

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

TERESA CHAVEZ, *Applicant*

vs.

ZODIAC SEAT SHELLS; TRAVELERS INSURANCE COMPANY, *Defendants*

**Adjudication Numbers: ADJ11217002, ADJ10808344, ADJ11216967
San Luis Obispo District Office**

**OPINION AND DECISION
AFTER RECONSIDERATION**

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

Defendant seeks reconsideration of the Findings and Award (F&A) issued on May 13, 2022, wherein the workers' compensation administrative law judge (WCJ) found that (1) applicant sustained a compensable consequence injury to the right shoulder and is entitled to future medical treatment to cure or relieve the effects of injury; (2) defendant unreasonably delayed evaluation of the right shoulder which led to an unreasonable delay in the provision of treatment of the right shoulder; (3) applicant is awarded a 25% penalty on all medical treatment to the right shoulder provided to the date, and defendant is to reimburse applicant or her providers for any self-procured treatment, with the parties to adjust the sums due and jurisdiction reserved to the WCJ; (4) applicant is entitled to future medical care to cure or relieve the effects of the injury to the right shoulder; (5) defendant unreasonably delayed the payment of temporary disability benefits from July 27, 2021 through August 30, 2021; (6) applicant is entitled to a 25% penalty on the temporary disability benefits delayed, with the parties to adjust the sums due and jurisdiction reserved to the WCJ; (7) applicant's attorney is awarded a Labor Code Section 5814.5¹ attorney fee of \$1,500.00 for enforcing the prior award for medical care for the hand which was inextricably linked to the temporary disability benefits and the unreasonable delay of those benefits; (8) there is insufficient

¹ Unless otherwise stated, all further statutory references are to the Labor Code.

evidence to impose a section 5813 penalty against defendant, and sanctions are denied with jurisdiction reserved to the WCJ if future conduct requires revisiting the issue; (9) there is no credit for overpayment of temporary disability benefits; (10) Dr. Balfour's reporting is substantial evidence; and (11) regulation section 9785 is not a valid defense to the delay in payment of temporary disability benefits.²

Defendant contends that the WCJ erroneously found that (1) applicant sustained injury arising out of and in the course of employment (AOE/COE) to the right shoulder; (2) defendant unreasonably delayed authorization of treatment of the right shoulder; and (3) applicant is entitled to a 25% penalty for defendant's delayed authorization of treatment of the right shoulder.³

We received an Answer from applicant.

The WCJ issued a Report and Recommendation on Petition for Reconsideration (Report) recommending that the Petition be denied.

We have reviewed the Petition, the Answer, and the contents of the Report. Based upon our review of the record, and for the reasons discussed below, we will affirm the F&A, except that we will amend to find that Dr. Balfour's reporting to date does not constitute substantial medical evidence on the issue of whether applicant sustained injury to the right shoulder, the issue of whether applicant sustained injury AOE/COE to the right shoulder is deferred, the issue of whether applicant is entitled to future treatment of the right shoulder is deferred, the record fails to show that defendant unreasonably delayed authorization of treatment of the right shoulder, and applicant is not entitled to a 25% penalty for defendant's delayed authorization of treatment of the right shoulder; and we will return the matter to the trial level for further proceedings consistent with this decision.

FACTUAL BACKGROUND

On March 17, 2022, the matter proceeded to trial in ADJ11216967, with the following issues in dispute:

1. Parts of body injured, with the right shoulder being an issue of AOE/COE.
2. Need for further medical treatment.

² We note that the F&A sets forth factual findings indicating that applicant is entitled to an award but does not set forth a separate award.

³ Defendant does not challenge the factual findings that it unreasonably delayed payment of temporary disability benefits from July 27, 2021 through August 30, 2021, and that applicant is entitled to a twenty-five percent (25%) penalty on the delayed temporary disability benefits.

3. The applicant alleges penalties pursuant to Labor Code section 5814, attorney's fees pursuant to Labor Code section 5814.5, and sanctions pursuant to Labor Code section 5813.

