WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

JOSEPH CASERES, *Applicant*

vs.

CITY OF LOS ANGELES, PERMISSIBLY SELF-INSURED, FORMERLY ADMINISTERED BY TRISTAR, CURRENTLY ADMINISTERED BY INTERCARE, *Defendants*

Adjudication Number: ADJ10575571
Van Nuys District Office

OPINION AND ORDER GRANTING PETITION FOR RECONSIDERATION AND DECISION AFTER RECONSIDERATION

Defendant seeks reconsideration of the May 1, 2023 First Amended Findings, Awards and Orders (F&A), wherein the workers' compensation administrative law judge (WCJ) found that applicant, while employed as a police officer from October 31, 1988 to February 2, 2016, sustained industrial injury to his circulatory system, digestive system, back, and lower extremities. The WCJ found that the value of the medical services provided by lien claimant Kaiser Permanente pursuant to the official medical fee schedule was $73,922.85; that lien claimant was entitled to a penalty of $11,088.43 plus statutory interest; and that applicant was entitled to a penalty pursuant to Labor Code[1] section 5814 in the amount of $10,000.

Defendant contends that the lien filed by Kaiser Permanente was barred by the 12 month statute of limitations found in section 4903.5(b), that lien claimant knew or should have known applicant was claiming industrial injury more than 12 months prior to the filing of its lien, that the WCJ erred in finding that the 12 month statute of limitations defense was without merit and subject to sanctions under section 5813, and that the WCJ lacked jurisdiction to determine issues of medical necessity because defendant had no obligation to perform retrospective utilization review.

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

We have not received an answer from any party. The WCJ prepared a Report and Recommendation on Petition for Reconsideration (Report), recommending that the Petition be denied.

We have considered the allegations of the Petition for Reconsideration and the contents of the report of the workers' compensation administrative law judge (WCJ) with respect thereto. Based on our review of the record, and for the reasons stated in the WCJ's report, which we adopt and incorporate, and for the reasons discussed below, we will grant reconsideration and affirm the decision of May 1, 2023, except that we will amend the decision to enter a finding that defendant and its lien representative violated section 5813 by raising and prosecuting a frivolous defense, and further amending Finding of Fact No. 5 to reflect that defendant is liable for the statutory increase of Labor Code section 4603.2(b)(2).

BACKGROUND

Applicant sustained injury to his circulatory system, digestive system, back, and lower extremities, while employed as a police officer by defendant City of Los Angeles, from October 31, 1988 to February 2, 2016. The parties resolved the case in chief by Stipulations with Request for Award, approved on August 8, 2018.

Lien claimant Kaiser Permanente Health Foundation filed its lien for medical treatment expenses on May 22, 2018. (Minutes of Hearing (Minutes), March 8, 2023, at p. 2:10.)

On March 8, 2023, the parties proceeded to lien trial, and placed in issue Kaiser Permanente's lien in the amount of $76,622.22. The parties framed additional issues including defendant's contention "that there is a 12-month rule pursuant to Labor Code section 4903.5(b), setting the statute of limitations at 12 months after date of knowledge of industrial injury, and the lien was not filed in a timely manner." (*Id.* at p. 2:16.) The parties also placed in issue the value of the Kaiser Permanente lien pursuant to the Office Medical Fee Schedule, penalties, interest, and the court's *sua sponte* issue of whether sanctions should attach pursuant to Labor Code section 5813 for "meritless issues raised regarding Labor Code 4903.5(b), Official Medical Fee Schedule, and bad faith EOB/denial." (*Id.* at p. 2:23.)

On May 1, 2023, the WCJ issued his F&A, finding in relevant part that defendant became liable for services performed by Kaiser Permanente Health Foundation on the day of the issuance of applicant's Award, August 8, 2018. (F&A, Finding of Fact No. 3.) The WCJ allowed the lien

in the amount of $73,922.85, and further awarded an increase for late payment of 15% per section 4603.2(b)(2), statutory interest, and a penalty of $10,000, payable to applicant per section 5814. (Findings of Fact Nos. 4, 5, 6, and 7.)

