WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

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| SHALISA CHAMBERLAIN,<br>*Applicant,*<br>vs.<br>HUMPHREY & GIACOPUZZI VETERINARY HOSPITAL; STATE COMPENSATION INSURANCE FUND,<br>*Defendants.* | **Case No. ADJ6945720**<br>**(Oxnard District Office)**<br><br>**OPINION AND DECISION AFTER RECONSIDERATION** |

We previously granted the Petition for Reconsideration filed by defendant, State Compensation Insurance Fund (State Fund), to allow sufficient opportunity for further study of the factual and legal issues in this case. This is our Decision After Reconsideration.

State Fund's petition sought reconsideration of the Findings of Fact and Orders issued by the workers' compensation administrative law judge (WCJ) on March 14, 2014. In that decision, the WCJ found that applicant sustained industrial injury "to her low back, soft tissue, neck, buttocks, right hip, and feet due to weight gain; and *claims to have sustained* injury to her psyche, vision, balance, urology, weight gain, brain, and internal organs." (Italics added.) The WCJ also found that defendant's utilization review (UR) determination was untimely and concluded that applicant was entitled to the following medical treatment: (a) a one-year gym membership extension; (b) a follow-up with a psychologist; (c) a follow-up with a psychiatrist; (d) pain management follow-ups with Dr. Kenly; (e) a urology consultation; (f) a neurology consultation; (g) 16 hours of home health assistance every week; and (h) eight visits of additional chiropractic treatment for the neck and back.

In its petition, State Fund contends: (1) its UR determination was timely and, therefore, the WCJ's Order of medical treatment that was denied through UR was improper; and (2) the WCJ's Order of medical treatment for body parts that have not been determined as industrial was also improper.

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Applicant filed an Answer. The WCJ prepared a Report and Recommendation on Petition for Reconsideration recommending that State Fund's petition be denied. Based on our review of the record and the report of the WCJ, the Findings of Fact and Orders issued on March 14, 2014 are affirmed, except that we amend Findings of Fact Nos. 1 and 3, substitute new Findings of Fact as ordered below, and return the matter to the WCJ for further proceedings.

## BACKGROUND

Applicant, while employed on September 10, 2009, as a veterinary technician by Humphrey & Giacopuzzi Veterinary Hospital, State Fund's insured, sustained injury arising out of and in the course of employment (AOE/COE) to her low back, soft tissue, neck, buttocks, right hip, and feet due to weight gain, and claims to have sustained injury AOE/COE to her psyche, vision, balance, urology, weight gain, brain, and internal organs. Applicant's primary treating physician, Dr. Moelleken, issued a report on March 5, 2013 (signed March 16, 2013) and requested authorization for a variety of treatments. He requested authorization for the following:

1. One year extension of gym membership;
2. Follow-ups with a psychiatrist;
3. Pain management follow-ups with Dr. Kenly;
4. Urology consultation to evaluate urinary retention and incontinence;
5. Neurology consultation to address headaches;
6. Follow-up in four weeks (not addressed in the WCJ's Findings and Award);
7. 16 hours of home health assistance every week; and
8. Eight visits of additional chiropractic treatment for neck and back.

After receiving Dr. Moelleken's report, State Fund submitted the following issues to UR: (1) the prospective request for a one-year gym membership extension; (2) the prospective request for "unknown home health assistant for 16 hours per week for unknown number of weeks"; and (3) the prospective request for eight sessions of chiropractic manipulation. State Fund did not request a UR with respect to the other treatment recommendations by Dr. Moelleken.

The April 2, 2013 UR determination did not certify the request for gym membership, 16 hours of home health assistance per week, and eight sessions of chiropractic treatment.

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## DISCUSSION

We must review the WCJ's Findings under three separate scenarios: One, the request for industrially-related treatment addressed by State Fund's UR; two, the industrially-related treatment not addressed by State Fund's UR; and three, treatment requested by Dr. Moelleken that is not related to any currently admitted body part.

1. **Request for industrially-related treatment addressed by State Fund's UR**

Preliminarily, we will find that State Fund's UR was timely.

