WORKERS' COMPENSATION APPEALS BOARD
STATE OF CALIFORNIA

JESUS MACIAS MACEDO, *Applicant*

vs.

HOFFMAN CONCRETE CO. INC.; INSURANCE COMPANY OF THE WEST, *Defendants*

Adjudication Number: ADJ10673089
Van Nuys District Office

OPINION AND DECISION AFTER RECONSIDERATION

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

Defendant and applicant both seek reconsideration of the Findings and of Fact and Order (F&O) issued by the workers' compensation administrative law judge (WCJ) on November 15, 2019. By the F&O, the WCJ found that multiple utilization review (UR) decisions were untimely. It was also found that applicant is in need of reasonable medical treatment to cure or relieve from the effects of the injury, including the treatment addressed in the UR decisions. No basis to disturb the determination of the Administrative Director (AD) was found. Applicant was awarded penalties with a citation to Labor Code[1] section 5814.5. (Lab. Code, § 5814.5)

Defendant contends that the evidence shows that all of the UR decisions at issue were timely and there was no unreasonable delay of medical treatment. Defendant also contends that there is no evidence to support an award of penalties under section 5814 or attorney's fees per section 5814.5.

Applicant contends that the WCJ failed to include an award for penalties per section 5814 and that the F&O is internally inconsistent regarding the attorney's fees awarded per section 5814.5.

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

We received an answer from applicant to defendant's Petition and from defendant in response to applicant's Petition. The WCJ prepared a separate Report and Recommendation on Petition for Reconsideration in response to each party's Petition (Reports), recommending that applicant's Petition be granted to amend the F&O to include a finding of a 25% penalty per section 5814 and remove the inconsistent finding of fact regarding fees per section 5814.5. The WCJ recommended that defendant's Petition be denied except to revise the finding of fact regarding section 5814.5.

We have considered defendant's Petition for Reconsideration, applicant's Petition for Reconsideration, the parties' respective answers and the contents of the WCJ's Reports with respect thereto. Based on our review of the record and for the reasons discussed below, we will rescind the F&O and issue a new decision finding that all of the UR decisions at issue were timely. We will also find that applicant is not entitled to penalties under section 5814 or attorney's fees under section 5814.5.

FACTUAL BACKGROUND

Applicant claims injury to the head, skull, brain, cervical spine, liver, hearing, lungs, stomach, vision, seizures, psyche, bilateral upper extremities, bilateral lower extremities, lumbar spine, blood clots, jaw, teeth, speech, hypertension and kidneys on September 26, 2016 while employed as a construction foreman by Hoffman Concrete Company.

On January 24, 2017, the parties stipulated to Sue Coleman as the nurse case manager. (Stipulation and Award/Order, January 24, 2017.)

This matter initially went to trial in 2017, at which time the parties stipulated that applicant sustained injury arising out of and in the course of employment (AOE/COE) to his neck, head, skull and brain. (Minutes of Hearing and Summary of Evidence, October 5, 2017, p. 2.) The sole issue at trial was enforcement of the January 24, 2017 order to utilize a nurse case manager. The WCJ issued his Findings and Order on November 9, 2017. The decision included a finding of injury AOE/COE to the body parts stipulated to by the parties and a finding of good cause for a change of nurse case manager. This decision was not challenged by either party.

Jacobo Chodakiewitz, M.D. provides treatment to applicant as his primary treating physician (PTP). Applicant also receives treatment from his secondary treating physicians: Dr. Marcia Lamm, Dr. Garbis and Dr. Burton Sobelman.

On August 7, 2017, a speech language pathologist's initial report was issued by Speech Matters. (Applicant's Exhibit No. 27, Speech Matters medical report, August 7, 2017.) The report included a recommendation for weekly speech therapy and cognitive therapy. (*Id.* at p. 5.) On October 4, 2017, defendant sent a UR decision denying these two treatment modalities. (Defendant's Exhibit J, Mitchell International, Inc. utilization review and denial, October 4, 2017.) The UR decision indicated that the request for authorization (RFA) was received on "09/27/2017." (*Id.* at p. 1.) The UR decision was faxed to Speech Matters and applicant's attorney, with service to applicant by mail. (*Id.* at p. 3.)

