WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

THE ROMANO TRUST, on behalf of CHARLES ROMANO, deceased, ***Applicant,*** **vs.** **THE KROGER CO. dba RALPH'S GROCERY CO., permissibly self-insured, administered by SEDGWICK CMS,** ***Defendants.***	**Case No. ADJ1372133 (VNO 0488219)** **OPINION AND DECISION AFTER RECONSIDERATION**

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

Defendant seeks reconsideration of the February 13, 2012 Supplemental Findings and Award. In that decision, the workers' compensation administrative law judge (WCJ) addressed defendant's repeated efforts to avoid or postpone its statutory duty to provide medical care, egregious behavior which increased the suffering of a horrifically ill individual.

The WCJ found that applicant, Charles Romano, while employed as a stocker for Ralph's Grocery Company on December 20, 2003, sustained an industrial injury to his left shoulder and cervical spine "with subsequently industrially-related staph infection resulting in a compensable consequence injury to the neck, cardiovascular system, pulmonary system, thoracic spine (with resulting paralysis) and as further compensable consequence injury to urinary/fecal incontinence, renal failure, psyche, and vision (bilateral retinal hemorrhages)."[1] Among other things, the WCJ also held that defendant unreasonably delayed medical care in 11 separate instances, imposing for each one the maximum penalty under Labor

[1] Tragically, Mr. Romano's industrial injury ultimately led to his death. However, an inter vivos application was filed on his behalf and, for convenience, we will refer to Mr. Romano as applicant rather than decedent.

Code Section 5814: 25% of the delayed medical benefit, not to exceed $10,000.[2] The WCJ also held that applicant was entitled to attorney's fees under section 5814.5 at the rate of $350 per hour, but the reasonable amount of the fee was deferred. The WCJ did not permit defendant to withdraw from a January 15, 2009 trial stipulation in which the parties agreed to present trial testimony in the form of depositions.

Defendant contends that no penalties for delay can be imposed because (1) applicant is now deceased; (2) the penalty issues were not heard within two years of the date that payment of compensation was due; (3) the incidents in question were not separate and distinct acts of misconduct subject to multiple penalties; (4) the WCJ did not set forth sufficient reasons for the imposition of each penalty; and (5) there was no unreasonable delay. Defendant further contends that, even if any penalties are warranted, applicant's attorneys' fees are excessive. Defendant also requests that the parties' stipulation regarding deposition testimony be set aside.

We have considered the Petition for Reconsideration and applicant's Answer. The parties have shown good cause why they should be allowed to exceed the page limit, so we grant both of their requests to do so. (Cal. Code Regs., tit. 8, §§ 10845(a), 10232(1).) The WCJ prepared a Report of Workers' Compensation Judge on Petition for Reconsideration (Report). For the reasons stated in the Report, which we hereby adopt and incorporate, and for the reasons discussed below, we will affirm the February 13, 2012 Supplemental Findings and Award, except that we will amend Finding No. 8 to clarify that the billing for St. John's Hospital is not included in the penalty for delayed reimbursement of the Medi-Cal lien.

We have rarely encountered a case in which a defendant has exhibited such blithe disregard for its legal and ethical obligation to provide medical care to a critically injured worker. Sedgwick CMS, acting as claims administer for The Kroger Company/Ralph's Grocery Company, demonstrated a callous indifference to the catastrophic consequences of its delays, inaction, and outright neglect. In light of defendant's repeated, unreasonable delays and denials, and its willingness to ignore a 2006 Finding and

[2] All further statutory references are to the Labor Code, unless stated otherwise.

Award issued by the Workers' Compensation Appeals Board, we will refer this case to the Audit Unit of the Division of Workers' Compensation (DWC). (See Lab. Code, § 129(b)(3); see also Cal. Code Regs., tit. 8, §§ 10100.2(o), 10106(b), 10106.1(c)(3).)[3]

I.

Although a thorough description of the facts may be found in the WCJ's Report, we will very briefly summarize them here for the purpose of clarity. (Report, pp. 3-45.)

Applicant Charles Romano sustained an admitted industrial injury to his left shoulder on December 20, 2003 and underwent surgery on August 29, 2005.

As a result of his surgery, applicant contracted methicillin-resistant staphylococcus aureus (the antibiotic-resistant staph infection known as MRSA), resulting in catastrophic, multi-system injury including renal failure, pulmonary failure, and paralysis from C8 down. Applicant was hospitalized at Ventura County Medical Center, which was paid for by Medi-Cal because defendant refused to authorize treatment. After his discharge, applicant self-procured treatment at County Villa Oxnard Manor, a facility unequipped to deal with his complex injuries; he was then hospitalized at St. John's Regional Medical Center after a visiting friend discovered that applicant's catheter bag was full of blood. (See Report, pp. 3-4.)