4. The applicant alleges penalties pursuant to Labor Code section 5814 for the following failures:

- a. The failure to pay temporary disability timely from July 27, 2021, through August 30, 2021.
- b. The failure to pay 4650(d) penalty on temporary disability.
- c. The failure to authorize Dr. Castello's treatment of the applicant in a timely fashion.
- d. The applicant alleges 5813 penalties for the obstructive conduct in refusing to provide treatment for the shoulder.
- e. The Petition to Reopen is at issue at this time concerning the right shoulder and the need for treatment to the shoulder.

5. The defendant asserts the following defenses:

- a. Defendant asserts there was no delay in providing treatment to the shoulder or any other body part.
- b. Defendant also asserts there was no delay in the provision of temporary disability.
- c. Defendant also asserts the applicant was not treating during the dates of May 28, 2021 through August 18, 2021, and that the failure to provide a report pursuant to California Code of Regulations section 9785(f)(8) as to make temporary disability nonpayable at that time.
- d. Defendant also asserts they are entitled to a credit for an overpayment of temporary disability during the aforementioned period of May 28, 2021, through August 18, 2021.

6. Whether the PQME report of Dr. Balfour is substantial evidence.

(Minutes of Hearing and Summary of Evidence (MOH/SOE)/Order Taking Off Calendar ADJ11217002/ADJ10808344, March 17, 2022, pp. 3:10-4:12.)

The WCJ admitted the report of QME Dr. Balfour dated September 15, 2020, and the report of QME report of Dr. Balfour dated July 15, 2020, into evidence.

The report of Dr. Balfour dated September 15, 2020 states:

In my report dated July 15, 2020, I reported that the patient had not worked since February of 2018, a period of 29 months. She had complaints of right shoulder and left hand pain. I expressed my opinion that she had osteoarthritis of the proximal interphalangeal joints of her left index and long fingers, osteoarthritis of the distal interphalangeal joint of her left little finger, and osteoarthritis of her left thumb. I had provided a rating report on May 9, 2018. Subsequent to my evaluation dated

May 9, 2018, the patient developed complaints about the right shoulder. Dr. Behrman has suggested a total joint replacement of the proximal interphalangeal joint of the left long finger. In addition, there was noted to be some osteoarthritis of the interphalangeal joint of the left thumb, which was mild. I note that the patient had a prior injury dated July 21, 2015, involving her right index finger, which is a separate, different injury. I had provided a rating report for the left thumb, the left index finger, and the left long finger, totaling eighteen percent of the whole person. I had provided work restrictions, estimating that the patient should be precluded from more than moderate lifting and grasping with her left hand, as well as from fine finger manipulation with the fingers of the left hand.

I am in receipt of three notes by Dr. Behrman, dated June 8, 2020, July 20, 2020, and August 7, 2020. Dr. Behrman is contemplating replacement of the proximal interphalangeal joint. He says that the proximal interphalangeal joint of the long finger tends to do very well with implant arthroplasty. He states this is because there is less side-to-side stress, and the likelihood of the implant dislocating or breaking is less. He has requested authorization for that surgical intervention.

...

In any case, in response to Mr. Ramirez, regarding restrictions for the right shoulder, this patient would be prohibited from frequent, repetitive overhead lifting and carrying. That is my best estimate. I had described the patient as requiring restriction from frequent, repetitive moderate lifting and carrying and grasping with the left hand.

Apparently, she now has pain sufficiently severe that Dr. Behrman wants to replace the joint. If that is authorized and done (Dr. Behrman is a competent hand surgeon), I would think that by definition this patient will not be returning to the workplace.

...

