

1 A Professional Law Corporation
2
3 San Diego, California 92108
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5 Arbitrator
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8 WORKERS' COMPENSATION APPEALS BOARD
9 STATE OF CALIFORNIA

10 WCAB Case No.:

11 Applicant,

12 vs.

13 CONTRACTING
14 COMPANY;
15 INSURANCE COMPANY;
16 INSURANCE COMPANY

17 Defendants

18 REPORT AND RECOMMENDATION ON
19 INSURANCE COMPANY'S
20 PETITION FOR RECONSIDERATION
21 [ADMINISTRATIVE RULES 10860,10867]
22 ARBITRATION PURSUANT TO
23 LABOR CODE §5275

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25 ARBITRATION DATE: 01/27/2018
26 ARBITRATION DECISION: 05/16/2018
27 Petition for Reconsideration 06/08/2018

28 Arbitrator:

29 I
30 INTRODUCTORY STATEMENT

31 The above matter was ordered to Arbitration on or about April 4, 2016, at the request of the
32 parties, and was heard by the Arbitrator on September 19, 2016, February 3, 2017, and January 18,
33 2018; as the parties were unable to resolve the issues involved, the Arbitrator's Decision was
34 issued and filed at the Workers' Compensation Appeals Board on May 16, 2018. The Arbitrator
35 notes that the parties granted additional time to the Arbitrator pursuant to Labor Code section

1 5288(a) (e).

2 The Decision included findings that Defendant **INSURANCE**
3 **COMPANY's** (hereinafter) 'early' '(premature' as articulated by Petitioner herein) filing
4 of their Petition for Contribution was not barred by the Statute of Limitations, that AME Dr.
5 s opinions, upon which the Arbitrator relied, was substantial evidence and served
6 as more compelling medical evidence than that of Dr. (as offered by
7 **INSURANCE COMPANY**, hereinafter), that s timing in its joinder of and
8 other action and/or inaction by does not support a laches defense as raised by (in part
9 due to s own action and/or inaction). The Arbitrator concluded that Applicant had sustained a
10 cumulative trauma injury to her bilateral upper extremities and neck. as alleged, and as provided
11 for by way of benefits by for which and had joint and several liability of 87%
12 and 13% respectively. The Arbitrator granted s Petition for Contribution with a provision
13 that the parties adjust the claim in accordance with the Findings and Opinions and that jurisdiction
14 would be reserved as to any controverted expenditures claimed by

15 Defendant, timely filed its Petition for Reconsideration. It alleges in its Petition
16 herein that the evidence does not justify the findings of fact, that the Decision and Findings and
17 Order (the Arbitrator) acted without in excess of his powers, and that the findings of fact do not
18 support the Decision and Findings and Order.

19 Specifically, as in the underlying litigation and briefing, sets forth applicant's medical
20 and treatment history. essentially argues that the case was allowed to 'spiral out of control'
21 and that did not take timely opportunities to settle the case. They second guess why
22 utilized an AME for applicant's right shoulder, they argue that Dr. reporting is severely
23 flawed, and question why Dr. a neurologist, was used as an AME, who they characterized
24 as a doctor who was reporting out of his specialty. They further argue that Dr. their
25 forensic QME, obtained and used solely in connection with the Arbitration proceedings, is
26 substantial evidence and should have been relied upon by the Arbitrator rather than upon Dr.
27 Dr. found that applicant had only suffered a cumulative trauma to the bilateral
28 wrists and that the other body parts were due to previous injuries and/or to non-industrial causes.

1 argues that violated the statute of limitations, when it filed its Petition on May
2 24, 2012, prior to any WCAB Award/Order or Compromise and Release. It notes that in
3 connection with the 'premature' filing that had requested from Presiding Judge that an
4 Arbitrator be appointed and that objected to same on the grounds that no Award had been
5 issued (i.e. that Arbitration would be premature). No WCAB action was taken and the underlying
6 case proceeded to mediation to explore settlement of the underlying case. Mediation was
7 unsuccessful and filed a Declaration of Readiness for a MSC on December 5, 2014 on all
8 issues including contribution. objected to contribution being heard as that issue is subject to
9 mandatory arbitration (LC 5275).

10 further argues that should be barred by laches by virtue of its delayed filing a
11 request for joinder of In doing so, they claim that the 'case was a train wreck' and that so
12 much damage had been done that there was little could do.