Dr. Lamm submitted an RFA for "OT/PT CP, Group and Speech" treatment dated December 12, 2017. (Applicant's Exhibit No. 8, Request for authorization, December 12, 2017.) Defendant issued a UR decision denying these treatment modalities on December 18, 2017. (Defendant's Exhibit H, Mitchell International, Inc. utilization review and denial, December 18, 2017.) The UR decision reflects receipt of the RFA on the date it was issued, December 12, 2017. (*Id.* at p. 1.) The decision was faxed to Dr. Lamm and applicant's attorney on the date the decision was made, and was mailed to applicant that day. (*Id.* at p. 4.)

Applicant submitted an application for IMR of the December 18, 2017 UR decision to DWC/IMR, Maximus Federal Services, Inc. (Applicant's Exhibit No. 46, Appeal of independent medical review, March 8, 2018, exh. pp. 11-12.) Maximus issued a final determination letter on February 23, 2018 in response to applicant's IMR application. (*Id.* at exh. pp. 23-27.) The IMR determination (CM18-0013819) upheld the UR non-certification. (*Id.*) Applicant filed a timely appeal of the IMR determination pursuant to section 4610.6(h). (*Id.*; Lab. Code, § 4610.6(h).)

Dr. Lamm submitted an RFA for medical/non-medical transportation dated December 28, 2017. (Applicant's Exhibit No. 7, Medical report of Marcia Lamm, Ph.D., December 28, 2017, p. 3.) Defendant issued a UR decision denying this recommendation on January 4, 2018. (Defendant's Exhibit F, Mitchell International, Inc. utilization review and denial, January 4, 2018.) The UR decision reflects receipt of the RFA on the date it was issued. (*Id.* at p. 1.) The decision was faxed to Dr. Lamm and applicant's attorney on the date the decision was made, and was mailed to applicant that day. (*Id.* at p. 4.)

Applicant submitted an application for IMR of the January 4, 2018 UR decision to DWC/IMR, Maximus Federal Services, Inc. (Applicant's Exhibit No. 48, Appeal of independent medical review, February 27, 2018, exh. pp. 11-14.) Maximus issued a final determination letter

on February 5, 2018 in response to applicant's IMR application. (*Id.* at exh. pp. 15-17.) The IMR determination (CM18-0005869) upheld the UR non-certification. (*Id.*) Applicant filed a timely appeal of the IMR determination pursuant to section 4610.6(h). (*Id.*)

Dr. Chodakiewitz submitted a RFA for a follow up and Keppra with refills dated May 18, 2018. (Applicant's Exhibit No. 13, Request for authorization, May 18, 2018.) Defendant issued a UR decision denying this recommendation on May 25, 2018. (Defendant's Exhibit D, Mitchell International, Inc. utilization review and denial, May 25, 2018.) The UR decision reflects receipt of the RFA on May 21, 2018. (*Id.* at p. 2.) The decision was faxed to Dr. Chodakiewitz and applicant's attorney on the date the decision was made, and was mailed to applicant that day. (*Id.* at p. 4.)

Applicant submitted an application for IMR of the May 25, 2018 UR decision to DWC/IMR, Maximus Federal Services, Inc. (Applicant's Exhibit No. 43, Appeal of independent medical review, August 1, 2018, exh. pp. 10-13.) Maximus issued a final determination letter on July 23, 2018 in response to applicant's IMR application. (*Id.* at exh. pp. 14-17.) The IMR determination (CM18-0113193) upheld the UR non-certification. (*Id.*) Applicant filed a timely appeal of the IMR determination pursuant to section 4610.6(h). (*Id.*)

On July 17, 2018, UR issued a decision denying an RFA for outpatient psychotherapy and a home health evaluation. (Defendant's Exhibit B, Mitchell International, Inc. utilization review and denial, July 17, 2018.) The UR decision states that the RFA from Dr. Lamm was received on July 10, 2018. (*Id.* at p. 1.) The decision was faxed to Dr. Lamm and applicant's attorney on the date the decision was made, and was mailed to applicant that day. (*Id.* at p. 4.)