Defendant's Petition for Reconsideration (Petition) contends section 4903.5(b) limits the filing of a lien to 12 months from the date the provider knew or should have known the injury was industrial in nature. (Petition, at 4:14.) Defendant avers the industrial nature of the claimed injuries can be gleaned from the medical records of applicant's non-Kaiser treatment. Defendant further contends that because lien claimant Kaiser Permanente reimbursed these non-network facilities, knowledge of the industrial nature of applicant's injuries can be imputed to Kaiser as early as April 11, 2014. (*Id.* at pp. 6:5; 8:5.) Accordingly, the defendant avers error in the WCJ's determination that penalties pursuant to section 5814 attach, and that defendant's argument was in bad faith. (*Id.* at p. 8:19.) Defendant also asserts that the defendant had no duty to perform retrospective utilization review, and as a result, the WCJ had no jurisdiction to determine the medical necessity of the underlying lien of Kaiser Permanente.

DISCUSSION

Defendant contends that the penultimate clause of section 4903.5(b) is a 12 month statute of limitations, barring the lien filed by Kaiser Permanente.

Section 4903.5(b) provides, in relevant part:

> (a) A lien claim for expenses as provided in subdivision (b) of Section 4903 shall not be filed after three years from the date the services were provided, nor more than 18 months after the date the services were provided, if the services were provided on or after July 1, 2013.
>
> (b) Notwithstanding subdivision (a), any health care service plan licensed pursuant to Section 1349 of the Health and Safety Code, group disability insurer under a policy issued in this state pursuant to the provisions of Section 10270.5 of the Insurance Code, self-insured employee welfare benefit plan issued in this state as defined in Section 10121 of the Insurance Code, Taft-Hartley health and welfare fund, or publicly funded program providing medical benefits on a nonindustrial basis, may file a lien claim for expenses as provided in subdivision (b) of Section 4903 within 12 months after the entity first knew or in the exercise of reasonable diligence should have known that an industrial injury is being claimed, but in no event later than five years from the date the services were provided to the employee.

There is no dispute that Kaiser Permanente is among the healthcare providers described in subdivision (b). Defendant contends that subdivision (b) provides for a 12 month statute of limitation for the filing of a lien from when lien claimant knew, or should have known, that applicant was claiming an industrial injury.

The WCJ found this argument to be specious. We agree. Subdivision (a) of section 4903.5 disallows lien filings more than 18 months from the date the services were provided. Subdivision (b) allows additional time for the filing of a lien by certain specified group disability insurance policies, self-insured employee welfare benefit plans, health and welfare funds, and publicly funded programs, providing benefits on a nonindustrial basis. These providers *may* file a claim within 12 months of when the entity first knew or in the exercise of reasonable diligence should have known that an industrial injury is being claimed, but not later than five years from the date the services were provided to the employee. (Lab. Code, §4903.5(b).)

Defendant argues that lien claimant had actual or constructive knowledge that applicant was claiming industrial injury as early as April 11, 2014, because applicant sought treatment at non-Kaiser Permanente facilities, and Kaiser later reimbursed those facilities. (Petition, at p. 6:12.) The WCJ observes in his report, however:

> In this case, lien claimant filed a lien on May 22, 2018. There is no showing that the claim form or any other workers' compensation document was served on lien claimant. There is no showing of actual knowledge that a work related injury was being claimed.
>
> The declaration of readiness to proceed filed on January 24, 2018, states that AOE/COE is at issue. (EAMS Doc ID 66361322.) The May 31, 2018, letter from the Rawlings Company, to the WCAB shows that as of June 5, 2018, AOE/COE had not been established. At this point in time, defendant had not acknowledged an industrial injury. The defendant's were reviewing the medicals from the perspective of finding or denying an industrial injury, lien claimant was reviewing the medicals from the perspective of simply caring for an injured Kaiser member. If the city did not find industrial injury, it is a leap to say lien claimant was put on notice to investigate if a workers' compensation claim was filed. The former statute is consistent with the above interpretation of the code. The 2012 amendment changed "…may be filed after six months for the date on which the appeals board or a workers' compensation administrative law judge issues a final decision, findings, order, including an order approving compromise and release, or award on the merits of the claim, after five years from the date of the injury for which the services were provided, or after one year from the date the services were provided, whichever is later."

