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**WORKERS' COMPENSATION APPEALS BOARD**  
**STATE OF CALIFORNIA**

**YOLANDA MARTINEZ,**

*Applicant,*

vs.

**MASS PRECISION; COMPWEST  
INSURANCE COMPANY; SCI @ BALANCE  
STAFFING SERVICE; ZURICH NORTH  
AMERICA,**

*Defendants.*

Case Nos. **ADJ7217859**  
**ADJ7544106**  
(San Jose District Office)

**OPINION AND DECISION  
AFTER  
RECONSIDERATION**

On January 17, 2014, we granted reconsideration in this matter to provide an opportunity to further study the legal and factual issues raised by the petition for reconsideration. Having completed our review, we now issue our Decision After Reconsideration.

Defendant, Zurich North America, on behalf of its insured, SCI @ Balance Staffing Service, seeks reconsideration of the Findings and Award, issued October 25, 2013, in which a workers' compensation administrative law judge (WCJ) found applicant Yolanda Martinez sustained both a specific industrial injury on November 30, 2009, and an industrial cumulative trauma injury over the period ending November 30, 2009, to her lumbar spine, right shoulder and psyche while employed as a part maker by Mass Precision and SCI @ Balance Staffing Service. Applicant was employed directly by Mass Precision from March 17, 2008 to March 12, 2009, and later worked at Mass Precision, employed by SCI @ Balance Staffing Service, as a general employer, from June 19, 2009 to November 30, 2009. The WCJ found apportionment of, and between, the injuries, finding 80% of applicant's psychiatric injury to be industrial, and 80% of the industrial disability due to the specific injury and 20% due to the cumulative trauma injury. All of applicant's disability from the orthopedic injury was found to be industrial, with 80% apportioned to the specific injury and 20% to the cumulative trauma injury. Applicant was awarded 31% permanent disability for her specific injury, and 9% permanent disability for

1 the cumulative trauma injury, both increased by 15% pursuant to Labor Code section 4658(d)(2). The  
2 WCJ also held the award to be joint and several as between the two co-defendants.

3 Defendant Zurich contests the WCJ's finding of liability against it for applicant's injury to her  
4 psyche, contending that applicant's claim against it is barred under Labor Code section 3208.3(d), since  
5 she was employed by SCI @ Balance Staffing Service for less than the minimum six month period  
6 required for a claim of injury to the psyche, and she did not claim her injury arose out of a sudden and  
7 extraordinary event. Defendant Zurich asserts that applicant may recover for her cumulative trauma  
8 injury to her psyche from co-defendant Mass Precision, insured by CompWest, since she was employed  
9 by that defendant for longer than six months. Defendant does not contest any other aspect of the Findings  
10 and Award.

11 Applicant has filed an answer to defendant's petition, and the WCJ has prepared a Report and  
12 Recommendation on Petition for Reconsideration (Report) in which she recommends that defendant's  
13 petition be denied.

14 For the reasons set forth below, and as our Decision After Reconsideration, we shall affirm the  
15 WCJ's Findings and Award holding both employers jointly and severally liable for applicant's industrial  
16 injury to her psyche.

17 I.

18 Applicant was employed as a part maker at Mass Precision by various employers, directly and as  
19 a temporary employee. She was first employed there by AeroTek, as a general employer, from December  
20 14, 2006 through March 16, 2008. Mass Precision then employed her directly from March 17, 2008  
21 through March 12, 2009. She was not employed for three months, but returned to dual employment at  
22 Mass Precision on June 19, 2009, when she was employed by SCI @ Balance Staffing Service, as a  
23 general employer and Mass Precision, as her special employer.

24 The issue presented is whether SCI @ Balance Staffing Service can be held liable for applicant's  
25 claim of injury to her psyche when it employed applicant at Mass Precision for less than six months. The  
26 WCJ relied upon an Appeals Board panel opinion in *Martinez v. Tarrant Apparel dba Fashion Resource*  
27 2010 Cal. Wrk. Comp. PD. LEXIS 192, to conclude that all of the time that applicant was employed at

1 Mass Precision, by dual and regular employers, counts towards the six month employment requirement  
2 in Section 3208.3(d).