On October 25, 2006, a prior WCJ issued an Amended Findings and Award holding, among other things, that applicant sustained an industrial injury to the "left shoulder and cervical spine with subsequently industrially related staph infection resulting in a compensable consequence injury to his neck, cardiovascular system, pulmonary system, thoracic spine with resulting paralysis." Applicant was awarded further medical treatment, and defendant was ordered to pay or adjust all reasonable medical and medical-legal liens.[4] Defendant did not comply, failing to pay medical costs incurred in treating applicant's industrial injury, including the hospital care previously provided by St. John's Regional

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[3] The Audit Unit not only audits insurers, but also self-insured employers and third-party administrators. (Lab. Code, § 129(a).)

[4] Defendant sought reconsideration of this decision, but the Appeals Board denied its petition. Defendant's subsequent petition for writ was summarily denied on June 19, 2007. (*Ralph's Grocery Co. v. Workers' Comp. Appeals Bd.* (*Romano*) 72 Cal.Comp.Cases 1028 (writ den.).)

Medical Center and Ventura County Medical Center. (See Report, pp. 4-5; 29-31 [no payment made until July 23, 2008].)

After several hospitalizations, applicant was eventually transferred to Care Meridian, a facility with only a single doctor, despite applicant's complicated and potentially deadly multi-system medical conditions. (See Report, pp. 6-9.) Throughout this time, despite the October 2006 award of further medical care, defendant delayed providing some medical services and refused to authorize others. Several times, defendant's claims adjuster, Theresa McDivitt, denied treatment (or withheld authorization) without consulting with a medical professional and without referring the request for treatment to utilization review. (See Report pp. 22-25 [denial of Bi-Pap machine], 26-28 [failure to authorize hospitalization], 31-32 [failure to authorize venous/Doppler studies and psychiatric consult].) Authorization of other treatment was delayed. (See Report, p. 20-23 [four month delay of provision of wheelchair]; 35-38 [delay in appointment of nurse case manager].) Payment for various medical services was delayed or never made at all. (Report p. 28-29 [X-rays and CT scans], 39-40 [hospitalization], 40-41 [ambulance], see also 41-43 [guardian ad litem expenses].) Defendant continued to deny or delay care through the end of applicant's life, failing to authorize his final hospitalization at Community Memorial Hospital, where he died on May 2, 2008 from cardiorespiratory arrest, respiratory failure and pneumonia brought on by his industrial MRSA infection and related medical conditions. (Report, pp. 2-9, 26-28.)

In the February 13, 2012 Supplemental Findings and Award, the WCJ found that defendant had unreasonably delayed or denied medical treatment in 11 separate instances and awarded penalties accordingly. Defendant then filed the present petition.

II.

Section 4600(a) provides: "Medical … treatment … that is reasonably required to cure or relieve the injured worker from the effects of his or her injury *shall be provided by the employer* [emphasis added]." Of course, "shall" denotes a mandatory duty. (Lab. Code, § 15.) Therefore, in *Braewood Convalescent Hosp. v. Workers' Comp. Appeals Bd.* (*Bolton*) (1983) 34 Cal.3d 159, 165 [48 Cal.Comp.Cases 566], the Supreme Court said: "Section 4600 requires more than a passive willingness on the part of the employer to respond to a demand or request for medical aid. [Citations.] This section

requires *some degree of active effort to bring to the injured employee the necessary relief* [emphasis added]."

Over the years, the Courts of Appeal have made similar statements. For example, in *Ramirez v. Workers' Comp. Appeals Bd.* (1970) 10 Cal.App.3d 227, 234 [35 Cal.Comp.Cases 383], the Court said:

> "Upon notice or knowledge of a claimed industrial injury an employer has both the right and *duty to investigate the facts* in order to determine his liability for workmen's compensation, but he must act with expedition in order to comply with the statutory provisions for the payment of compensation which require that he *take the initiative in providing benefits*. He must seasonably offer to an industrially injured employee that medical, surgical or hospital care which is reasonably required to cure or relieve from the effects of the industrial injury...[emphasis added]." (Accord, *Aliano v. Workers' Comp. Appeals Bd.* (1979) 100 Cal.App.3d 341, 366-367 [44 Cal.Comp.Cases 1156, 1172]; *Dorman v. Workers' Comp. Appeals Bd.* (1978) 78 Cal.App.3d 1009, 1020 [43 Cal.Comp.Cases 302, 308].)

Similarly, in *United States Cas. Co. v. Industrial Acc. Com.* (*Moynahan*) (1954) 122 Cal.App.2d 427, 435 [19 Cal.Comp.Cases 8], the Court said:

> "Section 4600 of the Labor Code places the responsibility for medical expenses upon the employer when he has knowledge of the injury. ... [¶¶] The duty imposed upon an employer who has notice of an injury to an employee is *not ... the passive one of reimbursement but the active one of offering aid in advance and of making whatever investigation is necessary* to determine the extent of his obligation and the needs of the employee [emphasis added]."[5]

In addition to these judicially announced obligations to do more than passively sit by, defendants also have a regulatory duty to conduct a reasonable and good faith investigation to determine whether benefits are due. Specifically, Administrative Director Rule 10109 provides, in relevant part:

> "(a) ... [A] claims administrator must conduct a reasonable and timely investigation upon receiving notice or knowledge of an injury or claim for a workers' compensation benefit.