> Furthermore, Labor Code § 4903.5(b) anticipates that the health care service plan may not know they were treating a claimed work injury until way after the last date of service, up to five years after the last date of service. The labor code anticipates the non-workers' compensation health care service plan may not be looking in EAMS to see if a claim has been filed. In this case, the parties put into evidence the report by agreed medical examiner Jeffrey A. Berman, M.D. dated July 27, 2017. Within the body of the report the agreed medical examiner says the case is complicated because the Applicant has injuries going back to the 1990s. This may be another reason the health care service plan did not suspect a new claim was filed. The agreed medical examiner found it complicated to determine if treatment was for the old injury or if there was a new injury. (Exhibit Z2 at p. 57.)

We also observe that defendant interposed no witnesses, and offered no direct evidence of Kaiser's knowledge that applicant was claiming an industrial injury prior to their lien filing on May 22, 2018, or *when* Kaiser acquired such knowledge. Additionally, the parties have stipulated that the last date of service was September 30, 2018, a date occurring only after the filing of the lien. (Minutes, at 2:10.)

Defendant repeatedly avers that because Kaiser paid for the medical treatment rendered by other medical providers outside of its network, Kaiser knew or should have known that applicant was alleging industrial injury. However, in the absence of specific evidence establishing direct or imputed knowledge, as well as the date of such knowledge, these assertions amount to little more than speculation.

We also observe that while we do not agree with defendant's interpretation of section 4903.5(b) as describing an independent 12 month statute of limitations, defendant's Petition cites to dates of service beginning on April 11, 2014, and continuing through October 28, 2016, all of which are dates less than five years from the lien filing on May 22, 2018, as provided by the last clause in subdivision (b). Accordingly, we agree with the WCJ that defendant's argument is without merit.

Defendant next contends that the WCJ was without jurisdiction to determine medical necessity, because defendant had no obligation to perform utilization review. (Petition, at 9:25.) However, section 4603.2(b)(2) provides:

> (2) Except as provided in subdivision (d) of Section 4603.4, or under contracts authorized under Section 5307.11, payment for medical treatment provided or prescribed by the treating physician selected by the employee or designated by the employer shall be made at reasonable maximum amounts in the official

> medical fee schedule, pursuant to Section 5307.1, in effect on the date of service. Payments shall be made by the employer with an explanation of review pursuant to Section 4603.3 within 45 days after receipt of each separate itemization of medical services provided, together with any required reports and any written authorization for services that may have been received by the physician. If the itemization or a portion thereof is contested, denied, or considered incomplete, the physician shall be notified, in the explanation of review, that the itemization is contested, denied, or considered incomplete, within 30 days after receipt of the itemization by the employer. An explanation of review that states an itemization is incomplete shall also state all additional information required to make a decision. A properly documented list of services provided and not paid at the rates then in effect under Section 5307.1 within the 45-day period shall be paid at the rates then in effect and increased by 15 percent, together with interest at the same rate as judgments in civil actions retroactive to the date of receipt of the itemization, unless the employer does both of the following:
>
> > (A) Pays the provider at the rates in effect within the 45-day period.
> >
> > (B) Advises, in an explanation of review pursuant to Section 4603.3, the physician, or another provider of the items being contested, the reasons for contesting these items, and the remedies available to the physician or the other provider if the physician or provider disagrees. In the case of an itemization that includes services provided by a hospital, outpatient surgery center, or independent diagnostic facility, advice that a request has been made for an audit of the itemization shall satisfy the requirements of this paragraph.
> >
> > An employer's liability to a physician or another provider under this section for delayed payments shall not affect its liability to an employee under Section 5814 or any other provision of this division.

The employer is thus required to make payment pursuant to the official medical fee schedule within 45 days of receipt of each separate itemization of medical services provided, together with any required reports and any written authorization for services, unless the itemization or a portion thereof is contested, denied, or considered incomplete. In that case, the employer must notify the requesting party through the issuance of an explanation of review (EOR).

