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

**DIANE GARIBAY-JIMENEZ**

*Applicant,*

**vs.**

**SANTA BARBARA MEDICAL FOUNDATION  
CLINIC; ZURICH AMERICAN INSURANCE,**

*Defendants.*

**Case No. ADJ6552734**  
**(Oxnard District Office)**

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

Applicant, Diane Garibay-Jimenez, seeks reconsideration or, alternatively, removal of this matter, to review the Expedited Findings of Fact and Order, issued February 11, 2015, in which a workers' compensation administrative law judge (WCJ) denied applicant's petition appealing the decision of the Administrative Director upholding the Independent Medical Review (IMR) determination which sustained a Utilization Review (UR) denial of recommended surgical treatment in the form of left ulnar nerve decompression. The WCJ held that applicant failed to establish a statutory basis for her appeal and that applicant neglected to provide the Agreed Medical Examiner (AME) reports in response to the IMR request for medical records. The WCJ further held that it would be unreasonable to require defendant to pay for an additional IMR determination.

Applicant contests the WCJ's decision upholding the IMR determination, contending the defendant failed to meet its obligation to provide all of applicant's medical records to IMR, including newly developed records pertinent to the request for authorization, and the WCJ erred in finding it was applicant's failure to provide medical records that led to the unfavorable IMR determination.

As of the date of this opinion, no Answer to applicant's petition has been filed. The WCJ has prepared a Report and Recommendation on Petition for Reconsideration recommending that applicant's petition be denied.

For the reasons set forth below, we will grant reconsideration to rescind the Expedited Findings

1 of Fact and Order, find defendant failed to comply with Labor Code section 4610.5(l), and return this  
2 matter for a new IMR application.

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4 I.

5 Applicant sustained an admitted industrial cumulative trauma injury to her cervical spine and  
6 elbows over the period September 5, 2001 through October 10, 2005, while employed by the  
7 Santa Barbara Medical Foundation Clinic.

8 Applicant appealed the December 12, 2014 IMR Determination on January 8, 2015, contending  
9 that pursuant to Labor Code section 4610(h)(1), the determination was the result of a plainly erroneous  
10 express or implied finding of fact, which mistake of fact is a matter of ordinary knowledge based on the  
11 information submitted for review pursuant to section 4610.5, and not a matter subject to expert opinion.

12 The error cited by applicant was the failure of both the UR and IMR physicians to review the  
13 report of the AMEs who recommended the left ulnar nerve decompression and post-operative physical  
14 therapy. Applicant stated:

15 UR and IMR both failed to review the agreed medical evaluators report  
16 along with the physicians report from Dr. Frecker that supports the need for  
17 applicant's surgery per ACOEM. Furthermore, Dr. Ruth does identify the  
18 procedure he wants to perform and this too was disregarded by UR and  
19 IMR.

20 Applicant requested that the IMR Final Determination be vacated and the matter remanded.

21 In its petition, applicant asserts that Maximus upheld the UR Non-Certification, based upon the  
22 absence of an independent evaluation of electrodiagnostic studies performed on June 4, 2014, and a  
23 failure to specify the technique to transposition of the nerve. Applicant further asserts that a request for  
24 information was received from IMR on November 4, 2014, and that defendant failed to forward the  
25 existing records as well as a supplemental report by the recommending surgeon, Dr. Ruth, which  
26 provided new information regarding the request for surgery and further supported the medical necessity  
27 of the recommended treatment.

28 An expedited hearing was held on January 27, 2015, on applicant's appeal of an IMR  
29 Determination to the Administrative Director, based on the absence of an indication in the IMR  
30 Determination that the AME report had been reviewed or discussed.

1 The Minutes of Hearing from the expedited hearing do not show that any evidence was submitted  
2 into the record.

3 II.

4 The WCJ concluded that it was applicant's failure to timely forward the medical records that  
5 prevented the IMR reviewer from considering the AME reports, such that any error on the part of IMR  
6 was self-inflicted by applicant. The WCJ concluded that since the error was caused by applicant's  
7 oversight and inadvertence, it would be unreasonable to force defendant to provide another IMR  
8 Determination.

9 As cited by applicant, Labor Code section 4610.5(l) places a mandatory obligation on the  
10 employer to forward all relevant medical records to IMR.

11 (l) Upon notice from the administrative director that an independent  
12 review organization has been assigned, **the employer shall provide** to the  
13 independent medical review organization all of the following documents  
within 10 days of notice of assignment:

14 (1) A copy of all of the employee's medical records in the possession of  
15 the employer or under the control of the employer relevant to each of the  
following:

16 (A) The employee's current medical condition.