3 Labor Code section 3208.3(d) provides, "Notwithstanding any other provision of this division, no  
4 compensation shall be paid pursuant to this division for a psychiatric injury related to a claim against an  
5 employer unless the employee has been employed by that employer for at least six months. The six  
6 months of employment need not be continuous. This subdivision shall not apply if the psychiatric injury  
7 is caused by a sudden and extraordinary employment condition. . . ."

8 It is not disputed that applicant worked at Mass Precision for more than six months. The issue is  
9 whether, when there is dual employment, the general employer may be liable for a claim of injury to the  
10 psyche while working at the special employer if the general employer employed the injured worker for  
11 less than six months.

12 In *Martinez v. Tarrant Apparel, supra*, upon which the WCJ expressly relied, it was held that an  
13 applicant's claim of injury to her psyche was not barred by the six month employment requirement,  
14 though the special employer held liable had employed the injured worker for less than six months.

15 In that case, the injured worker sustained an injury to her psyche two days after she was hired as a  
16 regular employee by Tarrant Apparel, but had previously worked at Tarrant Apparel as a special  
17 employee for more than six months under dual employment by Personnel Plus, as her general employer.  
18 The Appeals Board panel held that the time the injured worker was employed by Tarrant Apparel  
19 included the time she worked for Tarrant Apparel as a special employee.

20 Here, the plain language of section 3208.3(d) supports the conclusion that  
21 applicant was 'employed' by [Tarrant Apparel] for more than six months  
22 on the date of injury. It has long been recognized that an employee may  
23 have more than one employer at the same time. The characteristics of such  
24 dual employment are: 1) that the employee is sent by one employer (the  
25 general employer) to perform labor for another employer (the special  
26 employer); 2) rendition of the work yields a benefit to each employer; and  
27 3) each employer has some direction and control over the details of the  
work.

25 Though the injured worker in *Martinez* was employed by Tarrant Apparel as a regular employee  
26 for only two days, she was performing duties at Tarrant Apparel for more than six months as a special  
27 employee of Tarrant Apparel.

1 In finding applicant's industrial injury to be compensable, we see no  
2 conflict with the Legislature's goal in adopting Labor Code §3208.3, to  
3 'establish a new and higher threshold of compensability for psychiatric  
4 injury.' (Lab. Code §3208.3(c); *Hansen v. Workers' Comp. Appeals Bd.*  
5 (1993) 18 Cal.App.4th 1179 [58 Cal.Comp.Cases 62].) There is no  
6 evidence that allowing the claim will reward an employee who is either  
7 dishonest or not diligent. (See *Wal-Mart Stores, Inc. v Workers' Comp.*  
8 *Appeals Bd. (Garcia)* (2003) 112 Cal.App.4th 1435 [68 Cal.Comp.Cases  
9 1575].) There is no evidence that applicant did not provide satisfactory  
10 services to [Tarrant Apparel] as a special employee, and it is fairly inferred  
11 that her good work as a special employee was considered by [Tarrant  
12 Apparel] when it hired her as its regular employee. Denying benefits  
13 merely because applicant's status changed from special employee of  
14 [Tarrant Apparel] to regular employee of [Tarrant Apparel] within six  
15 months of the date of injury would exalt form over substance. Such a hyper  
16 technical reading and application of the statute would also be contrary to  
17 our obligation to construe the workers' compensation statutes 'with the  
18 purpose of extending their benefits for the protection of persons injured in  
19 the course of their employment' (Lab. Code, § 3202), and would be  
20 inconsistent with our constitutional mandate 'to accomplish substantial  
21 justice in all cases' (Cal. Const., Article XIV, § 4).