For the sake of clarity, the body parts involved in this particular industrial injury, according to my Qualified Medical Evaluation are the proximal interphalangeal joints of the left index and long fingers, the distal interphalangeal joint of the left little finger, and the right shoulder. In my report, I had mentioned arthritis of the interphalangeal joint of the right thumb; my notes imply that I thought that the osteoarthritis of the right thumb is not part of this industrial injury. I point out that osteoarthritis of the proximal interphalangeal and distal interphalangeal joints is common in somewhat older women in the mid-fifties or older. The condition occurs far more frequently in women than in men; however, it does occur in both men and women. It can be both traumatic in etiology and atraumatic in etiology, occurring for no obvious reason. In this case, the conclusion is that the involved joints of the left index and long fingers have industrial osteoarthritis. The vast majority of men and women who have osteoarthritis of these joints learn to live with it and to work around it. It appears that this patient has not been able to do that.

(Ex. 9, Report of Dr. Balfour, February 15, 2020, pp. 2-4.)

The report of Dr. Balfour dated July 15, 2020 states:

CURRENT CHIEF COMPLAINTS

The patient's chief complaints include right shoulder pain and left hand pain.

...

REVIEW OF MEDICAL RECORDS

The patient's medical records, a stack measuring three inches in thickness, have been provided for my review.

...

DIAGNOSTIC IMPRESSION

1. Osteoarthritis, proximal interphalangeal joints, left index and long fingers.
2. Osteoarthritis, distal interphalangeal joint, left little finger.
3. Osteoarthritis, interphalangeal joint, right thumb.

...

[T]he patient has complaints of the right shoulder, and she has subsequently changed primary treating physicians within the Associated Hand Surgeons of Santa Barbara group.

...

CAUSATION

This patient sustained a specific injury, direct trauma, to her left index finger. In my report dated May 9, 2018, I had discussed causation, indicating that this was probably a cumulative trauma injury. It is, but there is a specific aggravation to the osteoarthritic proximal interphalangeal joints of the right index and long fingers, during the discussed trauma dated February 1, 2018, involving the right thumb and wrist, and the index finger. There is also a claimed injury dated July 21, 2015, a specific injury to the right index finger. I had noted that the patient had osteoarthritis of the hand, aggravated the pre-existing trauma on the two dates of injury, July of 2015, and again in February of 2018.

...

Of greatest concern are the positive physical findings at the right shoulder. In my opinion, that is appropriately treated on a Workers' Compensation basis. There is significant osteoarthritic pain and stiffness of the proximal interphalangeal joints of the left index and long fingers. These, too, are appropriately treated on a Workers' Compensation basis.

(Ex. 10, Report of Dr. Balfour, July 15, 2020, pp. 2-14.)

In the Opinion on Decision, the WCJ states:

On or about June 11, 2019, applicant received an award of permanent disability and future medical care from the Court to her bilateral upper hands and lungs. The award did not, include injury to the right shoulder.

On November 20, 2019, based upon complaints by applicant of increased pain in the right shoulder, applicant filed a Petition to Reopen which included the right shoulder as a compensable consequence of her injuries.

On or about December 23, 2019, Dr. Balfour, without re-examining the applicant, opined that applicant's right shoulder pain could be a compensable consequence of her injuries but he would need to re-evaluate the applicant to make a final determination as to whether such right shoulder problem was industrially-related.

On or about the same time, December 23, 2019, defendant, without investigation or further inquiry with Dr. Balfour, denied the right shoulder claim (see Exhibit "I"). No basis for the denial is articulated.

...

The parties had previously resolved the penalty on the delay of Dr. Balfour's payment and attorney's fees were apparently paid to applicant's attorney on that issue.

(Opinion on Decision, pp. 3-4.)

In the Report, the WCJ states:

Dr. Balfour acted as the orthopedic QME. On November 20, 2019, applicant filed a Petition to Reopen claiming the right shoulder as a compensable consequence of the original continuous trauma injury. Defendant took no action to investigate such claim. Applicant was not deposed, no medical report was obtained, and no treating physician on the MPN was used to evaluate the applicant. Applicant therefore sought re-evaluation with Dr. Balfour, a course of action which was completely stymied by the defendant. In good faith, applicant attorney then wrote to QME Balfour.