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[5] See also, e.g., *Bergenstal v. Workers' Comp. Appeals Bd.* (1996) 45 Cal.App.4th 1272, 1277 [61 Cal.Comp.Cases 437] [" '[i]t is the duty of an employer ... *to take the initiative* in furnishing [medical treatment]' [emphasis added]" [quoting from *Deauville v. Hall* (1961) 188 Cal.App.2d 535, 540 [26 Cal.Comp.Cases 44])]; *Henson v. Workmen's Comp. Appeals Bd.* (1972) 27 Cal.App.3d 452, 457 [37 Cal.Comp.Cases 564] ["[a]n employer has the *affirmative statutory duty to provide medical ... treatment* [emphasis added]."].

"(b) A reasonable investigation must attempt to obtain the information needed to determine and timely provide each benefit, if any, which may be due the employee.

"(1) The administrator may not restrict its investigation to preparing objections or defenses to a claim, but must fully and fairly gather the pertinent information, whether that information requires or excuses benefit payment. ... The claimant's burden of proof before the Appeal Board does not excuse the administrator's duty to investigate the claim.

"(2) The claims administrator may not restrict its investigation to the specific benefit claimed if the nature of the claim suggests that other benefits might also be due.

"(c) The duty to investigate requires further investigation if the claims administrator receives later information, not covered in an earlier investigation, which might affect benefits due.

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"(e) Insurers, self-insured employers and third-party administrators shall deal fairly and in good faith with all claimants, including lien claimants."

(Cal. Code Regs., tit. 8, § 10109.)

If a defendant unreasonably breaches its affirmative duty to provide timely medical care, penalties are available under section 5814. [6] That statute provides: "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." (Lab. Code, § 5814(a).) "Compensation embraces every benefit or payment to which an injured employee is entitled, including reasonably required medical, surgical, and hospital treatment." (*Ramirez, supra,* 10 Cal.App.3d at p. 234.) Once an employer's delay in paying compensation is shown, the burden shifts to the employer to show good cause for the delay. (*Id.* at p. 235.)

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[6] Other remedies are also available. A defendant's bad-faith or frivolous delay in providing or failure to provide medical treatment may result in a sanction for each bad-faith or frivolous act or failure to act (Lab. Code, § 5813; Cal. Code Regs., tit. 8, § 10561), and a defendant's breach of its duties under Administrative Director Rule 10109 may result in audit penalties. (Cal. Code Regs., tit. 8, §§ 10111.1(c)(6) & (d)(1), 10111.2(b)(1) & (2).) The issue of sanctions is not presently before us, though we expressly reserve jurisdiction over that issue at the trial level. It will be up to the Audit Unit to consider the possibility of audit penalties.

In determining whether compensation has been "unreasonably delayed" within the meaning of section 5814, "the only satisfactory excuse for delay in payment of disability benefits, whether prior to or subsequent to an award, is genuine doubt from a medical or legal standpoint as to liability for benefits." (*Kerley v. Workmen's Comp. Appeals Bd.* (1971) 4 Cal.3d 223, 230 [36 Cal.Comp.Cases 152]; accord, *State Comp. Ins. Fund v. Workers' Comp. Appeals Bd.* (*Stuart*) (1998) 18 Cal.4th 1209, 1220 [63 Cal.Comp.Cases 916].) "[T]he burden is on the employer or [its] carrier to present substantial evidence upon which a finding of such doubt may be based." (*Kerley*, *supra,* at p. 230.)

The WCJ's Report contains a detailed explanation for each finding of unreasonable delay (Report, pp. 20-42), so we will not address every one individually.[7] Some of defendant's arguments about specific penalties, however, do warrant additional discussion.

a) The unreasonable delay in providing a wheelchair with tilt.

This issue is specifically addressed by the WCJ's Report at pages 20 to 24.

As admitted by defendant's claims adjuster, Ms. McDivitt, utilization review certified the provision of a motorized wheelchair with tilt on April 26, 2007 (Exh. 52), but the wheelchair was not delivered until four months later. (Exh. 109 [March 3, 2009 Deposition of Theresa McDivitt], p. 74:17-75:13 [stating wheelchair delivered on August 27, 2007]; Exh. 92B [email from Ms. McDivitt stating that wheelchair was delivered August 24, 2007].) Applicant, who was paralyzed, required a wheelchair with tilt in order to gain some mobility without suffering from ulcers. (Exh. 111 [March 2, 2010 deposition of

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[7] Each of the following contentions is thoroughly addressed in the following pages of the WCJ's Report: (1) regarding defendant's unreasonable delay in paying the bill of Community Imaging (see Petition, at 23:20-24), see the WCJ's Report at pages 28 through 29; (2) regarding defendant's unreasonable delay in the provision of venous/Doppler studies and psychiatric consultation (Petition, at 25:6-26:4), see the WCJ's Report at pages 29 through 32; (3) regarding defendant's unreasonable delay in reimbursement for a wheelchair accessible van (Petition, at 26:5-26:23), see the WCJ's Report at pages 32 through 35; (4) regarding defendant's unreasonable delay in the appointment of a nurse case manager upon applicant's discharge from Northridge Hospital in September 2007 (Petition, at 26:24-28:2), see the WCJ's Report at pages 35 through 38; (5) regarding defendant's unreasonable delay in paying Gold Coast Ambulance's transportation expense (Petition, at 28:14-29:7), see the WCJ's Report at pages 40 through 41; and (6) regarding defendant's unreasonable delay in paying applicant's Guardian Ad Litem for her time and expense in transporting applicant to medical appointments and in remaining with him there (Petition, at 29:8-30:2), see the WCJ's Report at pages 41 through 43.

