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STATE OF CALIFORNIA
Division of Workers' Compensation
Workers' Compensation Appeals Board

HERIBERTO MENDEZ SOLORIO, ✓ *Applicant,* vs. **ARAMARK** ✓ **UNIFORM AND CAREER; ACE AMERICAN INSURANCE COMPANY administered by SEDGWICK** ✓ **CVS BREA;** *Defendants.*	**Case No. ADJ11967253** ✓ **FINDINGS AND ORDER AND OPINION ON DECISION**

The above entitled matter having been heard and regularly submitted, the Honorable Jane Madsen, Workers' Compensation Administrative Law Judge, now decides as follows:

FINDINGS OF FACT

1. Heriberto Mendez Solorio, born May 4, 1978 while employed on June 30, 2017 as an O.P. Soil, occupational group number 340, at Lompoc, California, by Aramark, insured for workers' compensation by Ace American Insurance Company administered by Ace American Insurance Company administered by Sedgwick, sustained injury arising out of and in the course of his employment to his left elbow, right knee, right ankle and right foot.
2. Applicant is not entitled to penalties for unreasonable delay in providing medical treatment.
3. Applicant's attorney is not entitled to fees pursuant to Labor Code Section 5814.5 and California Code of Regulations 10561.
4. Applicant did not engage in bad faith or delaying tactics. Defendant is not entitled to penalties, sanctions or attorney's fees.

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ORDER

It is hereby ordered that all parties take nothing as the result of the allegations put forth herein.

DATE: July 6, 2022

Jane Madsen
WORKERS' COMPENSATION
ADMINISTRATIVE LAW JUDGE

Served by mail on all parties listed on the Official Address record on the above date.
BY: jleal

OPINION ON DECISION

Applicant relies on the following Labor Code Sections:

Labor Code Section 5814 states: **a)** 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.
(b) If a potential violation of this section is discovered by the employer prior to an employee claiming a penalty under this section, the employer, within 90 days of the date of the discovery, may pay a self-imposed penalty in the amount of 10 percent of the amount of the payment unreasonably delayed or refused, along with the amount of the payment delayed or refused. This self-imposed penalty shall be in lieu of the penalty in subdivision (a).
(c) Upon the approval of a compromise and release, findings and awards, or stipulations and orders by the appeals board, it shall be conclusively presumed that any accrued claims for penalty have been resolved, regardless of whether a petition for penalty has been filed, unless the claim for penalty is expressly excluded by the terms of the order or award. Upon the submission of any issue for determination at a regular trial hearing, it shall be conclusively presumed that any accrued claim for penalty in connection with the benefit at issue has been resolved, regardless of whether a petition for penalty has been filed, unless the issue of penalty is also submitted or is expressly excluded in the statement of issues being submitted.
(d) The payment of any increased award pursuant to subdivision (a) shall be reduced by any amount paid under subdivision (d) of Section 4650 on the same unreasonably delayed or refused benefit payment.
(e) No unreasonable delay in the provision of medical treatment shall be found when the treatment has been authorized by the employer in a timely manner and the only dispute concerns payment of a billing submitted by a physician or medical provider as provided in Section 4603.2.
(f) Nothing in this section shall be construed to create a civil cause of action.
(g) Notwithstanding any other provision of law, no action may be brought to recover penalties that may be awarded under this section more than two years from the date the payment of compensation was due.
(h) This section shall apply to all injuries, without regard to whether the injury occurs before, on, or after the operative date of this section.

(i) This section shall become operative on June 1, 2004.

Labor Code Section 5814.5 states: " *When the payment of compensation has been unreasonably delayed or refused subsequent to the issuance of an award by an employer that has secured the payment of compensation pursuant to Section 3700, the appeals board shall, in addition to increasing the order, decision, or award pursuant to Section 5814, award reasonable attorneys' fees incurred in enforcing the payment of compensation awarded."*

Defendant claims penalties, sanctions and attorney's fees for alleged frivolous Declaration of Readiness and Petition for Penalties. Defendant cites Labor Code Section 5813 which reads: *"**(a)** The workers' compensation referee or appeals board may order a party, the party's attorney, or both, to pay any reasonable expenses, including attorney's fees and costs, incurred by another party as a result of bad-faith actions or tactics that are frivolous or solely intended to cause unnecessary delay. In addition, a workers' compensation referee or the appeals board, in its sole discretion, may order additional sanctions not to exceed two thousand five hundred dollars ($2,500) to be transmitted to the General Fund.*
***(b)** The determination of sanctions shall be made after written application by the party seeking sanctions or upon the appeal board's own motion.*
***(c)** This section shall apply to all applications for adjudication that are filed on or after January 1, 1994."*

Defendant cites Rule 10561. That Section has been renumbered to Rule 10421 and titled Sanctions. It states in relevant part: *"**(a)** On its own motion or upon the filing of a petition pursuant to rule 10510, the Workers' Compensation Appeals Board may order payment of reasonable expenses, including attorney's fees and costs and, in addition, sanctions as provided in Labor Code section 5813 . Before issuing such an order, the alleged offending party or attorney must be given notice and an opportunity to be heard. In no event shall the Workers' Compensation Appeals Board impose a monetary sanction pursuant to Labor Code section 5813 where the one subject to the sanction acted with reasonable justification or other circumstances make imposition of the sanction unjust.*
***(b)** Bad faith actions or tactics that are frivolous or solely intended to cause unnecessary delay include actions or tactics that result from a willful failure to comply with a statutory or regulatory obligation, that result from a willful intent to disrupt or delay the proceedings of the Workers' Compensation Appeals Board, or that are done for an improper motive or are indisputably without merit. Violations subject to the provisions of Labor Code section 5813 shall include but are not limited to the following:....*