Labor Code section 4610[1] provides that prospective or concurrent UR 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 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." Although section 4610(g)(1) states that these time limits run "from the date of the medical treatment recommendation," Administrative Director Rule 9792.9(b)(2) clarifies the 14 days run "from the claims administrator's receipt" of the treatment recommendation. (Cal. Code Regs., tit. 8, § 9792.9(b)(2).) Dr. Moelleken's report is dated March 5, 2013, but signed March 16, 2013. State Fund received it on March 22, 2013. The UR denial itself memorializes the efforts State Fund made to obtain additional information about the treatment request from Dr. Moelleken. The UR company faxed Dr. Moelleken on March 27, 2013 and March 29, 2013, requesting additional information regarding the chiropractic treatment request; however, this additional information was never received. Where a treating physician fails to respond to requests for additional information, we conclude that a defendant's UR denial is timely if it is issued within five days of the last request for additional information (provided, of course, the 14-day absolute limit is met). State Fund's April 2, 2013 UR denial issued 12 days after it received Dr. Moelleken's report, within the 14 day time limit for receipt of additional information to make a determination of the treatment recommendation. Therefore, the UR denial issued "in no event more than

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

14 days" from receipt of the report, and the denial was therefore timely as to the industrially-related treatment addressed by State Fund's UR denial.

We recognize that the additional information requested by State Fund related only to the chiropractic treatment. We conclude, however, that State Fund was *not* required to issue separate partial denials with respect to the gym membership and the home health assistance within five days of its March 22, 2013 receipt of Dr. Moelleken's report. Neither section 4610 nor AD Rule 9792.9 (as it read in early 2013) requires separate partial denials. Furthermore, we do not read any such requirement into section 4610 or Rule 9792.9 because to do so would create a procedural morass, not only for defendants issuing UR determinations, but also for injured employees who now face a statutory deadline for requesting Independent Medical Review (IMR) with respect to any UR determination. (See Lab. Code, § 4610.5.)

We now address the merits of the industrially-related treatment addressed by State's UR. The mandatory IMR process under section 4610.5 does not apply to a pre-January 1, 2013 date of injury where the UR denial was communicated prior to July 1, 2013. (§ 4610.5(a)(1) & (2), (b).) In the circumstance where IMR does not apply to a medical treatment dispute, section 4610(g)(3)(A) mandates that medical treatment disputes not subject to IMR "shall be resolved . . . in accordance with Section 4062." However, as amended by Senate Bill (SB) 863, none of the current provisions of section 4062 apply to a pre-January 1, 2013 injury with a UR denial communicated prior to July 1, 2013.[2] Accordingly, we conclude that the former version of section 4062 applies. (Cf. *Nunez v. Workers' Comp. Appeals Bd.* (2006) 136 Cal.App.4th 584, 591-593 [71 Cal.Comp.Cases 161]; *Cortez v. Workers' Comp. Appeals Bd.* (2006) 136 Cal.App.4th 596, 601 [71 Cal.Comp.Cases 155]; *Simi v. Sav-Max Foods, Inc.* (2005) 70 Cal.Comp.Cases 217 (Appeals Board en banc).)

Under former section 4062(a), an employee who objects to a UR decision made pursuant to section 4610 "shall notify the employer of the objection in writing within 20 days of receipt of that

[2] Section 4062(a) applies only to a medical determination "not subject to Section 4610." Section 4062(b) applies only to section 4610 determinations that are subject to resolution through the IMR process of section 4610.5. Section 4062(c) applies only to diagnosis and treatment recommendations made by a medical provider network (MPN) physician.

decision." Here, on April 26, 2013, applicant's attorney timely objected to State Fund's April 2, 2013 UR determination, which had been sent to applicant's attorney by mail. Therefore, under section 4062, the dispute was required to be resolved utilizing the agreed medical evaluator (AME) and qualified medical evaluator (QME) provisions of section 4062.2.