On July 26, 2018, UR sent to Dr. Lamm a "review notice of voluntary appeal" regarding the RFA for outpatient psychotherapy and a home health evaluation. (Defendant's Exhibit A, Mitchell International, Inc. utilization review and denial, July 26, 2018.) It was noted that an appeal report from Dr. Lamm was received on July 18, 2018. (*Id.* at p. 2.) The outpatient psychotherapy and home health evaluation were found not to be medically necessary. (*Id.*)

The matter proceeded to trial over two days, October 9, 2018 and May 29, 2019. The parties stipulated at trial to injury AOE/COE to the head, skull, brain, cervical spine, liver, hearing and lungs. (Minutes of Hearing and Summary of Evidence, October 9, 2018, p. 2.) The issues at trial included as follows in relevant part: need for medical treatment, multiple petitions for penalties under section 5814, multiple petitions for attorney's fees under section 5814.5, "UR

denials dated 7/26/18, 7/17/18, 7/10/18, 6/22/18, 5/25/18, 2/12/18, 1/4/18, 12/18/17, 11/28/17, 11/24/17, and 10/4/2017,"[2] applicant's allegation that all UR denials were untimely, IMR appeals "dated 5/16/18, 3/19/18, 3/8/18, 2/28/18, 2/27/18, 1/18/18," and defendant's allegation that a UR denial is effective for 12 months. (*Id.* at pp. 2-3.)

The WCJ initially issued a Findings of Fact on July 12, 2019 wherein he found that all of the UR decisions were timely conducted and communicated to the necessary parties. It was further found that there was no basis to disturb the determination of the AD.

Applicant sought reconsideration of the July 12, 2019 Findings of Fact via a Petition filed on July 24, 2019. The WCJ issued an Order Vacating Order Pursuant to CCR 10859 and Notice of Hearing dated August 2, 2019. The July 12, 2019 Findings of Fact was ordered vacated. At a subsequent hearing on October 1, 2019 the matter was ordered submitted.

The WCJ issued the resulting F&O on November 15, 2019. In the F&O, it was found that the following UR decisions were untimely or did not comply with section 4610(g)(5): 7/26/18, 7/17/18, 5/25/18, 1/4/18,[3] 12/18/17 and 10/4/17. The WCJ found that applicant is in need of reasonable medical treatment to cure or relieve from the effects of the injury, including the items identified in the untimely UR decisions. The WCJ again found no basis to disturb the determination of the AD.[4] There was a finding that no section "5814.5 shall be awarded." The reasonable value of applicant's June 28, 2018 petition for penalties was found to be $10,000.00.

DISCUSSION

I.

Section 4600 requires the employer to provide reasonable medical treatment to cure or relieve from the effects of an industrial injury. (Lab. Code, § 4600(a).) Employers are required to establish a UR process for treatment requests received from physicians. (Lab. Code, § 4610; *State Comp. Ins. Fund v. Workers' Comp. Appeals Bd.* (*Sandhagen*) (2008) 44 Cal.4th 230, 236.)

Section 4610 provides time limits within which a UR decision must be made by the

[2] The record does not include a UR decision dated 7/10/18 and it is presumed this date was included in the Minutes of Hearing in error.
[3] The same UR decision dated 1/4/18 regarding transportation was identified twice in the F&O.
[4] Neither party has challenged the WCJ's finding regarding applicant's multiple appeals of IMR determinations. We consequently do not address the IMR determinations in our decision and will retain the WCJ's finding on this issue in the new decision.

employer. (Lab. Code, § 4610 et seq.) These time limits are mandatory. In *Dubon v. World Restoration, Inc.* (2014) 79 Cal.Comp.Cases 1298 (Appeals Board en banc) (*Dubon II*), the Appeals Board held that it has jurisdiction to determine whether a UR decision is timely. If a UR decision is untimely, the determination of medical necessity for the treatment requested may be made by the Appeals Board. (*Id.* at p. 1300.) If the UR decision is timely, the Appeals Board has no jurisdiction to address disputes regarding the UR because "[a]ll other disputes regarding a UR decision must be resolved by IMR." (*Id.* at p. 1299.)