22 We are persuaded that the policy prescription underlying the decision in *Martinez, supra*, is  
23 equally applicable to the facts presented here. Where section 3208.3(d) requires that "the employee has  
24 been employed by that employer for at least six months," it extends the requisite employment period in  
25 situations of dual employment to the entire period of employment by both the general and special  
26 employers. This recognizes that the policy reasons for the six month employment requirement are not  
27 applicable to a long serving "dual employee" who has performed the same job duties at the same place of  
employment but for shifting special and general employers. As stated in *Hansen v. Workers' Comp.*  
*Appeals Bd.* (1993) 18 Cal.App.4th 1179, 1183-1184 [58 Cal.Comp.Cases 602] fn. omitted,

Labor Code section 3208.3 was enacted as part of the Margolin-Greene  
Workers' Compensation Reform Act of 1989. It is part of the Legislature's  
response to increased public concern about the high cost of workers'  
compensation coverage, limited benefits for injured workers, suspected  
fraud and widespread abuses in the system, and particularly the  
proliferation of workers' compensation cases with claims for psychiatric  
injuries. For years commentators have written critically about problems  
unique to the disposition of psychiatric claims, notably vagueness in  
defining the injury and problems of establishing industrial causation and  
apportionment. (See, e.g., Lasky, *Psychiatry and California Workers'*  
*Compensation Laws: A Threat and a Challenge* (1980) 17 Cal. Western L.  
Rev. 1.)

The Legislature's apparent purpose in enacting subdivision (d) of section  
3208.3 was to limit questionable claims for psychiatric injuries resulting  
from routine stress during the first six months of employment. Underlying

1 this policy decision is the fact that in many employer-employee contracts  
2 the new employee is customarily on probation during the first six months  
3 of employment. It is during that period when problems between the  
4 employee and employer or supervisor often occur. Those problems often  
5 result in disciplinary action, resignation, or termination and lead to claims  
6 of psychiatric injury due to stress. Moreover, psychiatric injuries from  
7 stress during regular and routine employment are necessarily cumulative  
8 injuries that occur over time.

9 The stated purpose of avoiding fraudulent claims by newly hired employees is not advanced here  
10 by application of the six month employment requirement, where a change of employer has not resulted in  
11 any change in the nature of the employment. A contrary holding would only serve to provide employers  
12 with a means of gaming the system to avoid potential liability for temporary or leased employees,  
13 without extending workers' compensation benefits for the protection of persons injured in the course of  
14 their employment. (Lab. Code, § 3202.)

15 Accordingly, as our Decision After Reconsideration, we will affirm the WCJ's Findings and  
16 Award holding both employers jointly and severally liable for applicant's industrial injury to her psyche.

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For the foregoing reasons,

**IT IS ORDERED**, as our Decision After Reconsideration, that the Findings and Award, issued October 25, 2013, is **AFFIRMED**.

**WORKERS' COMPENSATION APPEALS BOARD**

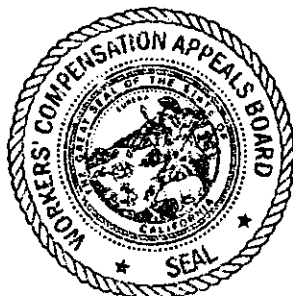
*[Handwritten signature]*  
FRANK M. BRASS

**I CONCUR,**

*[Handwritten signature]*  
MARGUERITE SWEENEY

**I DISSENT (See Dissenting Opinion),**

*[Handwritten signature]*  
DEIDRA E. LOWE



**DATED AND FILED AT SAN FRANCISCO, CALIFORNIA**

OCT 21 2014

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

**YOLANDA MARTINEZ  
LAW OFFICE OF HOWARD M. MAY  
TOBIN LUCKS, LLP (2)**

*SV/jp*

*[Handwritten initials]*

1 **DISSENTING OPINION**

2 I dissent. I would grant the Petition for Reconsideration filed by Zurich North America, on behalf  
3 of its insured, SCI @ Balance Staffing Service, and reverse the WCJ's determination that SCI @ Balance  
4 Staffing Service can be held liable for applicant's claim of injury to her psyche. Since applicant Yolanda  
5 Martinez was employed by SCI @ Balance Staffing Service for less than the required six month period  
6 under Labor Code section 3208.3(d), applicant's claim against that employer for an injury to her psyche  
7 is barred.