In addition, as is discussed in the F&A, when an employer defers utilization review during the time it is disputing liability for a claim, "and it is finally determined that the employer is liable for treatment of the condition for which treatment is recommended, the time for the employer to conduct retrospective utilization review … shall begin on the date the determination of the employer's liability becomes final, and the time for the employer to conduct prospective utilization review shall commence from the date of the employer's receipt of a treatment recommendation

after the determination of the employer's liability." (Lab. Code, § 4610(m).) Pursuant to subdivision (i)(2), "[i]n cases where the review is retrospective, a decision resulting in denial of all or part of the medical treatment service shall be communicated to the individual who received services, or to the individual's designee, within 30 days of the receipt of the information that is reasonably necessary to make this determination." (Lab. Code, § 4610(i)(2).)

Here, defendant offered no EORs into evidence, and failed to substantiate its compliance with either section 4603.2 or section 4610. Accordingly, we discern no error in the WCJ's exercise of jurisdiction to determine the medical necessity of the lien.

Pursuant to section 4603.2(b)(2), the failure to timely pay at the rates then in effect under section 5307.1 subjects the employer to a statutory increase of 15 percent along with statutory interest. While we agree with the WCJ's determination that reimbursement to lien claimant should be increased by 15 percent, we would characterize the additional 15 percent as an *increase* pursuant to section 4603.2(b)(2), rather than as a *penalty*. Accordingly, we will amend the term "penalties" to "increase per Labor Code section 4603.2(b)(2)," in Finding of Fact No. 5.

Section 4603.2(b)(2)(B) further provides that an employer's liability to another provider for late payment does not affect its liability to the employee under section 5814. Here, the WCJ awarded an additional $10,000 in penalties to applicant pursuant to section 5814. (Finding of Fact No. 6.)

In *Ramirez v. Drive Financial Services* (2008) 73 Cal.Comp.Cases 1324, 1329 [2008 Cal. Wrk. Comp. LEXIS 278] (Appeals Bd. en banc), we noted that the factors to be considered with respect to the imposition of penalties included (1) evidence of the amount of the payment delayed; (2) evidence of the length of the delay; (3) evidence of whether the delay was inadvertent and promptly corrected; (4) evidence of whether there was a history of delayed payments or, instead, whether the delay was a solitary instance of human error; (5) evidence of whether there was any statutory, regulatory, or other requirement (e.g., an order or a stipulation of the parties) providing that payment was to be made within a specified number of days; (6) evidence of whether the delay was due to the realities of the business of processing claims for benefits or the legitimate needs of administering workers' compensation insurance; (7) evidence of whether there was institutional neglect by the defendant, such as whether the defendant provided a sufficient number of adjusters to handle the workload, provided sufficient training to its staff, or otherwise configured its office or business practices in a way that made errors unlikely or improbable; (8) evidence of whether

the employee contributed to the delay by failing to promptly notify the defendant of it; and (9) evidence of the effect of the delay on the injured employee. (*Id.* at pp. 1329-1330.) We further observed that, "[t]he penal aspect of section 5814 provides an incentive to employers and insurance carriers to pay benefits promptly by making delays costly [citations omitted] … In discussing former section 5814, the Supreme Court has stated that 'section 5814 was enacted as an inducement to prompt payment on the part of private employers and their insurers, which otherwise would have an economic incentive to delay or deny the payment of workers' compensation benefits.' (*DuBois v. Workers' Comp. Appeals Bd.* (1993) 5 Cal.4th 382, 396 [58 Cal.Comp.Cases 286, 297]." (*Id.* at p. 1329.) Here, we agree with the WCJ that the defendant's failure of timely provision of benefits, and specifically, reimbursement to lien claimant, was unreasonable and unwarranted, and consideration of the factors set forth in *Ramirez, supra*, warrants the imposition of penalties at the statutory maximum afforded under section 5814 of $10,000. (Lab. Code, § 5814(a); Finding of Fact No. 7.)

Finally, we note that pursuant WCAB Rule 10421(a), on its own motion or upon the filing of a petition pursuant to rule 10510, the WCAB may order payment of reasonable expenses, including attorney's fees and costs, and in addition, sanctions as provided in Labor Code section 5813, provided that the alleged offending party is given notice and an opportunity to be heard. (Lab. Code, § 5813; Cal. Code Regs., tit. 8, § 10421(a).) Here, the WCJ provided specific notice to the parties at the time of trial that the court was considering the imposition of sanctions under section 5813 for "meritless issues raised regarding Labor code 4903.5(b), official Medical Fee schedule and bad faith EOB/ denial." (Minutes, at 2:23.)