17 (B) The medical treatment being provided by the employer.

18 (C) The disputed medical treatment requested by the employee.  
(Labor Code section 4610.5(l). Emphasis added.)

19 Administrative Director's Rule 9792.10.5 also mandates that the IMR organization "shall receive  
20 from the claims administrator," all reports of the physician relevant to the employee's current medical  
21 condition, including reports specifically identified in the request for authorization.

22 There is no statutory or regulatory obligation placed on applicant to submit medical records to the  
23 IMR organization. Though the WCJ concluded that applicant failed to provide the required medical  
24 records, he does not cite to any existing requirement that applicant is responsible for providing medical  
25 records. In his Report and Recommendation on Petition for Reconsideration, the WCJ does not respond  
26 to applicant's citation to the employer's obligation to submit all relevant medical records in Labor Code  
27 section 4610.5(l).

1 Therefore, defendant's failure to provide the relevant medical records to the IMR organization  
2 constitutes grounds for appeal of the IMR Determination, under Labor Code section 4610.6(g) and (h),  
3 which provide:

4 (g) The determination of the independent medical review organization shall  
5 be deemed to be the determination of the administrative director and shall  
6 be binding on all parties.

7 (h) A determination of the administrative director pursuant to this section  
8 may be reviewed only by a verified appeal from the medical review  
9 determination of the administrative director, filed with the appeals board  
10 for hearing pursuant to Chapter 3 (commencing with Section 5500) of Part  
11 4 and served on all interested parties within 30 days of the date of mailing  
12 of the determination to the aggrieved employee or the aggrieved employer.  
13 The determination of the administrative director shall be presumed to be  
14 correct and shall be set aside only upon proof by clear and convincing  
15 evidence of one or more of the following grounds for appeal:

16 (1) The administrative director acted without or in excess of the  
17 administrative director's powers.

18 By failing to provide the IMR reviewer with all material and relevant medical records, the  
19 determination of the IMR organization, and thus the Administrative Director, was an act without or in  
20 excess of its powers. The IMR process can only work if the parties meet their obligations to provide the  
21 necessary medical records. The WCJ's determination that it would be unfair to defendant to require it to  
22 pay for another IMR appeal fails to recognize that it is defendant, not applicant, who is mandated to  
23 provide the medical records for the IMR Determination. Under these circumstances, unfairness to  
24 defendant is not a valid basis upon which to make a determination, where defendant has not met its  
25 statutory obligation to serve medical records.

26 We further note that the record created at the time of the expedited hearing is not adequate. The  
27 WCJ did not identify any exhibits that were admitted and reviewed prior to making his determination.  
The preparation of an adequate record is mandatory. When a case is submitted for decision to the WCJ, it  
is the responsibility of the parties and the WCJ to ensure that the record of the proceedings contains, at a  
minimum, the issues submitted for decision, the admitted evidence, and the stipulations of the parties.  
(*Hamilton v. Lockheed Corp.* (2001) 66 Cal.Comp.Cases 473 (Appeals Board en banc).) A proper record  
allows a reviewing tribunal, whether the Workers' Compensation Appeals Board or a court on further

1 appeal, to understand the basis for the disputed decision. (*Id.* at page 475.) The exhibits that the parties  
2 submit, and that the WCJ intends to receive into evidence, must be formally admitted and included in the  
3 record. (*Id.*)

4 Accordingly, we will grant reconsideration to rescind the Expedited Findings of Fact and Order  
5 and find defendant failed to comply with Labor Code section 4610.5(l), and return this matter for a new  
6 IMR application.

7 For the foregoing reasons,

8 **IT IS ORDERED** that the February 25, 2015 Petition for Reconsideration be, and hereby is,  
9 **GRANTED**, and as our Decision After Reconsideration, the Expedited Findings of Fact and Order,  
10 issued February 11, 2015, is **RESCINDED**.

11 **IT IS FURTHER FOUND** that Defendant failed to comply with its obligation under Labor Code  
12 section 4610.5(l) to provide all relevant medical records to the IMR organization, making the Final  
13 Determination of the Independent Medical Review organization an act without or in excess of its powers.

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1 IT IS FURTHER ORDERED that the Independent Medical Review Final Determination is  
2 RESCINDED, and the matter shall be RETURNED to the trial level for remand to the Administrative  
3 Director for re-submission to the Independent Medical Review organization.