8 Section 3208.3(d) provides, in relevant part:

9 Notwithstanding any other provision of this division, no compensation  
10 shall be paid pursuant to this division for a psychiatric injury related to a  
11 claim against an employer unless the employee has been employed by *that*  
12 *employer* for at least six months. (Emphasis added.)

13 This provision specifically precludes placing liability on an employer for a psychiatric injury  
14 unless the injured worker has been employed by "that employer," for at least six months. Here, even  
15 though applicant worked at Mass Precision for several different employers for more than six months, it is  
16 undisputed that applicant was employed by SCI @ Balance Staffing Service for less than six months.

17 The Appeals Board panel decision in *Martinez v. Tarrant Apparel dba Fashion Resource* 2010  
18 Cal. Wrk. Comp. PD. LEXIS 192, which the majority relies upon, is distinguishable and does not support  
19 finding liability against SCI @ Balance Staffing Service as applicant's general employer here. The  
20 distinguishing factor in *Martinez* is that the employer held liable, Tarrant Apparel, had employed the  
21 injured worker as a special employer for more than six months just prior to hiring her as a regular  
22 employee two days prior to her industrial injury. Thus, the injured worker worked continuously for the  
23 same employer, Tarrant Apparel, but only changed from being a special employee to being a regular  
24 employee. It was reasonable to find Tarrant Apparel had employed the injured worker for more than six  
25 months, by combining the period of time she worked as a special employee and as a regular employee.

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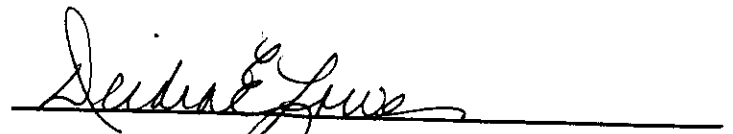
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1 The same cannot be said for applicant here. Applicant was employed by Mass Precision as a  
2 special employee and as a regular employee. However, applicant was only employed by SCI @ Balance  
3 Staffing Service as a general employee. The only continuity between employers was Mass Precision. SCI  
4 @ Balance Staffing Service had no relationship with applicant other than for the period from June 19,  
5 2009 to November 30, 2009, which is less than the required six months to place liability on an employer.  
6 Therefore I would reverse the finding that Zurich North America, on behalf of its insured, SCI @  
7 Balance Staffing Service, is liable for applicant's claim of injury to her psyche.



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9 **WORKERS' COMPENSATION APPEALS BOARD**

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14 **DEIDRA E. LOWE, COMMISSIONER**

15 **DATED AND FILED AT SAN FRANCISCO, CALIFORNIA**

16 **OCT 21 2014**

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

19 **YOLANDA MARTINEZ**  
20 **LAW OFFICE OF HOWARD M. MAY**  
21 **TOBIN LUCKS, LLP (2)**

22 *SV/jp*





1 **WORKERS' COMPENSATION APPEALS BOARD**  
2 **STATE OF CALIFORNIA**

3  
4 **YOLANDA MARTINEZ,**

5 *Applicant,*

6 *vs.*

7 **MASS PRECISION; COMPWEST**  
8 **INSURANCE COMPANY; SCI @ BALANCE**  
9 **STAFFING SERVICE; ZURICH NORTH**  
10 **AMERICA,**

11 *Defendants.*

Case Nos. **ADJ7217859 MF**  
**ADJ7544106**  
**(San Jose District Office)**

**OPINION AND ORDER**  
**GRANTING PETITION FOR**  
**RECONSIDERATION**

12 Reconsideration has been sought by defendant, with regard to a decision filed on October 28,  
13 2013).

14 Taking into account the statutory time constraints for acting on the petition, and based upon our  
15 initial review of the record, we believe reconsideration must be granted in order to allow sufficient  
16 opportunity to further study the factual and legal issues in this case. We believe that this action is  
17 necessary to give us a complete understanding of the record and to enable us to issue a just and reasoned  
18 decision. Reconsideration will be granted for this purpose and for such further proceedings as we may  
19 hereinafter determine to be appropriate.