Susan Crane, RN], p. 20:14-21:5; see Exh. 45 [December 6, 2012 deposition of Dr. Joel S. Rosen] p. 25:1-26:19.)

Defendant contends, without any citation to the record, that this delay was reasonable because applicant "had the availability of a wheelchair" at Northridge Hospital, where he was hospitalized at the time. (Petition, p. 19:17-19:18.) That contention was fully rebutted by the deposition testimony of Susan Crane, RN, applicant's nurse case manager, that there was no wheelchair available at Northridge that would have been suitable. (Exh. 111, p. 46:17-46:20.) Defendant is advised that "[e]very petition for reconsideration…shall fairly state *all* of the material evidence relative to the point or points at issue [emphasis added]." (Cal. Code Regs., tit. 8, § 10842(a).) Failure to comply is a basis for denying a petition and may be subject to sanction. (*Ibid.*; Lab. Code, § 5813, Cal. Code Regs., tit. 8, § 10561(b).)

b) The unreasonable delay in providing a BiPAP machine.

This issue is specifically addressed by the WCJ's Report at pages 24 to 26.[8]

Ms. Crane and Dr. Joel S. Rosen, one of applicant's treating physicians, testified during deposition that applicant's paralysis was affecting the muscles that control breathing, a potentially fatal condition. (Exh. 111, pp. 31:18-33:9; Exh. 45, pp. 15:20-16:2; see also Exh. 90A [August 31, 2007 letter from Dr. Rosen to applicant's counsel stating that Bi-PAP had been denied and that applicant had "actually stop[ped] breathing for periods of time..."].) Ms. McDivitt denied a request for a BiPAP machine to relieve applicant's sleep apnea; she testified that she could not recall referring that prescription to utilization review, and there is nothing in the record suggesting that she did so. (Exh. 109 [March 3, 2009 deposition of Theresa McDivitt], pp. 36:11-25.) After initially testifying that she "believe[d]" she had called or written to a medical provider about the BiPAP, she later admitted that she had denied the claim based on her own lay evaluation of the medical records, without contacting applicant's physician. (*Id.* at pp. 36:11-25, 38:6-41-22.)

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[8] We note the WCJ's statement at page 26 of his Report that "there is substantial evidence to support the findings made [that] the defendant unreasonably delayed medical treatment in the form of [a] motorized wheelchair with tilt" is clerical error. It should read "there is substantial evidence to support the findings made that the defendant unreasonably delayed medical treatment in the form of a Bi-PAP machine."

Defendant's assertion that it had genuine medical and legal doubt about its obligation to provide the machine because it could not "have guessed that the sleep apnea was caused or aggravated by the Applicant's industrial injury" and was "entitled to investigate before blindly issuing medical treatment *for a non-industrial condition*" is utterly without merit. (Petition, pp. 22:3-22:12 [emphasis added].) The October 25, 2006 Amended Findings and Award established that shoulder surgery performed to treat applicant's admitted December 20, 2003 industrial injury had caused a MRSA infection that resulted in "paralysis" and injury to the "pulmonary system" *as a compensable consequence of the original injury.* Even assuming that applicant's sleep apnea was pre-existing, the WCJ's Report correctly observed that a defendant is liable to treat even an entirely non-industrial condition if such treatment is reasonably required in order to cure or relieve the effects of an industrial injury. (*Bolton, supra*, 34 Cal.3d at pp. 165-166 [employee with non-industrial obesity entitled to weight loss in order to facilitate his recovery from back injury]; see also *Granado v. Workmen's Comp. Appeals Bd.* (1968) 69 Cal.2d 399, 405-406 [33 Cal.Comp.Cases 647, 652] ["treatment for nonindustrial conditions may be required of the employer where it becomes essential in curing or relieving from the effects of the industrial injury itself"].) The evidence unequivocally established that applicant needed the BiPAP to cure or relieve the effects of the breathing problems resulting from his industrially-caused paralysis and pulmonary condition.

c) The unreasonable delay in authorizing treatment and paying for treatment at Community Memorial Hospital.

This issue is specifically addressed by the WCJ's Report at pages 26 to 28.

An emergency room report states that applicant was admitted to Community Medical Hospital on April 24, 2008 for a potential congestive heart failure. (Exh. 102.) In other words, he was admitted for the MRSA-related pulmonary and cardiac condition which a WCJ found to be industrial in October 2006. Ms. McDivitt testified that she did not authorize this hospitalization because "they didn't know what was wrong with him." (Exh. 109A, p. 25:7-17.) Defendant asserts that it did not unreasonably delay authorizing and paying for the hospitalization at Community Memorial Hospital because its claims adjuster "had no clue as to why the Applicant was being hospitalized." (Petition, pp. 7:2-7:4, 23:14.)