Subsequent to *Dubon II*, in a significant panel decision, the Appeals Board held that a UR decision that is timely made, but is not timely communicated, is untimely. (*Bodam v. San Bernardino County/Dept. of Social Services* (2014) 79 Cal.Comp.Cases 1519.)[5] In *Bodam*, the employer did not notify the requesting physician of its UR decision within 24 hours and did not send written notice of the UR decision to the physician, applicant or applicant's attorney within two business days after the UR decision was made. (*Id.* at p. 1523.)[6] The UR decision was therefore deemed untimely and the Appeals Board had authority to determine the issue of medical necessity for the disputed treatment.

Although there were additional UR decisions at issue at trial other than those discussed herein, applicant did not challenge the WCJ's decision regarding the timeliness of the UR decisions in his Petition. Therefore, our analysis is restricted to addressing defendant's contentions regarding the UR decisions that the WCJ found to be untimely.

The UR decisions in dispute are subject to different statutory language depending on which year they were issued. With respect to the treatment recommendations submitted in 2017, former section 4610 applicable that year provided as follows in relevant part:

> (g)(1) Prospective or concurrent decisions shall be made in a timely fashion that is appropriate for the nature of the employee's condition, **not to exceed five**

[5] Significant panel decisions are not binding precedent in workers' compensation proceedings; however, they are intended to augment the body of binding appellate court and en banc decisions and, therefore, a panel decision is not deemed "significant" unless, among other things: (1) it involves an issue of general interest to the workers' compensation community, especially a new or recurring issue about which there is little or no published case law; and (2) all Appeals Board members have reviewed the decision and agree that it is significant. (See *Elliott v. Workers' Comp. Appeals Bd.* (2010) 182 Cal.App.4th 355, 361, fn. 3 [75 Cal.Comp.Cases 81]; *Larch v. Workers' Comp. Appeals Bd*. (1999) 64 Cal.Comp.Cases 1098, 1099-1100 (writ den.); see also Cal. Code Regs., tit. 8, §§ 10305(r), 10325(b).)

[6] It is noted that section 4610 and administrative director (AD) Rule 9792.9.1(e)(3) contained different language regarding communication of a UR decision when the UR decision issued in *Bodam*. (*Bodam*, *supra*, 79 Cal.Comp.Cases at p. 1522.) However, the principles outlined in *Bodam* remain applicable to this matter.

working days from the receipt of the information reasonably necessary to make the determination, but in no event more than 14 days from the date of the medical treatment recommendation by the physician.

…

(g)(3)(A) Decisions to approve, modify or deny requests by physicians for authorization prior to, or concurrent with, the provision of medical treatment services to employees shall be communicated to the requesting physician within 24 hours of the decision. **Decisions resulting in modification or denial of all or part of the requested health care services shall be communicated to physicians initially by telephone or facsimile, and to the physician and employee in writing within 24 hours for concurrent review, or within two business days of the decision for prospective review, as prescribed by the administrative director.** If the request is not approved in full, disputes shall be resolved in accordance with Section 4610.5, if applicable, or otherwise in accordance with Section 4062.

…

(g)(6) A utilization review decision to modify or deny a treatment recommendation shall remain effective for 12 months from the date of the decision without further action by the employer with regard to a further recommendation by the same physician for the same treatment unless the further recommendation is supported by a documented change in the facts material to the basis of the utilization review decision.

(Former Lab. Code, § 4610(g)(1), (g)(3)(A) and (g)(6), repealed as of Jan. 1, 2018 per former Lab. Code, § 4610(j), emphasis added.)