Rule 10421 provides that sanctions may be imposed for "bad faith actions or tactics that are frivolous or solely intended to cause unnecessary delay … or that are done for an improper motive or are indisputably without merit." (Cal. Code Regs., tit. 8, § 10421(b).) Here, defendant has denied payment to lien claimant based on its assertion of a 12 month statute of limitations that is indisputably without merit. Moreover, defendant offers no specific evidence of lien claimant's knowledge that applicant was claiming industrial injury. Defendant further specifies dates of knowledge as establishing that the lien is barred by a statute of limitations, even when those dates are within five years of the filing of the lien, as allowed by section 4903.5(b).

Accordingly, and following our review of the record occasioned by defendant's Petition, we are persuaded that defendant's continued litigation of these issues meets the criteria set forth

in WCAB Rule 10421, of actions or tactics that are indisputably without merit. We will amend the Findings of Fact to impose monetary sanctions on defendant pursuant to section 5813, payable to the General Fund, in an amount to be determined by the WCJ in further proceedings. We will further amend the Findings of Fact to reflect that defendant is liable to lien claimant for costs pursuant to WCAB Rule 10421, including attorney fees, in an amount to be determined by the WCJ in further proceedings.

In summary, we find that the WCJ appropriately determined the services provided by Kaiser Permanente were medically necessary, and that defendant's assertion of a 12 month statute of limitations under section 4903.5(b) was devoid of merit. We also agree with the WCJ that defendant's failure of prompt payment warrants the imposition of the statutory increase found in section 4603.2(b)(2), statutory interest, and the award of penalties to applicant pursuant to section 5814. We further conclude that defendant has insisted on litigating a defense that is frivolous and without merit, and we return the matter to the trial level for determination of the amount of monetary sanctions payable to the general fund pursuant to section 5813, and costs and attorney's fees payable to lien claimant pursuant to WCAB Rule 10421.

For the foregoing reasons,

IT IS ORDERED that reconsideration of the decision of May 1, 2023 First Amended Findings, Awards and Orders is **GRANTED**.

IT IS FURTHER ORDERED as the Decision After Reconsideration of the Workers' Compensation Appeals Board that the May 1, 2023 First Amended Findings, Awards and Orders is **AFFIRMED, EXCEPT** that it is **AMENDED** as follows:

FINDINGS OF FACT

* * *

5. Kaiser Permanente Health Foundation is entitled to an increase pursuant to Labor Code section 4603.2(b)(2) of $11,088.43 for a total of $85,011.28.

* * *

8. Defendants' bad faith actions or tactics require the imposition of monetary sanctions, costs, and attorney fees, pursuant to Labor Code section 5813 and WCAB Rule 10421, as against the City of Los Angeles and AM Lien Solutions, jointly and severally, in amounts to be determined by the WCJ in further proceedings.

ORDER

IT IS HEREBY ORDERED that the City of Los Angeles and AM Lien Solutions are jointly and severally liable for monetary sanctions pursuant to Labor Code section 5813, payable to the General Fund, and are further jointly and severally liable for costs and attorney fees pursuant to WCAB Rule 10421, payable to Kaiser Permanente Healthcare Foundation, in amounts to be determined by the WCJ in further proceedings.

WORKERS' COMPENSATION APPEALS BOARD

/s/ CRAIG SNELLINGS, COMMISSIONER

I CONCUR,

/s/ ANNE SCHMITZ, DEPUTY COMMISSIONER

/s/ JOSEPH V. CAPURRO, COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

JULY 21, 2023

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

AM LIEN SOLUTIONS
THE RAWLINGS COMPANY
JOSEPH CASERES

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I certify that I affixed the official seal of the Workers' Compensation Appeals Board to this original decision on this date.
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REPORT AND RECOMMENDATION OF WORKERS' COMPENSATION ADMINISTRATIVE LAW JUDGE ON PETITION FOR RECONSIDERATION