As discussed above, section 4600(a) imposes a mandatory duty to timely provide reasonably required medical treatment. The Labor Code does not permit a defendant to bury its head in the sand in order to dodge its obligations. (See *Braewood Convalescent Hosp.* (*Bolton*), *supra*, 34 Cal.3d at p. 165; *Ramirez, supra*, 10 Cal.App.3d at p. 234; *Aliano, supra*, 100 Cal.App.3d at pp. 366-367; *Dorman, supra*, 78 Cal.App.3d at p. 1020; *United States Cas. Co.* (*Moynahan*), *supra*, 122 Cal.App.2d at p. 435; Cal. Code Regs., tit. 8, § 10109.) Ms. McDivitt studiously avoided information that might lead to the provision of benefits, a tactic that may have saved her employer some money in the short run—at great cost to Mr. Romano—but which clearly violated the demands of section 4600.

Applicant was admitted to the hospital in April 2008 because he was profoundly ill with serious, life-threatening medical conditions that were all related to his industrial injury. (See, e.g., Exh. 100 [April 24, 2008 report of Dr.Tara M. Snow]; Exh. 101 [June 9, 2008 discharge summary by Dr. Diane Li]; Exhibit 102 [April 24, 2008 report of Dr. Mark Reynoso]; Exh. 103, [April 28, 2008 report of Dr. Thomas Brugman]; Exh. 106 [April 30, 2008 progress note of Dr. Robert Feiss].) These conditions had been found compensable a year and a half earlier, in the WCJ's October 2006 award. Defendant could have easily identified these conditions as work-related with a simple inquiry.

Defendant's Petition for Reconsideration cites no evidence in the record indicating that it made any serious, timely investigation into applicant's April 2008 hospitalization. To the contrary, defendant's petition merely cites to evidence that, after being notified that "the Applicant was on his way to the hospital with an unknown illness," its claims adjuster had *one conversation* with Community Memorial Hospital. (Petition, at 6:25-6:28; see Exh. 109, p. 25:7-27:12.) This breach of defendant's affirmative statutory and regulatory duties exemplifies defendant's efforts to "evade liability through a see-no-evil, hear-no-evil, passive approach to claims administration in a catastrophic, life-and-death case," as aptly described in applicant's Answer to the Petition for Reconsideration. (Answer, p. 22:16-22:19.)

d) Unreasonable delays in reimbursing the Department of Health Services (Medi-Cal).

This issue is specifically addressed by the WCJ's Report at pages 29 through 32.

The October 25, 2006 Amended Findings and Award ordered defendant to pay or adjust all reasonable industrial medical expenses *and* found that applicant was in need of further medical treatment.

Therefore, both pre- and post-award medical treatment was covered by the award. Medi-Cal submitted liens of $7,807.85 and $275,439.14 for various medical services provided to applicant from November 2005 through February 2007, with the majority of the services being rendered by Ventura County Medical Center, St. John's Regional Medical Center, Evergreen Pharmaceutical, and Country Villa Oxnard. (Exh. 55; Exh. 57; Exh. 58-B.) It is undisputed that defendant never directly paid these medical providers for treatment that occured either before or after the October 25, 2006 award.

Defendant's petition does not assert that it had a genuine doubt from a medical or legal standpoint as to its liability for these bills. Instead, defendant argues that "[g]iven the fact that treatment had already been provided and the sole issue was reimbursement [to Medi-Cal] for payments already made, there can be no finding of unreasonable delay with regard to the underlying treatment." (Petition, at 24:26-24:28.) However, a defendant's unreasonable failure to provide medical treatment is not excused by a State agency's payments for the treatment on a non-industrial basis. (Cf. *Ramirez, supra*, 10 Cal.App.3d 227 [Employment Development Department's payment of unemployment compensation disability benefits did not excuse defendant's failure to pay temporary disability indemnity].) Accordingly, it is immaterial whether or not the defendant made prompt payments to Medi-Cal after receiving its liens: the only question is whether defendant should have timely paid the treatment covered by the Medi-Cal liens in the first place.

Defendant also argues that "it would be improper to pay any penalty to applicant as any penalty, if found, would be owed to [Medi-Cal]." (Petition, p. 25:3-5].) However, section 5814 penalties are not payable to a lien claimant; they are payable only to the injured employee. (*Vogh v. Workmen's Comp. Appeals Bd.* (1964) 264 Cal.App.2d 724, 728 [33 Cal.Comp.Cases 491, 494] [overruled on other grounds in *Adams v. Workers' Comp. Appeals Bd.* (1976) 18 Cal.3d 226, 230 [41 Cal.Comp.Cases 680]]; *Minter v. Workers' Comp. Appeals Bd.* (1996) 61 Cal.Comp.Cases 1491 (writ den.).)[9]

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[9] Defendant's argument that "it would be improper to pay any penalty to the Applicant as any penalty, if found, would be owed to Gold Coast Ambulance" fails for the same reason. (See Petition, p. 29:4-5.)

e) Unreasonable delay in reimbursing applicant for treatment at St. John's Regional Medical Center.