13 has filed a responsive Answer to s Petition. also sets forth a complete
14 history of the case and of applicant's course of treatment. responds that was not in
15 violation of the Statute of Limitations in that it timely *instituted* proceedings for contribution, that
16 it did not unduly delay joinder of and did not commit laches, and that the use of Dr.
17 as an AME was appropriate and that his evaluations of applicant support the finding of substantial
18 medical evidence. notes that did obtain a LC 4050 forensic report from Dr.

19 which opined that causation of applicant's disability of her multiple body parts were to
20 be apportioned to the alleged cumulative trauma and preexisting causes. They note that Dr.
21 upon being asked for clarification by refused to do any further work on the case
22 (i.e. clarification was not forthcoming).

23 Regarding the statute of limitations issue, argues that they 'initiated' proceedings
24 for contribution by filing a Declaration of Readiness solely for the contribution issue on January
25 22, 2016, which is within one year of the Order Approving the Compromise and Release on April
26 7, 2015. They note that agreed to the selection of the Arbitrator on April 4, 2016 at the MSC
27 calendar which was then ordered to Arbitration, also within one year of the C&R Order. They
28 argue that LC 5500.5(e) does not specifically require that the institution of proceedings occur after

1 the Award of compensation; rather, the provision would be the last day upon which a party may
2 institute proceedings.

3 argues, consistent with the Arbitrator's opinion, that there was no mandate for
4 to join prior to an Award for benefits. They point out that even when was joined
5 in 2001, did not pursue discovery until the LC 4050 report in October 2009. After obtaining
6 the unfavorable 4050 report, failed to take any further action. They argue that s
7 actions/inaction reveal that they were not prejudiced by and that actively 'fought'
8 the claim throughout.

9 Lastly, argues that Dr. opinions are substantial by virtue of his multiple
10 evaluations of the applicant over a period of several years of the case, which is consistent with the
11 many other physicians evaluating and treating the applicant. They further argue that Dr.
12 opinion has an inadequate history and that he did not examine the applicant, who had
13 expired a few years before before.

14 II

15 FACTUAL SUMMARY

16 The Arbitrator incorporates by reference the factual and procedural summary set forth in
17 the Arbitrator's Decision and Findings and Order on file herein (pages 4-11).

18 III

19 DISCUSSION

20
21 The Arbitrator believes that his Decision and Findings and Order, as filed herein, is self-
22 explanatory, responsive to, and dispositive of, the issues raised by except as discussed further
23 herein. The Arbitrator incorporates, by reference, his discussion regarding the issues on pages 6
24 through 12 in the Decision and Findings and Order.

25 The Arbitrator has carefully reviewed and considered the arguments raised by on
26 Reconsideration herein as well as the arguments and points argued by The Arbitrator
27 responds further in support of his Arbitration Decision and Findings and Order, as follows.
28

1 The Arbitrator's powers are derived from Labor Code section 5272. Arbitrators shall have
2 all of the statutory and regulatory duties and responsibilities of a workers' compensation judge
3 (with some exceptions not relevant here). The Arbitrator has broad latitude to evaluate evidence
4 and render determinations related to compensation arising out of the Labor Code.

5 Having reviewed the Petitioner's and Respondent's arguments it remains the Arbitrator's
6 interpretation of the facts and medical reporting that the initial medical treatment and diagnostic
7 efforts focused on applicant's bilateral hands/carpal tunnel which failed to account for applicant's
8 neck pathology (which took approximately one year to clearly identify as a positive cervical disc).
9 The substantial medical reporting opines that applicant's cervical injury was caused, at least in
10 part, by cumulative trauma (and not as a result of the specific injury of 1989). The Arbitrator is in
11 agreement with Dr. discussion and assessment regarding what would otherwise appear
12 to be a later onset of applicant's cervical condition. For these reasons, the Arbitrator continues to
13 disagree with Dr. opinions and conclusions. It should be further stated that Dr.
14 a neurologist, was perfectly suited to serve as an AME and, unlike Dr. had
15 the benefit of contemporaneous examinations of the applicant. Unfortunately, Dr. was
16 operating under very difficult circumstances (record review only of a very complex, convoluted,
17 and extensive history). The Arbitrator continues to find Dr. reporting to be more
18 compelling than that of Dr. and that Dr. reporting is considered to be
19 substantial medical evidence. The Arbitrator notes that at that time Dr. had a fine
20 reputation in this community and often served as an AME in these types of cases. This should not
21 be interpreted to impugn the integrity of Dr. as he is a fine orthopedist and is often used
22 as an AME as well.