INTRODUCTION:

On May 22, 2023, Defendant City of Los Angeles, by and through its representative AM Lien Solutions, filed a timely verified Petition for Reconsideration. Petitioner contends:

a) The undersigned WCJ did not properly construe Labor Code § 4903.5(b); and,

b) Kaiser knew or in the exercise of reasonable diligence should have known the applicant's injury was industrially related;

c) The undersigned WCJ failed to adequately explain how Defendant raising Labor Code § 4903.5(b), as an affirmative defense, constitutes bad-faith actions or frivolous tactics, and gives rise to a payment of penalties to Kaiser and the applicant;

d) WCJ Bushin did not have jurisdiction to determine the medical necessity of treatment and services provided by various Kaiser associated facilities, because requests for authorization were not submitted; and,

e) The undersigned WCJ failed to provide an adequate explanation for his opinion that the treatment and services provided by various Kaiser associated facilities, which were ultimately paid by Kaiser, were medically necessary

STATEMENT OF FACTS:

On March 8, 2023, the parties appeared for trial, documentary evidence was admitted and the matter was submitted. On April 18, 2023, the undersigned WCJ issued Findings, Awards and Orders. On April 28, 2023, the lien claimant filed a request that the court correct typographical errors and on May 1, 2023, a first amended findings, awards and orders was issued. The undersigned WCJ found: The services of Kaiser were reasonable and necessary and the value of services related to the industrial injury was $73,922.85 plus interest and penalty; and, a finding the reason for denying benefits was unreasonable with increase in benefits in the amount of $10,000.00 payable to the applicant. Defendant seeks relief from these findings, awards and orders.

DISCUSSION:

THERE IS NOTHING IN LABOR CODE § 4903.5(b) THAT IMPLIES A TWELVE MONTH STATUTE OF LIMITATIONS

Any defect contained in the Opinion on Decision under Labor Code section 5313 is cured by the herein WCJ's Report and Recommendation on Reconsideration (*Smales v. Workers' Comp. Appeals Bd.* (1980) 45 Cal. Comp. Cases 1026 (writ denied)).

The parties agree that lien claimant Kaiser Permanente Health Foundation is a member of the lien claimants described in Labor Code § 4903.5(b), hereinafter health care service plan. A health care service provider may file a lien claim for expenses within 12 months after the entity first knew or in the exercise of reasonable diligence should have known that an industrial injury is being claimed, but in no event later than five years from the date the services were provided to the employee. (Cal Lab Code § 4903.5(b).) Subsection a of Labor Code section 4903.5(a) says "A lien claim for expenses as provided in subdivision (b) of Section 4903 ***shall not*** be filed after three years from the date the services were provided, nor more than 18 months after the date the services were provided, if the services were provided on or after July 1, 2013." (emphasis added.) Subsection b uses "***may*** file." The difference is substantial, subsection a is a statute of limitation, subsection b implies the lien by a health care service plan may be the opening document in a case.

In this case, lien claimant filed a lien on May 22, 2018. There is no showing that the claim form or any other workers' compensation document was served on lien claimant. There is no showing of actual knowledge that a work related injury was being claimed.

The declaration of readiness to proceed filed on January 24, 2018, states that AOE/COE is at issue. (EAMS Doc ID 66361322.) The May 31, 2018, letter from the Rawlings Company, to the WCAB shows that as of June 5, 2018, AOE/COE had not been established. At this point in time, defendant had not acknowledged an industrial injury. The defendant's were reviewing the medicals from the perspective of finding or denying an industrial injury, lien claimant was reviewing the medicals from the perspective of simply caring for an injured Kaiser member. If the city did not find industrial injury, it is a leap to say lien claimant was put on notice to investigate if a workers' compensation claim was filed. The former statute is consistent with the above interpretation of the code. The 2012 amendment changed "…***may*** be filed after six months for the date on which the appeals board or a workers' compensation administrative law judge issues a final decision, findings, order, including an order approving compromise and release, or award on the merits of the claim, after five years from the date of the injury for which the services were provided, or after one year from the date the services were provided, ***whichever is later***."