AD Rule 9792.9.1 further provides in pertinent part:

(c) Unless additional information is requested necessitating an extension under subdivision (f), the utilization review process shall meet the following timeframe requirements:

(1) The first day in counting any timeframe requirement is the day after the receipt of the DWC Form RFA, except when the timeline is measured in hours. Whenever the timeframe requirement is stated in hours, the time for compliance is counted in hours from the time of receipt of the DWC Form RFA.

…

(3) Prospective or concurrent decisions to approve, modify, delay, or deny a request for authorization shall be made in a timely fashion that is appropriate for the nature of the injured worker's condition, not to exceed five (5) business days from the date of receipt of the completed DWC Form RFA.

…

(h) A utilization review decision to modify, delay, or deny a request for authorization of medical treatment shall remain effective for 12 months from the date of the decision without further action by the claims administrator with regard to any further recommendation by the same physician for the same

> treatment unless the further recommendation is supported by a documented change in the facts material to the basis of the utilization review decision.
>
> (Cal. Code Regs., tit. 8, § 9792.9.1(c)(1), (c)(3) and (h).)[7]

The October 4, 2017 UR decision states that the RFA was received on September 27, 2017, which was a Wednesday.[8] Excluding the day the RFA was received per AD Rule 9792.9.1(c)(1), as well as the following Saturday and Sunday,[9] five working days from receipt of the RFA per former section 4610(g)(1) would fall on October 4, 2017. Therefore, the UR decision was timely made. The UR decision was also timely communicated to the requesting physician, applicant's attorney and applicant since it was faxed and mailed on the decision date.

The December 18, 2017 UR decision states that the RFA was received on December 12, 2017, which was a Tuesday. Excluding the day the RFA was received per AD Rule 9792.9.1(c)(1), as well as the following Saturday and Sunday, five working days from receipt of the RFA per former section 4610(g)(1) would fall on December 19, 2017. Therefore, the UR decision was timely made. The UR decision was also timely communicated to the requesting physician, applicant's attorney and applicant since it was faxed and mailed on the decision date.

The January 4, 2018 UR decision states that the RFA was received on December 28, 2017, which was a Thursday. Excluding the day the RFA was received per AD Rule 9792.9.1(c)(1), the following Saturday and Sunday, and January 1, 2018 as a holiday,[10] five working days from receipt of the RFA per former section 4610(g)(1)[11] would fall on January 5, 2018. Therefore, the UR decision was timely made. The UR decision was also timely communicated to the requesting physician, applicant's attorney and applicant since it was faxed and mailed on the decision date.

The additional UR decisions in dispute were all issued in 2018 and are subject to the following former version of section 4610(i)(1):

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[7] The same version of these regulatory subdivisions are applicable to all of the UR decisions in dispute.

[8] The Appeals Board takes judicial notice of the days of the week the dates fell on pursuant to Evidence Code section 451(f). (Evid. Code, § 451(f).)

[9] See significant panel decision: *Pa'u v. Department of Forestry/Cal Fire* (2019) 84 Cal.Comp.Cases 815, 826 [2019 Cal. Wrk. Comp. LEXIS 86] ["the phrase 'working day' in Labor Code section 4610 means a day other than a Saturday, Sunday, or holiday as defined in the Government Code"].

[10] January 1 is defined as a state holiday in Government Code section 6700(a)(2). (Gov. Code, § 6700(a)(2).) Pursuant to *Pa'u*, this day is not counted as a working day for purposes of determining the timeliness of a UR decision.

[11] We applied the former version of section 4610 applicable in 2017 to this UR decision because the RFA was submitted in 2017. However, it is noted that the UR decision would be timely under either the version of section 4610 applicable in 2017 or the version applicable in 2018. In other words, the UR decision was timely made and communicated pursuant to either version of the statute.