20 For the foregoing reasons,

21 **IT IS ORDERED** that the Petition for Reconsideration is **GRANTED**.

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1 **IT IS FURTHER ORDERED** that pending the issuance of a Decision After Reconsideration in  
2 the above cases, all further correspondence, objections, motions, requests and communications shall be  
3 filed in writing only with the Office of the Commissioners of the Workers' Compensation Appeals Board  
4 at either its street address (455 Golden Gate Avenue, 9<sup>th</sup> floor, San Francisco, CA 94102) or its Post  
5 Office Box address (PO Box 429459, San Francisco, CA 94142-9459), and shall not be submitted to the  
6 San Jose District Office or any other district office of the WCAB and shall not be e-filed in the Electronic  
7 Adjudication Management System.

8 **WORKERS' COMPENSATION APPEALS BOARD**

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12 **FRANK M. BRASS**

13 **I CONCUR,**

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15 \_\_\_\_\_  
16 **MARGUERITE SWEENEY**

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18 \_\_\_\_\_  
19 **DEIDRA E. LOWE**



20 **DATED AND FILED AT SAN FRANCISCO, CALIFORNIA**

21 **JAN 17 2014**

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

24 **YOLANDA MARTINEZ**  
25 **LAW OFFIC OF HOWARD M. MAY**  
26 **TOBIN LUCKS LLP (2)**



27 **abs**

**MARTINEZ, Yolanda**

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

Case No. ADJ7217859; ADJ7544106

YOLANDA MARTINEZ,

*Applicant,*

vs.

MASS PRECISION (COMPWEST) and SCI  
@ BALANCE STAFFING SERVICE  
(ZURICH SAN FRANCISCO);

*Defendants.*

**REPORT AND RECOMMENDATION  
ON PETITION FOR  
RECONSIDERATION**

I.

**INTRODUCTION**

Applicant, YOLANDA MARTINEZ, while employed on 11/30/2009 (ADJ7217859) and during the period 11/30/2008 – 11/30/2009 (ADJ7544106), as a part maker, occupational group number 221, in San Jose, California, by Mass Precision (11/30/2008 – 03/12/2009) and by SCI @ Balance Staff Service (06/19/2009 – 11/30/2009), sustained an injury AOE/COE to the lumbar spine, right shoulder and psyche.

The Findings and Award in this case issued on 10/28/2013. The Petitioner is Defendant Zurich (for SCI @ Balance Staffing Service), who has timely filed the verified Petition for Reconsideration on 11/18/2013. The Petition for Reconsideration is not legally defective. Applicant has not yet filed an Answer.

Petitioner/Zurich contends that Applicant's psychiatric injury is barred by Labor Code Section 3208.3(d) and that the case of Martinez v. Tarrant Apparel dba Fashion Resource (2010) Cal. Wrk. Comp. PD LEXIS 192 is not applicable.

## II.

### FACTS

Applicant's employment history is critical herein, as follows:

- 1) Applicant was employed by Aero Tek (general employer – temp agency) at Mass Precision (special employer) from 12/14/2006 - 03/16/2008;
- 2) Applicant was employed by Mass Precision (directly) from 03/17/2008 – 03/12/2009;
- 3) Applicant was either unemployed or employed in miscellaneous other employment from 03/13/2009 – 06/18/2009;
- 4) Applicant was employed by SCI @ Balance Staffing Service (general employer – temp agency) at Mass Precision (special employer) from 06/19/2009 – 11/30/2009.

Applicant has suffered both a specific injury on 11/30/2009 and a cumulative trauma claim from 11/30/2008 – 11/30/2009, and has alleged injury to the lumbar spine, right shoulder and psyche. Defendant Zurich for SCI @ Balance Staffing Service has alleged that the employment with SCI is for less than six months duration, and therefore the claim of psychiatric injury against this employer is barred by Labor Code Section 3208.3(d).