(6) Bringing a claim, conducting a defense or asserting a position:
(A) That is:
(i) Indisputably without merit;
(ii) Done solely or primarily for the purpose of harassing or maliciously injuring any person; and/or
(iii) Done solely or primarily for the purpose of causing unnecessary delay or a needless increase in the cost of litigation; and
(B) Where a reasonable excuse is not offered or where the offending party has demonstrated a pattern of such conduct.
(7) Presenting a claim or a defense, or raising an issue or argument, that is not warranted under existing law -- unless it can be supported by a non-frivolous argument for an extension, modification or reversal of the existing law or for the establishment of new law -- and where a reasonable excuse is not offered or where the offending party has demonstrated a pattern of such conduct. In determining whether a claim, defense, issue or argument is warranted under existing law, or if there is a reasonable excuse for it, consideration shall be given to:
(A) Whether there are reasonable ambiguities or conflicts in the existing statutory, regulatory or case law, taking into consideration the extent to which a litigant has researched the issues and found some support for its theories; and
(B) Whether the claim, defense, issue or argument is reasonably being asserted to preserve it for reconsideration or appellate review.

This subdivision is specifically intended not to have a "chilling effect" on a party's ability to raise and pursue legal arguments that reasonably can be regarded as not settled.

(8) Asserting a position that misstates or substantially misstates the law, and where a reasonable excuse is not offered or where the offending party has demonstrated a pattern of such conduct...."

After reviewing the evidence submitted a time line was determined as follows:

1. April, 2020: emails exchanged regarding treatment for Mr. Mendez Solorio's foot and ankle. No treatment was obtained.
2. December 17, 2020: case submitted for decision. Parties stipulated to the level of permanent disability but submitted the issue of need for further medical treatment. The dispute with regard to medical care centered on treatment for the right foot and ankle. Mr. Mendez

Solorio testified no one had examined his ankle other than on the initial injury date. His attorney told him the insurance company was not accepting an appointment for the ankle. (MOH December 17, 2020)

3. February 16, 2021 order issued vacating submission for further development of the record. Parties were instructed to ask QME Dr. Schwartz whether applicant should be awarded treatment for the right foot, right heel and right ankle *because the doctor did not address medical treatment for those body parts.*
4. June 24, 2021 trial: supplemental report of Dr. Schwartz dated April 6, 2021 admitted into evidence. Case submitted.
5. August 24, 2021 Award of future medical treatment for all injured body parts.
6. January 3, 2022 4600 letter to defendant selecting Dr. Pearson as primary treating physician and asking MAA to assist. (Applicant's Exhibits 4 &5) The gap between August and January was not addressed in the evidence submitted.
7. Exhibits 6, 7, 8 and10 cover authorization requests and the identity of the attorney at Bradford Barthel responsible for handling the claim. The emails also document Mr. Lazar was willing to accept Dr. Pearson *or* Dr. Haggerty as primary treating physician.
8. January 18, 2022 the new defense attorney wrote a letter asking why applicant could not treat within the MPN—a question that had been answered in prior email exchanges between the parties. However, since defendant's client had authorized treatment 5 days before this letter there was no delay occasioned.
9. January 13, 2022 Sedgwick's letter to Dr. Haggerty authorizing treatment. (Exhibit B)
10. January 28, 2022 date Dr. Haggarty's office indicates the authorization was received. (Exhibit C)
11. February 11, 2022 voice mail from Dr. Haggerty's office to applicant's attorney asking for acknowledgement treatment would only be to ankle and foot because that is the nature of Dr. Haggerty's practice. Per Dr. Haggerty no reply. (Exhibit C)
12. March 11, 2022 applicant scheduled per Exhibit C.
13. March 14, 2022 appointment notice with Dr. Haggerty. (Exhibit D)

There was delay obtaining treatment for Mr. Mendez Solorio's ankle and foot between April 2020 and March 2022. The delays in large part are the result of the

unwieldy and complicated system declared to be designed to expedite treatment to injured workers.

The QME initially did not specifically address whether treatment was needed for the right ankle, heel and foot. No one asked the doctor to correct the oversight.

Next, the parties asked a judge to decide the issue without having the QME address the question. When the judge determined the QME did not address the question more time passed while the matter was vacated, the information obtained, case submitted again and decided.

Following the Award there was confusion as to whether the defendant's MPN provided the appropriate specialist to treat the ankle and foot. The MPN did not. When that fact was finally established to defendant's satisfaction, treatment was authorized with one of the two doctors applicant's attorney had indicated were acceptable. There was another delay because Dr. Haggerty's office wanted to be sure parties knew he only treated ankles and feet.

At the trial on penalties Mr. Solorio Mendez testified he has started treatment with Dr. Haggerty, nearly 5 years after his industrial injury. This delay is hardly what the legislature envisioned when the MPN/QME changes were made. It is however, often the unfortunate result.

After reviewing all trial briefs and the evidence presented it is determined there are no grounds for penalties, attorney's fees or sanctions for or against either party.

DATE: July 6, 2022

Jane Madsen
WORKERS' COMPENSATION
ADMINISTRATIVE LAW JUDGE

STATE OF CALIFORNIA
DEPARTMENT OF INDUSTRIAL RELATIONS
DIVISION OF WORKERS' COMPENSATION

07-06-2022

PROOF OF SERVICE

OF

FINDINGS AND ORDER

AND

OPINION ON DECISION

Served by mail or email on the following parties:

By: J. Leal **Date: July 6, 2022**

OFFICIAL ADDRESS RECORD

Case Number: ADJ11967253

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