Furthermore, Labor Code § 4903.5(b) anticipates that the health care service plan may not know they were treating a claimed work injury until way after the last date of service, up to five years after the last date of service. The labor code anticipates the non-workers' compensation health care service plan may not be looking in EAMS to see if a claim has been filed. In this case, the parties put into evidence the report by agreed medical examiner Jeffrey A. Berman, M.D. dated July 27, 2017. Within the body of the report the agreed medical examiner says the case is complicated because the Applicant has injuries going back to the 1990s. This may be another reason the health care service plan did not suspect a new claim was filed. The agreed medical examiner found it complicated to determine if treatment was for the old injury or if there was a new injury. (Exhibit Z2 at p. 57.)

SANCTIONS AND AN INCREASE IN BENEFITS WERE APPROPRIATE

Any defect contained in the Opinion on Decision under Labor Code section 5313 is cured by the herein WCJ's Report and Recommendation on Reconsideration (*Smales v. Workers' Comp. Appeals Bd.* (1980) 45 Cal. Comp. Cases 1026 (writ denied)).

The burden of proof rests on the party holding the affirmative of an issue. (Labor Code §5705.) To meet its burden, the party holding the affirmative of an issue is required to prove each fact supporting its issue by a preponderance of the evidence. "Preponderance of the evidence' means that evidence that when weighed with that opposed to it, has more convincing force and the greater probability of truth." (Lab. Code, §3202.5.) In this case, defendant raised the statute of limitation pursuant to Labor Code § 4903.5 as an affirmative defense, it is defendant's burden to support each element, including that the lien claimant knew or should have known that an industrial injury was being claimed, by the preponderance of the evidence. No evidence was produced to support the contention that lien claimant knew or should have known an industrial injury was being claimed.

Proceeding to trial without any evidence or with evidence that is utterly incapable of meeting its burden of proof is frivolous and constitutes bad faith within the meaning of section 5813 justifying an award of sanctions, attorney's fees and costs against the party or lien claimant, its attorney(s) or hearing representative(s), individually or jointly and severally. (*Torres v. AJC Sandblasting*, 77 Cal. Comp. Cases 1113, 1115 (November 15, 2012).) In this case, defendant has not referenced any evidence to support the contention that the health care service plan knew or should have known there was a claim filed. In the petition for reconsideration, the defendant references an "Exhibit A." (Petition for Reconsideration at 6:19.) There is no exhibit "A" (Minutes of Hearing (Court Reporter) dated March 8, 2023.) Joint Exhibit 3, is probably the report Defendant referencing. Page 10, of the report discusses old injuries and states the Applicant denies new onset of symptoms." This does not constitute a new work injury. The same with Dr. Zhao, Dr. Zhao says chronic pain related to a work-related incident in 1996. (Exhibit 4 at p. 9.) The agreed medical examiner Jeffrey A. Berman, M.D. as well found it complicated to determine if treatment was for the old injury or if there was a new injury. (Exhibit Z2 at p. 57.) The Defendant's knew, before proceeding to trial there was nothing to indicate knowledge or should have known.

THE SERVICES PAID FOR BY A GROUP MEDICAL PROVIDER ARE REQUIRED TO BE PAID AT FULL VALUE

"[W]here there is no legitimate dispute as to industrial causation, the group medical provider stands in a different position. If the injury or illness was industrially caused, the workman will always be entitled to at least care and treatment at the employer's expense and if the workman, after due notice to the employer, is entitled to obtain that care and treatment from his own medical provider, the employer will be required to pay the full value of the services necessarily provided. In such a case, the group medical provider will be entitled to a lien for the full amount of its legitimate claim, irrespective of whether other issues may exist between the employer and the workman." (*Kaiser Found. Hosps. v. Workers' Comp. Appeals Bd.*, 87 Cal. App. 3d 336, 362 (1978).) In this case, the causation for the injury to the body parts in the stipulation are to be paid in the full amount. The court eliminated all line items to body parts not admitted in this industrial injury, totaled the remaining line items and awarded that amount.

RECOMMENDATION:

The undersigned WCJ recommends that the defendant's Petition for Reconsideration filed May 22, 2023 be denied.

Dated: June 5, 2023

M. Victor Bushin
Workers' Compensation
Administrative Law Judge