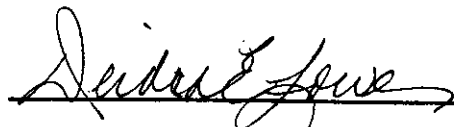
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5 WORKERS' COMPENSATION APPEALS BOARD

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8 DEPUTY

RICK DIETRICH

9 I CONCUR,

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12 DEIDRA E. LOWE



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15 DEPUTY

CRISTINE E. GONDAK

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17 DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

18 APR 02 2015

19  
20 SERVICE MADE ON THE ABOVE DATE ON THE PERSONS LISTED BELOW AT THEIR  
21 ADDRESSES SHOWN ON THE CURRENT OFFICIAL ADDRESS RECORD.

22 DIANE GARIBAY-JIMENEZ  
23 ROSE KLEIN  
24 TOBIN LUCKS  
25 DIETZ GILMOR  
26 GILBERT KELLY  
27 POLLARD MAVREDAKIS  
DWC MEDICAL UNIT/IMR

SV/sry 

JIMENEZ, Diane Garibay

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

**CASE NUMBER: ADJ6552734**

**DIANE GARIBAY-JIMENEZ**

**vs.**

**SANTA BARBARA MEDICAL  
FOUNDATION CLINIC**

**WORKERS' COMPENSATION  
ADMINISTRATIVE LAW JUDGE:**

**SCOTT J. SEIDEN**

**REPORT AND RECOMMENDATION  
ON PETITION FOR RECONSIDERATION**

**I  
INTRODUCTION**

- |    |                                 |   |  |
|----|---------------------------------|---|--|
| 1. | Applicant's Occupation          | : | Receptionist   |
|    | Applicant's DOB                 | : | , , ,  |
|    | Dates of Injury                 | : | 09/05/2001 thru 10/10/2005   |
|    | Parts of Body Injured           | : | Cervical spine, elbows   |
|    | Manner in Which Injury Occurred | : | Course of employment   |
| 2. | Identity of petitioner          | : | Applicant  |
|    | Timeliness                      | : | The petition is timely   |
|    | Verification                    | : | The petition is verified   |
| 3. | Date of Issuance of Decision    | : | February 11, 2015  |
| 4. | Petitioners Contention          | : | The Court erred in not referring the IMR<br>determination back to the AD for re-reviews. |

## **II** **FACTS**

Applicant's PTP completed an RFA for treatment. The issue of timeliness was the subject of a previous trial with the WCJ finding that the UR was performed timely and therefore the WCJ had no jurisdiction to decide any other issue.

After the denial by UR, Applicant filed for an IMR appeal on or about October 29, 2014. All parties agree the IMR appeal was done timely. Sometime thereafter, IMR requested the parties to provide medical and other records for IMR to review and consider.

Applicant provided various medical records, including PTP reports and other medical reports, in response to IMR's request for records. However, Applicant inadvertently left out submitting the AME reports, notwithstanding they were in their possession at the time the other records were forwarded to IMR.

Applicant mailed out the AME reports on December 11, 2014. However, IMR had already issued its denial on December 9, 2014, which was received by Applicant on or about December 15, 2014.

This matter proceeded to trial on the issue of the sufficiency of the IMR determination without having reviewed the AME reports.

## **III** **DISCUSSION**

The IMR process performed as designed. Applicant filed a timely UR appeal, IMR asked for records and once they were provided to IMR, it issued its determination upholding the UR denial.

It was Applicant's failure to provide all of the medical records (AME reports), which were in Applicant's possession at the time IMR requested the records that resulted in IMR not reviewing the AME reports. While it was oversight and inadvertence on the part of Applicant not to provide the AME reports, this failure cannot provide the basis for an additional IMR review.

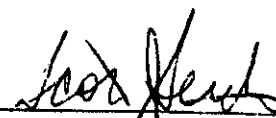
To force defendant to have to pay for an additional IMR review when it was due to Applicant's failure to provide the medical records would put an unreasonable burden on defendant.



**IV**  
**RECOMMENDATION**

It is respectfully recommended that Applicant's Petition for Reconsideration be denied based on the merits and for the reason stated above.

Dated: 3/10/15

  
\_\_\_\_\_  
SCOTT J. SEIDEN  
Workers' compensation Administrative Law Judge

Served on:

ROSE KLEIN VENTURA, US Mail  
TOBIN LUCKS GOLETA, US Mail  
POLLARD MAVREDAKIS PASADENA, US Mail  
GILBERT KELLY LOS ANGELES, US Mail  
DIETZ GILMOR ENCINO, US Mail

Dated: March 10, 2015

Service on parties above

by preferred method per EAMS.

By: Cynthia Weber