The parties proceeded to trial primarily on this issue, and this Judge determined that Applicant had dual employment between Mass Precision and SCI @ Balance Staffing Service, and that the dual employment met the six month threshold for psychiatric compensability. Defendant Zurich has filed its Petition for Reconsideration on this determination.

### III.

#### **DISCUSSION**

1. **SHOULD APPLICANT'S PSYCHIATRIC CLAIM BE BARRED AS AGAINST SCI @ BALANCE STAFFING SERVICE?**

Defendant Zurich alleges that the plain meaning of Labor Code Section 3208.3(d) specifically bars Applicant's psychiatric claim against SCI @ Balance Staffing Service because Applicant was employed by this employer for less than six months, to wit 06/19/2009 – 11/30/2009, a period of 165 days. Applicant did not allege that her psychiatric injury was as a result of a sudden or extraordinary event/incident.

Zurich does not dispute that Applicant had worked at Mass Precision, in a dual capacity, since 12/14/2006, a period of nearly three years.

Zurich admits that Applicant may recover for her psychiatric injury against Mass Precision as Applicant clearly worked there, directly, for more than six months.

Zurich then concludes that since Applicant may recover against the co-Defendant for the psychiatric injury, there is no basis to recover against Zurich. This reasoning is faulty.

As cited in the Opinion on Decision, there is legal authority for the proposition that the time an injured worker worked as a special employee should be included in determining whether the six month requirement has been met. This Judge relied upon the panel decision of Martinez cited above.

In Martinez, the employee was injured two days after having been hired by Fashion Resource. The trial Judge found that her claim of psychiatric injury was barred by section 3208.3(d) as employment was not for six months. However, the WCAB disagreed and reversed the trial Judge, finding that the time Ms. Martinez spent as a special employee with Personnel Plus, working for Fashion Resource, also counted towards the six month requirement. The WCAB found that Martinez was employed by Fashion for more than six months on the date of injury as it has long been recognized that an employee may have more than one employer at the same time. The characteristics of dual employment are 1) that the employee is sent by one employer (the general employer) to perform labor for another employer (the special employer); 2) the rendition of the work yields a benefit to each employer; and 3) each employer has some direction and control over the details of the work.

As in Martinez, Ms. Martinez [what a coincidence!] was employed with SCI @ Balance Staffing (a general employer) for 165 days, and with Mass Precision [at times a special employer and at other times a general employer] for a period of about three years. As in Martinez, Applicant had dual employment. While Applicant may be short of six months working for SCI @ Balance Staffing, pursuant to the principles of dual employment, Applicant is allowed "credit" for the time she worked at Mass Precision. After all, it is the same employee, doing the same work, for the same general/special employer (Mass Precision).

We keep in mind the legislative intent behind the six month rule, of adopting Section 3208.3, to establish a new and higher threshold of compensability for psychiatric injury. There is no evidence that allowing the claim will reward and employee who is either dishonest or not diligent.

As stated in Martinez, denying benefits merely because Applicant's status changed from general employee of Mass Precision to special employee of Mass Precision through SCI @ Balance Staffing Service, within six months of the date of injury, would exalt form over substance. Also, as in Martinez, such a hyper technical reading and application of the statute would be contrary to Labor Code Section 3202 and would be inconsistent with our constitutional mandate to "accomplish substantial justice in all cases." Martinez, *ibid*.

Here, Applicant will still be entitled to benefits from Mass Precision for her psychiatric injury, but legal authority, equity and substantial justice require that the liability for said psychiatric injury be properly adjudicated and in this case, that means that SCI @ Balance Staffing Service is also liable for the psychiatric injury and said psychiatric injury is not barred by Labor Code Section 3208.3(d).

#### IV.

#### RECOMMENDATION

The Petition for Reconsideration should be denied.

DATE: 11/26/2013



ADORALIDA PADILLA  
WORKERS' COMPENSATION JUDGE

Served:  
Date: 12-2-2013  
Copy served by mail on all parties as are listed  
on the current Official Address Record Attached.  
By: *Helen M. Gorman*