This issue is specifically addressed by the WCJ's Report at pages 38 through 40.

In his Report, the WCJ describes how defendant failed to pay for two hospitalizations at St. John's Regional Medical Center in 2006. (See Exh. 42 [Sep. 2, 2006 Discharge Summary]; Exh. 44 [Nov. 25, 2006 Discharge Summary]; Exh 68B [invoice]; 69A [Notice and Request for Lien].) However, defendant's unreasonable failure to pay for applicant's treatment at St. John's was part of the basis for the separate penalty, discussed above, relating to the Medi-Cal lien. It is improper for defendant to be penalized twice for the same delay. We will therefore amend Finding No. 8 of the Supplemental Findings and Award to exclude St. John's billings in determining the penalty for the delay in reimbursing Medi-Cal.

III.

As discussed above, applicant's injury eventually led to his death on May 2, 2008. Section 4700 states: "The death of an injured employee does not affect the liability of the employer under Articles 2 (commencing with Section 4600) and 3 (commencing with Section 4650) [of Chapter 2 of Part 2 of Division 4 of the Labor Code]." Defendant argues that section 5814 is in Chapter 6 of Part 4 of Division 4, thus penalties do not survive the death of the injured employee. (Petition, pp. 13-14.) However, "[s]ection 5814 penalties are part and parcel of the original compensation award." (*Mote v. Workers' Comp. Appeals Bd.* (1997) 56 Cal.App.4th 902, 911 [62 Cal.Comp.Cases 891].) The penalties are therefore a part of the original award of medical benefits due under section 4600 et seq. and are not affected by applicant's death. (Lab. Code, § 4700.)

Defendant also claims that the penalties are barred by section 5814(g), which provides: "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." However, this time limit is a statute of limitations and therefore an affirmative defense that may be waived. (*Abney v. Aera Energy* (2004) 69 Cal.Comp.Cases 1552, 1561 (Appeals Board en banc); cf. Lab. Code, § 5409 ["Failure to present such defense prior to the submission of the cause for decision is a

sufficient waiver."].) Defendant was required to raise the 5814(g) statute of limitations issue at the mandatory settlement conference and did not do so. (April 21, 2010 Mandatory Settlement Conference Statement; Lab. Code, § 5502(d)(3).) Although defendant mentioned 5814(g) in a July 30, 2010 Trial Brief, the statute of limitations was not raised as a defense during the December 20, 2010 trial. "The pleadings shall be deemed amended to conform to the stipulations and statement of issues agreed to by the parties on the record" (Cal. Code Regs., tit. 8, § 10492), and defendant agreed to a statement of issues that did not include the two-year limitation stated in 5814(g). (December 20, 2010 Minutes of Hearing and Summary of Evidence, p. 4.) Defendant therefore waived the purported section 5814(g) statute of limitations issue and we will not address it further.[10]

Defendant also contests the imposition of multiple penalties, which may be assessed only "when the unreasonable delay or refusal of [the] benefits [due] is attributable to separate and distinct acts by an employer or insurance carrier." (*Christian v. Workers' Comp. Appeals Bd.* (1997) 15 Cal.4th 505, 507 [62 Cal.Comp.Cases 576, 577]; see *Green v. Workers' Comp. Appeals Bd.* (2005) 127 Cal.App.4th 1426, 1443-1445 [70 Cal.Comp.Cases 294].) "A separate and distinct act of misconduct occur[s] where there was an unreasonable delay or refusal to pay after 'the same conduct had already been found … to be unreasonable and a prior penalty imposed, or some analogous, legally significant event such as stipulation of liability by the carrier had intervened between the first act for which a penalty was imposed and the second." (*Ramirez v. Drive Financial Services* (2008) 73 Cal.Comp.Cases 1324, 1322 (Appeals Board en banc) [quoting *Christian, supra,* 15 Cal.4th at p. 511].)

Delays in providing different medical services may constitute separate and distinct acts of misconduct. (See *City of Los Angeles v. Workers' Comp. Appeals Bd.* (*Dalcour-Martinelli*) (1997) 62 Cal.Comp.Cases 1445 (writ den.); *St. Jude Hosp. v. Workers' Comp. Appeals Bd.* (*Limousin*) (1997) 62

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[10] We observe that section 5814(g) merely requires that an action for penalties "be brought" within two years, not, as defendant contends, that it be heard or a declaration of readiness filed during that time period. (Petition, pp. 14-15.) An action for penalties is "brought" when a penalty petition is filed. (See *Abney, supra,* 69 Cal.Comp.Cases at p. 1561; *Pacific Steel Engineering v. Workers' Comp. Appeals Bd.* (*Finley*) (2005) 70 Cal.Comp.Cases 1365, 1368-1369 (writ den.).) Although the WCAB is not bound by the statutory rules of civil procedure (Lab. Code, § 5708), this interpretation is consistent with civil law, which provides: "An action is commenced… when the complaint is filed." (Code Civ. Proc., § 350; see also Code Civ. Proc., § 411.10 ["A civil action is commenced by filing a complaint with the court"].)