> Except for treatment requests made pursuant to the formulary, **prospective or concurrent decisions shall be made in a timely fashion that is appropriate for the nature of the employee's condition, not to exceed five working days from the receipt of a request for authorization for medical treatment and supporting information reasonably necessary to make the determination, but in no event more than 14 days from the date of the medical treatment recommendation by the physician.** Prospective decisions regarding requests for treatment covered by the formulary shall be made no more than five working days from the date of receipt of the medical treatment request. The request for authorization and supporting documentation may be submitted electronically under rules adopted by the administrative director.
>
> (Former Lab. Code, § 4610(i)(1), amended by Stats. 2019, ch. 647, § 6, eff. Jan. 1, 2020.)

The May 25, 2018 UR decision states that the RFA was received on May 21, 2018, which was a Monday. Excluding the day the RFA was received per AD Rule 9792.9.1(c)(1), the following Saturday and Sunday, as well as the following Monday as a holiday,[12] five working days from receipt of the RFA per former section 4610(g)(1) would fall on May 29, 2018. Therefore, the UR decision was timely made. The UR decision was also timely communicated to the requesting physician, applicant's attorney and applicant since it was faxed and mailed on the decision date.

The July 17, 2018 UR decision states that the RFA was received on July 10, 2018, which was a Tuesday. Excluding the day the RFA was received per AD Rule 9792.9.1(c)(1), as well as the following Saturday and Sunday, five working days from receipt of the RFA per former section 4610(g)(1) would fall on July 17, 2018. Therefore, the UR decision was timely made. The UR decision was also timely communicated to the requesting physician, applicant's attorney and applicant since it was faxed and mailed on the decision date.

The July 26, 2018 UR "decision" was not actually a UR decision of a new RFA. Rather, this determination was a "voluntary appeal" by Dr. Lamm of the same treatment recommendations that were previously denied in the July 17, 2018 UR decision. Pursuant to section 4610(k), a UR decision denying "a treatment recommendation shall remain effective for 12 months from the date of the decision without further action by the employer with regard to a further recommendation by

[12] The last Monday in May is defined as a state holiday in Government Code section 6700(a)(7). (Gov. Code, § 6700(a)(7).) Pursuant to *Pa'u*, this day is not counted as a working day for purposes of determining the timeliness of a UR decision.

the same physician, or another physician within the requesting physician's practice group, for the same treatment unless the further recommendation is supported by a documented change in the facts material to the basis of the utilization review decision." (Lab. Code, § 4610(k).) The record does not reflect a documented change in the facts material to the original UR decision from July 17, 2018. Therefore, the July 17, 2018 UR decision remained effective with respect to this RFA and defendant was not obligated to conduct UR of Dr. Lamm's appeal per section 4610(k). A UR "decision" cannot be untimely if it was not required to be conducted.

All of the UR decisions that the WCJ found to be untimely were in fact timely issued and communicated pursuant to the analysis above. The Appeals Board's jurisdiction regarding a disputed UR decision is restricted to whether the decision was timely. (*Dubon II*, *supra*.) Since the UR decisions were timely, we are precluded from addressing the medical necessity of the treatment modalities denied by these decisions.

Therefore, we will issue a new decision finding that all of the UR decisions in dispute were timely issued. We will also include a finding that defendant was not obligated to conduct another UR with respect to Dr. Lamm's appeal per section 4610(k).

II.

Medical treatment is considered part of compensation and subject to penalties under section 5814. (See Lab. Code, § 3207; see also *Mote v. Workers' Comp. Appeals Bd.* (1997) 56 Cal.App.4th 902 [62 Cal.Comp.Cases 891]; *Davison v. I.A.C.* (1966) 21 Cal.App.2d 15 [31 Cal.Comp.Cases 77].) Section 5814 provides for penalties when compensation has been unreasonably delayed or refused for an increase of up to 25 percent of the amount delayed or refused, or $10,000, whichever is less. (Lab. Code, § 5814.)