23 As to the Statute of Limitations defense raised by the Arbitrator's discussion in the
24 Arbitration Decision and Findings and Order is thorough and remains unaltered herein. As noted,
25 filed its Petition for Contribution on May 24, 2012, well after had been joined as a
26 Defendant in 2001, and approximately three years before the Order Approving the Compromise
27 and Release on April 7, 2015. Labor Code section 5500.5 (e) states that "*at any time within one*
28 *year after the appeals board has made an award ..., any employer held liable under the award*

1 *may institute proceedings before the appeals board for the purpose of determining ...*
2 *contribution.*” The provision does not specify that the Petition must be filed after the Award;
3 rather it limits the time of initiating proceedings to be no later than one year after the Award. It is
4 generally recognized that a separate Petition must be filed which secures the jurisdiction of the
5 WCAB for contribution proceedings. However, there are cases that have found that a formal
6 petition is not necessarily required and that other pleadings may be sufficient to substitute for a
7 Petition. Additionally, it has been held that a Declaration of Readiness to Proceed listing
8 contribution as the issue sufficiently “instituted proceedings” before the Appeals Board (Bennett,
9 (2010) 75 CCC 168). The Petition for Contribution had been on file since May 2012 and was
10 fully aware of s claim and position at that time. More importantly, had filed a
11 Declaration of Readiness in December 2014 which included the issue of contribution as an issue.
12 The Compromise and Release was ordered approved on April 7, 2015 and within one year, on
13 January 22, 2016, again filed a Declaration of Readiness to Proceed for a Status Conference
14 solely to initiate proceedings on the sole issue of Contribution. The Arbitrator continues to find
15 that the Declaration of Readiness, in the context of s having previously filed a Petition for
16 Contribution, served as a functional equivalent of a Petition for Contribution and should be
17 considered remedial to the perceived issue. Also within one year of the Order Approving C&R, on
18 April 4, 2016, WCAB Judge ordered the matter out for Arbitration *proceedings*, within the
19 WCAB’s jurisdiction. It is the Arbitrator’s continued opinion and determination that s
20 ‘early’ filing of their Petition for Contribution does not violate the letter or spirit of Labor Code
21 section 5500.5. Moreover, had been fully aware of the pending issues and was not prejudiced
22 or mislead in any way by s Declaration of Readiness to Proceed (to Arbitration). For these
23 reasons, Petition for Contribution should not be barred by the Statute of Limitations.

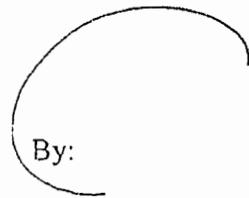
24 As for the Laches Defense raised by the Arbitrator continues to disagree with
25 position on this issue and remains of the opinion that it has not met its burden of proof. In
26 order for the doctrine to apply, both delay and prejudice must be affirmatively established. There
27 was no requirement that join in 1991 or 1992; moreover, while joinder generally
28 occurs before an Award is issued, it is even permissible to join a defendant for contribution

1 purposes after the Award. In this case, was formally in the case from 2001 and had until
2 February 2015, nearly fourteen years, to do full formal discovery. however, delayed its quest
3 for a LC 4050 exam with Dr. until 2009 and then, after obtaining the disappointing and
4 unfavorable report as to causation, appears to have resigned themselves to their apparent situation:
5 they did not follow up with a deposition of Dr. nor did they seek a QME until after
6 applicant's death. Lastly, the Arbitrator cannot accept s proposition that had been in the
7 case earlier and had administered the claim, in the place of that the outcome of the case
8 would have been different; this is purely speculation. Consequently, it is the Arbitrator's
9 determination that there was neither undue delay by in their request to join nor that it
10 can be established that the delay that did occur, which was significantly contributed to by
11 own inaction, prejudiced s rights; in this regard, has not met its burden to establish the
12 elements and defense of laches.

13 This undoubtedly is a very complex and convoluted case requiring the parties, the medical
14 treaters and evaluators, and Arbitrator to attempt to sort out, weigh evidence, and to play "Monday
15 Morning Quarterback". All parties should be commended for the exceptional work devoted to the
16 issues and case, as indeed this was not a typical contribution litigation matter.

17 For these reasons, and as more fully and completely set forth in the Arbitrator's Findings,
18 Decision and Order, it is recommended that s Petition for Reconsideration be denied.

19
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21 Dated: 20 JUNE 2018

By: 

Workers' Compensation Arbitrator