Cal.Comp.Cases 1743 (writ den.).) "Continuing failures and delays for providing medical care, for reimbursing payments made for providing medical care, and for medications to be provided through the pharmacy are separate and distinct acts supporting these additional, multiple penalties." (*Mote, supra*, 56 Cal.App.4th at p. 914.) Here, although each of the penalties was imposed by the WCJ for unreasonable delay in the provision of medical treatment, the penalties were for "separate and distinct unreasonable acts" by defendant. (*Christian, supra,* 15 Cal.4th at p. 511.) To hold otherwise would mean that a defendant who delayed a particular kind of medical treatment could then delay all other medical care without risk of additional penalty. That would directly conflict with the purpose of section 5814, to provide "an incentive to employers and insurance carriers to pay benefits promptly by making delays costly" and to "ameliorate the economic hardship on the injured employee that results from the delay in the provision of benefits...." (*Ramirez, supra*, 73 Cal.Comp.Cases at p. 1329.)

Defendant argues that all of the penalties were defective because the Opinion on Decision did not provide facts and reasoning in support of the WCJ's findings of unreasonable delay. We direct defendant to the WCJ's 43-page Report, which cured any alleged failure of the Opinion on Decision to satisfy the requirements of Labor Code section 5313. (*City of San Diego v. Workers' Comp. Appeals Bd. (Rutherford)* (1989) 54 Cal.Comp.Cases 57 (writ den.); *Smales v. Workers' Comp. Appeals Bd.* (1980) 45 Cal.Comp.Cases 1026 (writ den.).) Similarly, defendant argues that the WCJ's Opinion failed to explain why, for each penalty awarded, he found that applicant was entitled to the section 5814 statutory maximum of 25% of the medical treatment benefit delayed, not to exceed $10,000. Again, any defect was cured by the WCJ's Report. Sending this case back to the trial level for an expanded Opinion on Decision "would result in nothing but a wasteful spinning of the wheels." (See *Albert Van Luit Wallpaper Co. v. Workmen's Comp. Appeals Bd. (Taylor)* (1973) 36 Cal.App.3d 88, 92 [38 Cal.Comp.Cases 802, 804].)

The WCJ's Report makes it clear that he imposed the harshest penalties possible under section 5814 because of defendant's extensive history of delay in the provision of medical treatment; the effects of those delays on a paralyzed, catastrophically ill employee; the lengths of the various delays; and defendant's repeated failure to act when the delays were brought to its attention. (See *Ramirez, supra*, 73

Cal.Comp.Cases at pp. 1328-1331.) Indeed, defendant's broad and extended pattern of unreasonable delays rises to the level of "institutional neglect." (See, e.g., *County of San Luis Obispo v. Workers' Comp. Appeals Bd.* (*Barnes*) (2001) 92 Cal.App.4th 869, 877-878 [66 Cal.Comp.Cases 1261]; *Waters v. Workers' Comp. Appeals Bd.* (2000) 80 Cal.App.4th 652, 662 [65 Cal.Comp.Cases 484].)

Defendant's final contention concerning the penalties is that the WCJ's award of section 5814.5 attorneys' fees is not in compliance with the law and is not supported by the evidence. Defendant's argument that fees should not be awarded for certain briefing is premature, since the WCJ has not yet decided the amount of fees to be awarded. The WCJ has found only that fees will be assessed at $350.00 per hour, which defendant's petition does not challenge. Accordingly, defendant has waived any objection to that rate. (Lab. Code, §§ 5902, 5904.)

IV.

As an alternative basis for our decision, we conclude that defendant's individualized penalty contentions are each subject to denial for defendant's failure to adequately comply with WCAB Rules 10842, 10846, and 10852. (Cal. Code Regs., tit. 8, §§ 10842, 10846, 10852.) Rule 10846 provides that a petition for reconsideration may be denied "if it is unsupported by specific references to the record." (Cal. Code Regs., § 10846; see Cal. Code Regs § 10842(b) [petition "shall support its evidentiary statements by specific references to the record."].) Rule 10852 provides that a petition for reconsideration "shall set out specifically and in detail how the evidence fails to justify the findings," and Rule 10842 provides that a petition for reconsideration may be denied unless it "fairly state[s] all of the material evidence...." (Cal. Code Regs., tit. 8, §§ 10842(a), 10852.) In particular, Rule 10842(b) states:

> "(2) References to any documentary evidence shall specify: (A) the exhibit number or letter of the document; (B) the date and time of the hearing at which the document was admitted or offered into evidence; (C) where applicable, the author(s) of the document; (D) where applicable, the date(s) of the document; and (E) the relevant page number(s) and, if available, at least one other relevant identifier (e.g., line number(s), paragraph number(s), section heading(s)) that helps pinpoint the reference within the document (e.g., 'the 6/16/08 report of John A. Jones, M.D., at p. 7, Apportionment Discussion, 3rd full ¶ [Defendant's Exh. B, admitted at 8/1/08 trial, 1:30pm session]').