The parties did use Diemha T. Hoang, M.D., as the AME in physical medicine and rehabilitation. Dr. Hoang issued reports of May 6, 2013 and July 30, 2013. Neither of these reports, however, reflects that Dr. Hoang reviewed Dr. Moelleken's PR-2 report dated March 5, 2013 and signed on March 16, 2013. Furthermore, neither report addresses the home health assistance or chiropractic treatments denied by defendant's April 2, 2013 UR. Both reports do recommend a gym membership. However, it appears that Dr. Hoang may be recommending a gym membership solely to help applicant lose weight she gained due to decreased activity secondary to chronic pain. Although AME Hoang states this weight gain "is industrial," this is not yet admitted and this question was not placed in issue at trial. In any event, Dr. Hoang does not discuss whether a gym membership, even if otherwise medically reasonable on an industrial basis, falls within the presumptively correct medical treatment utilization schedule (MTUS) or, if not, why a variance from the MTUS is reasonably required. (§ 4604.5.)[3]

Therefore, the WCJ should not have awarded the home health assistance, the chiropractic treatments, or the gym membership and these issues will be returned to the trial level for further development of the record. With respect to the issue of home health assistance, the WCJ and the parties should be cognizant of the home health care provisions of SB 863 (§§ 4600(h), 4603.2(b)(1), 5307.1, 5307.8) and should take into consideration *Neri Hernandez v. Geneva Staffing, Inc.* (2014) 79 Cal.Comp.Cases [2014 Cal. Wrk. Comp. LEXIS 77] (Appeals Board en banc) .[4]

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[3] Dr. Hoang also does not discuss the length of any gym membership.

[4] State Fund's UR denied Dr. Moelleken's request for home health assistance on the basis that it "is not a medical service for the cure or relief of an industrial injury, and is therefore not within the scope of utilization review as described within LC4600." However, section 4600(h), which has been in effect at all times relevant here, expressly provides that home health care services are medical treatment.

2. **Industrially-related treatment not addressed by State Fund's UR**

State Fund's UR denial did not address Dr. Moelleken's recommendation for pain management follow-ups with Dr. Kenly. However, the fact that a defendant's UR fails to address or fails to timely address a particular medical treatment does not mean that the injured employee is automatically entitled to the treatment; rather, the employee still has the burden of proof. (*State Comp Ins. Fund v. Workers' Comp. Appeals Bd.* (*Sandhagen*) (2008) 44 Cal.4th 230, 242 [73 Cal.Comp.Cases 981].) Here however, the record reflects that Dr. Hoang was concerned about "possible prior pain med seeking behavior," and she recommended that applicant should be evaluated by a pain management specialist. Therefore, on the record before us, it appears that the WCJ's finding that pain management follow-ups with Dr. Kenly are reasonable and necessary is supported by the record.

3. **Prescribed treatment requested that is not related to any currently admitted body part**

State Fund's UR denial did not address Dr. Moelleken's treatment recommendations for follow-ups with a psychologist, follow-ups with a psychiatrist, the urology consultation to evaluate urinary retention and incontinence, or the neurology consultation to address headaches. These treatment recommendations relate to body parts that are not yet determined to be industrial, or are not admitted on the current record. UR determinations for non-industrial body parts are not relevant, since non-industrial treatment recommendations are not subject to UR. (*Simmons v. State of California, Dept. of Mental Health* (2005) 70 Cal.Comp.Cases 866 (Appeals Board en banc).) The dispute over authorization of these treatment requests are, therefore, returned to the trial level for further development of the record and determination whether the disputed body parts are industrially-related.

Therefore, we affirm the Findings of Fact and Orders issued on March 14, 2014, except that we amend Findings of Fact Nos. 1 and 3, substitute new Findings of Fact as ordered below, and return the matter to the WCJ for further proceedings.

For the foregoing reasons,

**IT IS ORDERED,** as the Decision After Reconsideration of the Workers' Compensation Appeals Board, that the Findings of Fact and Orders issued by the workers' compensation administrative law judge on March 14, 2014 are **AFFIRMED** except that it is **AMENDED** as follows:

Findings of Fact Nos. 1 and 3 are amended:

## FINDINGS OF FACT

1. