreed with Dr. Lundeen's finding of MMI, as the applicant had not gotten any better and there was additional treatment he wanted to try short of an actual surgery, an arthroscopic subacromial decompression. (See Exhibit #5, EAMS I.D.#3325726711/5/2019 at page 8, line 22 – page 9 line 5).

Therefore, the PTP felt the applicant continued to be TTD, whereas the PQME found the applicant to be MMI. That is the crux of the issue before this court.

III. DISCUSSION

This court felt the Applicant continued to be TTD, and stated in the Opinion on Decision:

Per the medical reports(s) of Dr. Behrman, M.D., his explanations in his deposition of 11/5/2019 as well as the Medical reporting of PQME Dr. Lundeen, it is found that the applicant is entitled to continued temporary disability for the additional period beginning 5/27/2019 and continuing until the Applicant has concluded treatment, rendered MMI or has exhausted her TTD. See explanations below.

Although the applicant's left shoulder complaints had not significantly changed when PQME Dr. Lundeen rendered her MMI on 5/8/19, he never the less confirmed that all treatment had been appropriate and also confirmed she was still having problems. However, the Doctor also noted (see pg. 3) the patient stated "she did not desire to undergo any invasive treatment at this time and wanted to settle her case."

The Doctor noted specifically: Her pain was constant 4/10 with exacerbations to 7-8/10 upon overhead activity, reaching and lifting activities. (pg. 2). He Diagnosed left shoulder impingement syndrome (pg.7). Patient to be considered TPD up to P&S [date of his report] however, if there were no modified duty work available, then it would be medically reasonable and appropriate for the patient to be considered in a TTD work status. (pg 8) Patient does have a continuation of left shoulder pain symptoms that significantly impact on her ability to perform activities of daily living. (pg 8). The applicant would need a judicious use of nonsteroidal anti-inflammatory medications, monitoring by a PTP, with exacerbation of symptoms that are reasonably expected given the patient's condition, the patient may benefit from periodic P.T., with 4-6 weeks of P.T. with 3 visits per week up to 18 per year, with subacromial steroid injections, and if failed to respond to non-surgical treatment, to allow for shoulder surgery, to include subacromial decompression and possible distal clavicle resection. (pg 9). She is not capable of performing her customary duties (pg9).

In Dr. Lundeens later report of 4/9/2020 (Exhibit #F, marked as #G in Filenet) he didn't change his mind as to MMI but did reiterate: That on his exam of 5/8/2019 the applicant desired to move forward with a settlement of her claim. (pg 1). Dr. Lundeen further reviewed the treatment rendered by Dr. Behrman up to that exam and again found it medically reasonable and appropriate for this patient's ongoing left shoulder pain condition. (pg 1). Dr. Lundeen reiterated in his Final Comments his opinion that the Patient had reached MMI status at his 5/8/2019 exam because her condition remained stable and essentially unchanged. In the next sentence he commented on Dr. Behrmans treatment after his 5/8/2019 exam and stated the patient had received all appropriate non-operative treatment up to that point in time and then again reiterated that the patient had made it clear to him at the time of the 5/8/2019 exam that she was not interested in pursuing any surgery for the left shoulder.

Dr. Behrman disagreed with Dr. Lundeens finding her P&S. He clearly stated she wanted to continue to treat and noted she could possibly benefit from further P.T., steroid injections and possible platelet injections, and eventually surgery if all this failed. This is consistent with the description of further treatment needed by Dr. Lundeen in his report of 5/8/2019. However,

Dr. Behrman indicated that in most cases similar to the applicant's they would recover short of actual surgery. As pointed out by Dr. Behrman, it did appear the PQME found her MMI, based at least in part because he believed she wanted to settle her case and did not want surgery at his exam on 5/8/2019. Therefore, when one compares the treatment completed, the additional treatment suggested by Dr. Behrman and completed as confirmed by Dr. Lundeen, the fact that even Dr. Lundeen felt she was a Qualified Injured Worker and should not return to her prior occupation, this court believes she continued to be TTD from 5/27/2019 and continuing. This should continue as long as treatment is being rendered and authorized up to and including surgery. If all treatment is in fact exhausted and surgery is the only option, and at which point the Applicant refuses, she of course would be P&S/MMI at that point.

Therefore at this time this court finds the Applicant continued to be TTD and was entitled to additional TTD at least from 5/8/2019 and continuing until she has/had exhausted treatment by the PTP, is again found MMI by the PTP, or possibly by the PQME after further treatment or has exhausted her TTD benefits.

To put it another way, when Dr. Lundeen examined the applicant on 5/8/2019 and rendered her MMI, that decision was made based on what appeared to be his opinion at that time that the applicant wanted to settle her case at that point and short of considering any surgery. Was she MMI on 5/8/2019? No, as discussed above, when considering all the medical reporting, the fact the applicant was still in a lot of pain and was in fact receiving ongoing treatment, the more prudent approach was to continue to render treatment, hopefully to avoid the surgery mentioned by both doctors. Dr. Brouman did not feel she was MMI for these reasons and felt she may recover short of a surgery. Therefore, he continued to treat her. In fact, the treatment after 5/8/2019, would have had to have been approved by U.R. and/or IMR. We can see from the various reports of Dr. Brouman that he gave the applicant injections for her trigger fingers, and platelet injections in the shoulder. He felt additional P.T. would help and after Dr. Lundeen confirmed his course of treatment, hoped that further P.T. would be authorized. There was no evidence that the continued treatment was ever disapproved, denied, or "exhausted" as the Petition states. In fact, when Dr. Lundeen reviewed the records of treatment by Dr. Brouman subsequent to his first and only exam on 5/8/2019 as recorded in his supplemental report of 4/9/2020, Dr. Lundeen also confirmed that all treatment done by Dr. Brouman was reasonable and necessary. (See Exhibit Identified as #F but is "G" in file net, EAMSI.D.#33629856, Dr. Lundeen 4/9/2020, page 7). This is despite his opinion in his prior report of 5/8/2019 that at that point the applicant "had received all appropriate non-operative treatment" and the applicant had made it clear to Dr. Lundeen that "she was not interested in pursuing any surgery for her left shoulder at that time." (Lundeen 5/8/2019, page 6, EAM's I.D.# 33629855, at page 6). Obviously this was not correct as the treatment rendered by Dr. Brouman after his report on 5/8/2019, that was non-surgical, was in fact found to be reasonable by Dr. Lundeen himself per his report of 4/9/2020.

Dr. Brouman, felt the applicant needed continued treatment beyond the date of 5/8/2019 and did in fact continue to treat her in his same capacity as before 5/8/2019. This court did not put an end date on the TTD, as that issue was not before the court. The issue before this court was whether she continued to be TTD or was MMI at the time TTD terminated. This court merely found that the applicant was entitled to continued TTD at the time it stopped on 5/27/2019, pending further treatment status, rejection of further treatment or surgery, further finding of MMI by the PTP or PQME after further treatment, or exhaustion of TTD benefits.

It should be noted that Dr. Brouman is the PTP and was issuing required PR-2 reports, which are not meant to be exhaustive reports, but are designed by the WCAB system to be short. However, as a PTP, all treatment RFA's are reviewed by the Defenses' U.R. and or I.M.R. protocols. Further in this case all treatment was in fact reviewed by the PQME who found it all to be reasonable and necessary.

The Petition also states the Applicant was MMI because the PTP, Dr. Brouman did not give work restrictions for possible modified duty. The Defense apparently did not question this until now. The PTP did not change his reporting formula. He was consistent both before and after the finding of MMI by the PQME. Further the question arises as to why defendant, themselves, did not ask Dr. Brouman about work restrictions at his deposition on 11/5/2019? If work restrictions were a concern as to whether or not to pay TTD vs. PDA, certainly a question could have been asked of the PTP at any time during his treatment, particularly at his deposition.

Further, the PQME in his report of 5/8/2019 did give work restrictions. There was no evidence presented that an offer of modified or alternative work was ever made by the defendants. Therefore any further discussion regarding work restrictions, is moot.

Non-Surgical? The Petition by Defense makes the medically conclusionary statement several times that the Applicant was/is non-surgical. That is an incorrect statement. This court would agree that surgery is the very thing the treatment rendered by Dr. Brouman was trying to avoid. Dr. Brouman even expressed his opinion that often times in cases like this, surgery can be avoided with the type of treatment he was providing. As for surgery, that is a medical decision, not a legal one. In this case both doctors have indicated that if the treatment doesn't work the final option is a subacromial decompression and possible clavicle resection.

In evaluating the evidentiary value of medical evidence, a physician's report and testimony must be considered as a whole rather than in segregated parts; and, when so considered, the entire report and testimony must demonstrate the physician's opinion is based upon reasonable medical probability. (See Lamb v. Workmen's Comp. Appeals Bd. (1974) 11 Cal.3d 274, 281, 113 Cal. Rptr. 162, 39 Cal. Comp. Cases 310). Dr. Brouman's reporting clearly takes into consideration the concept of reasonable medical probability, and his reporting is based on his ongoing examination findings or lack thereof, not on any incorrect legal theory as defendant alleges. This combined with the fact that all treatment has to be U.R. and/or IMR approved not to mention Dr. Lundeen's ratification of all of his treatment.

When a WCJ's finding on industrial injury "is supported by solid, credible evidence, it is to be accorded great weight by the Board and should be rejected only on the basis of contrary evidence of considerable substantiality." Lamb v. Workmen's Comp. Appeals Bd., *supra*, 11 Cal.3d 274, 281.

**IV.
RECOMMENDATION**

For reasons as stated herein, and in the Opinion on Decision, and Findings and Award, this court recommends that the Findings and Award be upheld.

DATE: 3/9/2021

/s/Robert M. Mays
Robert M. Mays
WORKERS' COMPENSATION
ADMINISTRATIVE LAW JUDGE