The burden is on applicant to show a delay in the provision of benefits. (Lab. Code, § 5705 [the burden of proof is on the party holding the affirmative of the issue].) Whether a delay in delivery of benefits is unreasonable is a question of fact to be resolved by the Appeals Board. (See *Gallamore v. Workers' Comp. Appeals Bd.* (1979) 23 Cal.3d 815 [44 Cal.Comp.Cases 321].) Determining "whether a delay is reasonable or unreasonable depends on more than the number of days payment was delayed. Many factors are to be considered." (*Kampner v. Workers' Comp. Appeals Bd.* (1978) 86 Cal.App.3d 376, 382 [43 Cal.Comp.Cases 1198].) "[D]elays become 'unreasonable' for purposes of Labor Code Section 5814 only when they are excessive." (*Id.* at p.

380.) The Appeals Board "is required to determine whether the delay . . . was egregious in the light of the legitimate needs to administering workers' compensation insurance." (*Id.*)

Applicant filed several petitions for penalties, with the last one dated 6/28/18 and incorporating prior petitions for penalties dated 1/18/18, 1/9/18 and 12/18/17. (Applicant's Exhibit No. 34, Amended petition for penalties, June 28, 2018.)[13] Applicant asserts unreasonable delay of medical treatment for defendant's denial of various treatment modalities. With respect to penalties in relation to UR, section 4610.1 provides in its entirety:

> An employee shall not be entitled to an increase in compensation under Section 5814 for unreasonable delay in the provision of medical treatment for periods of time necessary to complete the utilization review process in compliance with Section 4610. A determination by the appeals board or a final determination of the administrative director pursuant to independent medical review that medical treatment is appropriate shall not be conclusive evidence that medical treatment was unreasonably delayed or denied for purposes of penalties under Section 5814. In no case shall this section preclude an employee from entitlement to an increase in compensation under Section 5814 when an employer has unreasonably delayed or denied medical treatment due to an unreasonable delay in completion of the utilization review process set forth in Section 4610.
>
> (Lab. Code, § 4610.1.)

Pursuant to the analysis above, the UR decisions that the WCJ found to be untimely were in fact timely conducted. Defendant is not obligated to provide applicant with treatment that was denied by a timely UR decision. The record does not show an unreasonable delay in completion of the UR process for the UR decisions in dispute. Thus, there was no unreasonable delay of these benefits because they were not owed to applicant.

Three of applicant's petitions for penalties (dated 1/18/18, 1/9/18 and 12/18/17) contain bare allegations that defendant has denied certain treatment with no discussion of which physician or when the treatment was recommended or if the treatment was denied by defendant pursuant to a UR decision. As discussed above, applicant bears the burden of proving an unreasonable delay or denial of treatment in order to be awarded penalties. The Appeals Board is not obligated to

[13] The Minutes of Hearing identify as an issue the petitions for penalties dated "6/28/18, 1/18/18, 1/9/18, 12/18/17." Applicant's Exhibit No. 37 is a petition for penalties dated 8/17/17, which was not among the petitions identified for adjudication. Therefore, we do not address this petition as part of our decision. (See *Gangwish v. Workers' Comp. Appeals Bd.* (2001) 89 Cal.App.4th 1284, 1295 [66 Cal.Comp.Cases 584] [due process requires notice and an opportunity to be heard before a decision adverse to an interested party issues].)

parse through a voluminous record to hunt out which treatment applicant is alleging was unreasonably delayed or denied in the absence of specific allegations and identification of specific evidence by applicant in support of those allegations.

Applicant therefore did not meet his burden of proving entitlement to penalties under section 5814.

III.

Section 5814.5 separately provides for an award of attorney's fees 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." (Lab. Code, § 5814.5.)

Applicant argued in his petitions for penalties that he was entitled to attorney's fees. The services performed by applicant's attorney outlined in the petitions included preparation of multiple appeals of IMR determinations and review of UR denials and IMR determinations. (Applicant's Exhibit No. 34, Amended petition for penalties, June 28, 2018, p. 3.) As discussed above, applicant failed to show an unreasonable delay or denial of benefits by defendant. Thus, we discern no basis for an award of attorney's fees.