In response to such written correspondence by applicant's counsel, on December 23, 2019, Dr. Balfour, without reexamining the applicant, indicated in a report that the right shoulder could be a compensable consequence of the original continuous trauma, but to make a final determination thereon, he would need to fully re-evaluate the applicant. In response to such reporting, defendant then immediately denied the claim of right shoulder injury. . . . No medical examinations were set and no investigation of any kind appears to have occurred. No written inquiry was made to Dr. Balfour or to treating doctor, Dr. Behrman, who was treating the applicant for a bilateral hand problem. Defendant delayed payment to Dr. Balfour for his prior services such that further medical evaluation with Dr. Balfour was declined by such physician until the ultimate re-evaluation in July 2020.

On July 15, 2020, after defendants had finally paid the prior bills of Dr. Balfour, and after full evaluation by Dr. Balfour, such physician explicitly stated in a report that treatment to the right shoulder should be provided on an industrial basis. The

defendants did not depose Dr. Balfour, did not institute benefits, and did not provide treatment or seek clarification of Dr. Balfour's report.

...

At trial, on March 17, 2022, information was elicited through applicant's testimony that applicant had ultimately been possibly provided evaluation for potential treatment with a Dr. Castello, whose reporting was not prepared nor ready at the time of trial and the original submission of the case on March 17, 2022.

(Report, pp. 2-3.)

The Minutes of Hearing of March 17, 2022 further reflect a statement by the WCJ that "there is an upcoming evaluation with the QME to be undertaken shortly, and the Defendant has stipulated and agreed to provide treatment up until the date of that evaluation". (MOH/SOE, 3/17/22, at p. 2:13-15.)

DISCUSSION

Defendant contends that the WCJ erroneously found that applicant sustained injury AOE/COE to the right shoulder on the ground that the reporting of Dr. Balfour does not constitute substantial medical evidence.

All findings of the WCAB must be based on substantial evidence. (*Le Vesque v. Workmen's Comp. Appeals Bd.* (1970) 1 Cal.3d 627, 637 [35 Cal.Comp.Cases 16]; *Escobedo v. Marshalls* (2005) 70 Cal.Comp.Cases 604, 620 [Appeals Bd. en banc].)

To constitute substantial evidence "... a medical opinion must be framed in terms of reasonable medical probability, it must not be speculative, it must be based on pertinent facts and on an adequate examination and history, and it must set forth reasoning in support of its conclusions." (*Escobedo v. Marshalls* (2005) 70 Cal.Comp.Cases 604, 621 (Appeals Board en banc).) "Medical opinion ... fails to support the Board's findings if it is based on surmise, speculation, conjecture or guess." (*Heggin v. Workmen's Comp. Appeals Bd.* (1971) 4 Cal. 3d 162, 169 [36 Cal.Comp.Cases 93, 97].)

The applicant for workers' compensation benefits has the burden of proving industrial causation. (*LaTourette v. Workers' Comp. Appeals Bd.* (1998) 17 Cal.App.4th 644, 650 [63 Cal.Comp.Cases 253] citing *McAllister v. Workmen's Comp. Appeals Bd.* (1968) 69 Cal.2d 408, 413 [33 Cal.Comp.Cases 660].) However, in order to prove industrial causation, the applicant need only show that industrial factors were a contributing cause of the injury. (*South Coast Framing, Inc. v. Workers' Comp. Appeals Bd. (Clark)* (2015) 61 Cal.4th 291, 299 [80 Cal. Comp. Cases

489].) Where a subsequent injury is the direct and natural consequence of an original industrial injury, the subsequent injury is deemed under the compensable consequence doctrine to relate back to the original injury and it is not treated as a new and independent injury with a different date of injury. (E.g., *Southern Cal. Rapid Transit Dist. v. Workers' Comp. Appeals Bd. (Weitzman)* (1979) 23 Cal.3d 158 [44 Cal.Comp.Cases 107]; *Ballard v. Workmen's Comp. Appeals Bd.* (1971) 3 Cal.3d 832 [36 Cal.Comp.Cases 34].)