> "(3) References to any deposition transcript shall specify: (A) the exhibit number or letter of the document; (B) the date and time of the hearing at which the deposition transcript was admitted or offered into evidence; (C) the name of the person deposed; (D) the date and time of the deposition; and (E) the relevant page number(s) and line(s) (e.g., 'the 6/20/08 depo of William A. Smith, M.D., at 21:20-22:5 [Applicant's Exh. 3, admitted at 12/1/08 trial, 8:30am session]')." (Cal. Code Regs., tit. 8, § 10842(b).)

Here, well over 100 documentary exhibits were admitted into evidence.[11] Many of these were quite lengthy.[12] However, when describing the evidence for each factual argument, defendant's petition either: (1) made no reference to the record; (2) referred generally to a particular exhibit without any other identifier or page citation; and/or (3) identified a document and its page citation(s) but without identifying the exhibit number.

A petitioner for reconsideration cannot evade or shift its responsibility by attempting to place upon the Appeals Board the burden of discovering—without assistance from the petitioner—evidence in the record that supports its position. (See *Nielsen v. Workers' Comp. Appeals Bd.* (1985) 164 Cal.App.3d 918, 923-924 [50 Cal.Comp.Cases 104]; cf., *Grant-Burton v. Covenant Care, Inc.* (2002) 99 Cal.App.4th 1361, 1379 ("[i]t is the duty of a party to support the arguments in its briefs by appropriate reference to the record" and "[t]here is no duty on this court to search the record for evidence"); *Del Real v. City of Riverside* (2002) 95 Cal.App.4th 761, 768 ("[i]t is counsel's duty to point out portions of the record that support the position taken on appeal. The appellate court is not required to search the record on its own seeking error"); *Lewis v. County of Sacramento* (2001) 93 Cal.App.4th 107, 113–114 ("a busy court… cannot be expected to search through a voluminous record" and it is "not obliged to perform the duty resting on counsel" accordingly, "appellate counsel should be vigilant in providing [the court] with

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[11] Applicant offered numbered exhibits through Exhibit 116 (although there were no Applicant's Exhibits 9, 11 through 15, 17, 18, 20 to 23, 34, 40, 66, 70, 78, 85, 88, 99, 104, 105, 107, and 108) and defendant offered lettered exhibits through Exhibit I (although Exhibits G, H and I were not admitted in evidence). However, many of the exhibits contained multiple documents. For example, Defendant's Exhibit A was actually five separate exhibits (i.e., A-1, A-2, A-3, A-4, and A-5). Similarly, many of applicant's exhibits included anywhere from two to five documents (e.g., Exhibits 92-A, 92-B, 92-C, 92-D, 92-E and Exhibits 110-A, 110-B, 110-C, 110-D, and 110-E).

[12] For example, the April 28, 2006 deposition of applicant (Defendant's Exhibit D) is 130 pages, the March 3, 2009 deposition of Theresa McDivitt (Applicant's Exhibit 109) is 144 pages, and the March 3, 2010 deposition of Susan Colleen Crane, RN (Applicant's Exhibit 111) is 55 pages long with some 20 pages of attachments.

effective assistance"); *Guthrey v. State of California* (1998) 63 Cal.App.4th 1108, 115 ("[t]he reviewing court is not required to make an independent, unassisted study of the record in search of error or grounds to support the judgment.").) Therefore, defendant's petition is alternatively denied for failure to comply with WCAB Rules 10842, 10846, and 10852.

Finally, as discussed earlier, this matter is being referred to the Audit Unit of the DWC. We shall provide the Audit Unit with copies of the WCJ's Supplemental Findings and Award and his accompanying Opinion on Decision, the WCJ's Report and Recommendation, and the Appeals Board's decision.

For the foregoing reasons,

IT IS ORDERED, as the Decision After Reconsideration of the Workers' Compensation Appeals Board, that the February 13, 2012 Supplemental Findings and Award is **AFFIRMED, EXCEPT** that it is **AMENDED** as follows:

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Findings of Fact No. 8 is amended as set forth below:

FINDINGS OF FACT

8. The defendant did unreasonably delay reimbursement to HMS/Department of Health Services, entitling applicant to increased compensation under Labor Code section 5814 of 25% of the medical treatment benefit delayed, not to exceed $10,000, payable to the applicant's personal representative or heir under Labor Code section 4700. This delayed reimbursement does not include any treatment incurred at St. John's Regional Medical Center and subject to the penalty imposed by Finding 12.

WORKERS' COMPENSATION APPEALS BOARD

DEPUTY

NEIL P. SULLIVAN

I CONCUR,

FRANK M. BRASS

DEIDRA E. LOWE

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

APR 16 2013

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

BRADFORD BARTHEL
ERNEST CANNING
RALPHS GROCERY CO
SEDGWICK CLAIMS MANAGEMENT
DWC AUDIT UNIT

CNF:jmp