In conclusion, we will rescind the F&O and issue a new decision finding that the UR decisions were timely issued. Our decision will include a finding in accordance with the WCJ's finding of fact that there is no basis to disturb the determination of the AD, which was not challenged by either party. We will also include a finding that applicant is not entitled to penalties under section 5814 or attorney's fees per section 5814.5. The new decision will retain the parties' trial stipulations. (See Lab. Code, § 5702; see also *County of Sacramento v. Workers' Comp. Appeals Bd.* (*Weatherall*) (2000) 77 Cal.App.4th 1114 [65 Cal.Comp.Cases 1].) An award for future medical treatment for the body parts the parties stipulated to as AOE/COE will be included as well.[14]

[14] It is emphasized that this is a general award for treatment and not an award for the specific treatment in dispute with respect to the UR decisions at issue herein. As discussed above, we have no jurisdiction to address the medical necessity of treatment that was denied per a timely UR decision.

For the foregoing reasons,

IT IS ORDERED as the Decision After Reconsideration of the Workers' Compensation Appeals Board that the Findings and of Fact and Order issued by the WCJ on November 15, 2019 is **RESCINDED** and the following is **SUBSTITUTED** in its place:

FINDINGS OF FACT

1. Jesus Macias Macedo, while employed on September 26, 2016, as a construction foreman, at Corona, California, by Hoffman Concrete Company, sustained injury arising out of and in the course of employment to his head, skull, brain, cervical spine, liver, hearing, and lungs. Applicant claims injury arising out of and in the course of employment to his stomach, vision, seizures, psyche, bilateral upper extremities, bilateral lower extremities, lumbar spine, blood clots, jaw, teeth, speech, hypertension, and kidneys.

2. At the time of injury, the employer's workers' compensation carrier was Insurance Company of the West.

3. The employee has been adequately compensated for all periods of temporary disability claimed.

4. The employer has furnished some medical treatment. The primary treating physician is Dr. Chodakewitz with Dr. Marcia Lamm, Dr. Garbis, and Dr. Sobelman as secondary treating physicians.

5. Temporary disability has been paid for 104 weeks.

6. Applicant is entitled to medical treatment for his head, skull, brain, cervical spine, liver, hearing, and lungs.

7. The UR decisions dated 7/17/18, 6/22/18, 5/25/18, 2/12/18, 1/4/18, 12/18/17, 11/28/17, 11/24/17, and 10/4/2017 were timely issued.

8. Defendant was not obligated to conduct UR of Dr. Lamm's July 18, 2018 appeal of the July 17, 2018 UR decision per Labor Code section 4610(k).

9. Applicant has not shown by clear and convincing evidence that the IMR determinations dated 5/16/18, 3/19/18, 3/8/18, 2/28/18, 2/27/18 and 1/18/18 must be set aside per Labor Code section 4610.6(h).

10. Applicant has not shown an unreasonable delay or denial of treatment such that penalties are owed under Labor Code section 5814.

11. Applicant has not shown entitlement to attorney's fees per Labor Code section 5814.5.

AWARD

AWARD is made in favor of **JESUS MACIAS MACEDO** against **INSURANCE COMPANY OF THE WEST** for medical treatment to cure or relieve from the effects of the injury to the head, skull, brain, cervical spine, liver, hearing, and lungs.

ORDERS

IT IS ORDERED that applicant's appeals of the IMR determinations 5/16/18, 3/19/18, 3/8/18, 2/28/18, 2/27/18 and 1/18/18 are **DENIED**.

IT IS FURTHER ORDERED that applicant's petitions for penalties (dated 6/28/18, 1/18/18, 1/9/18 and 12/18/17) and petitions for attorney's fees (dated 6/28/18, 1/18/18 and 1/9/18) are **DENIED**.

WORKERS' COMPENSATION APPEALS BOARD

/s/ JOSÉ H. RAZO, COMMISSIONER

I CONCUR,

/s/ MARGUERITE SWEENEY, COMMISSIONER

/s/ DEIDRA E. LOWE, COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

February 2, 2022

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

JESUS MACIAS MACEDO
LAW OFFICE OF DENNIS HERSHEWE
TOBIN LUCKS

AI/*pc*

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