Here, Dr. Balfour's reporting of February 15, 2020 identifies the right shoulder as a body part involved in this particular industrial injury and placed restrictions on applicant's use of the right shoulder. (Ex. 9, Report of Dr. Balfour, February 15, 2020, pp. 2-4.) His reporting of July 15, 2020 refers to "positive physical findings at the right shoulder" which lead him to conclude that the shoulder should be treated as an industrial injury. (Ex. 10, Report of Dr. Balfour, July 15, 2020, pp. 2-14.)

However, Dr. Balfour's reporting does not (1) diagnose injury to the right shoulder; (2) attribute industrial causation to any such injury by explaining how any injury or physical findings developed as a direct and natural consequence of applicant's original industrial injury; or (3) show that his medical opinion was based on pertinent facts and on an adequate examination and history, including by identifying the medical records reviewed. (Ex. 10, Report of Dr. Balfour, July 15, 2020, pp. 2-14; *Weitzman, supra.*)

We therefore conclude that Dr. Balfour's reporting does not constitute substantial medical evidence on the issue of whether applicant sustained injury to the right shoulder, and, therefore, fails to support the WCJ's findings that applicant sustained a compensable consequence injury and is entitled to future medical treatment to cure or relieve the effects of that injury.

The Appeals Board has the discretionary authority to develop the record when the medical record is not substantial evidence or when appropriate to fully adjudicate the issues. (§§ 5701, 5906; *Tyler v. Workers' Comp. Appeals Bd.* (1997) 56 Cal.App.4th 389 [62 Cal.Comp.Cases 924]; see *McClune v. Workers' Comp. Appeals Bd.* (1998) 62 Cal.App.4th 1117 [63 Cal.Comp.Cases 261].) In our en banc decision in *McDuffie v. Los Angeles County Metropolitan Transit Authority* (2001) 67 Cal.Comp.Cases 138 (Appeals Board en banc), we stated that "[s]ections 5701 and 5906 authorize the WCJ and the [Appeals] Board to obtain additional evidence, including medical evidence, at any time during the proceedings (citations) [but] [b]efore directing augmentation of the medical record ... the WCJ or the [Appeals] Board must establish as a threshold matter that

specific medical opinions are deficient, for example, that they are inaccurate, inconsistent or incomplete." (*McDuffie, supra*, at p. 141.) The preferred procedure is to allow supplementation of the medical record by the physicians who have already reported in the case. (*Id.*)

Here, we have explained that PQME Dr. Balfour concluded that the right shoulder should be treated as an industrial injury, but the record lacks reporting as to which, if any, diagnosis, applies to the right shoulder, what caused any right shoulder injury, or whether his opinions thereon are based on pertinent facts and an adequate examination and history.

Accordingly, we will amend the F&A to find that Dr. Balfour's reporting to date does not constitute substantial medical evidence on the issue of whether applicant sustained injury to the right shoulder, that the issue of whether applicant sustained injury to the right shoulder is deferred, and that the issue of whether applicant is entitled to future medical treatment of the right shoulder is deferred. Per *McDuffie, supra*, our non-binding recommendation is that the parties obtain further reporting on these issues from PQME Dr. Balfour.

We turn next to defendant's contention that the WCJ erroneously found that defendant unreasonably delayed authorization of treatment of the right shoulder.

Section 5814(a) states:

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.

In *Ramirez v. Drive Financial Services* (2008) 73 Cal.Comp.Cases 1324 (Appeals Bd. en banc), we emphasized that section 5814 affords a WCJ discretion in determining the penalty which should be assessed, with a primary view towards the goals of encouraging the prompt payment of benefits by making delays costly on defendants, and of ameliorating the effects of any delays on the injured worker. To that end, in *Ramirez*, we listed several factors to be considered in assessing a section 5814 penalty. These factors are: (1) evidence of the amount of the payment delayed; (2) evidence of the length of the delay; (3) evidence of whether the delay was inadvertent and promptly corrected; (4) evidence of whether there was a history of delayed payments or, instead, whether the delay was a solitary instance of human error; (5) evidence of whether there was any statutory, regulatory, or other requirement (e.g., an order or a stipulation of the parties) providing that

payment was to be made within a specified number of days; (6) evidence of whether the delay was due to the realities of the business of processing claims for benefits or the legitimate needs of administering workers' compensation insurance; (7) evidence of whether there was institutional neglect by the defendant, such as whether the defendant provided a sufficient number of adjusters to handle the workload, provided sufficient training to its staff, or otherwise configured its office or business practices in a way that made errors unlikely or improbable; (8) evidence of whether the employee contributed to the delay by failing to promptly notify the defendant of it; and (9) evidence of the effect of the delay on the injured employee. (*Ramirez, supra*, at pp. 1329–1330.)

Here, the record shows that the WCJ concluded that defendant delayed payment to Dr. Balfour for his prior services and that Dr. Balfour subsequently declined to further evaluate applicant until July 2020 as a result. (Report, pp.2-3.) We therefore conclude that defendant's conduct delayed evaluation and treatment to which applicant may have been entitled.

Accordingly, we admonish defendant to comply with its obligations to make timely payments as necessary to investigate and evaluate workers' compensation claims in the future.

However, since the record fails to support the WCJ's findings that applicant sustained a compensable consequence injury to the right shoulder and is entitled to future medical treatment to cure or relieve the effects of that injury, and since the record consequently is unclear with respect to the other foregoing *Ramirez* factors, we conclude that the record fails to show that defendant's delay of payment was unreasonable under section 5814.

Accordingly, we will amend the F&A to find that the record fails to show that defendant unreasonably delayed authorization for treatment of the right shoulder, and that applicant is not entitled to a 25% penalty for defendant's delayed authorization of treatment of the right shoulder.

Accordingly, we will affirm the F&A, except that we will amend to find that Dr. Balfour's reporting to date does not constitute substantial medical evidence on the issue of whether applicant sustained injury to the right shoulder, the issue of whether applicant sustained injury AOE/COE to the right shoulder is deferred, the issue of whether applicant is entitled to future treatment of the right shoulder is deferred, the record fails to show that defendant unreasonably delayed authorization of treatment of the right shoulder, and applicant is not entitled to a 25% penalty for defendant's delayed authorization of treatment of the right shoulder; and we will return the matter to the trial level for further proceedings consistent with this decision.

For the foregoing reasons,

IT IS ORDERED, as the Decision After Reconsideration of the Workers' Compensation Appeals Board, that the Findings and Award issued on May 13, 2022 is **AFFIRMED, EXCEPT** that it is **AMENDED** as follows:

FINDINGS OF FACT

1. The issue of whether applicant has suffered a compensable consequence injury to the right shoulder is deferred.

2. The record fails to establish that defendant unreasonably delayed authorization of treatment of the right shoulder.

3. Applicant is not entitled to a 25% penalty on all medical treatment to the right shoulder.

4. The issue of whether applicant is entitled to future medical care to cure or relieve the effects of injury to the right shoulder is deferred.

* * *

10. Dr. Balfour's reporting to date does not constitute substantial medical evidence on the issue of whether applicant sustained injury to the right shoulder.

IT IS FURTHER ORDERED that the matter is **RETURNED** to the trial level for further proceedings consistent with this decision.

WORKERS' COMPENSATION APPEALS BOARD

/s/ JOSÉ H. RAZO, COMMISSIONER

I CONCUR,

/s/ CRAIG L. SNELLINGS, COMMISSIONER

/s/ KATHERINE WILLIAMS DODD, COMMISSIONER



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

MARCH 5, 2026

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

**TERESA CHAVEZ
LAURA CHAPMAN & ASSOCIATES
HERRERAS & FORSHER, LLP
CABALLERO COLLECTIONS**

SRO/*kl*

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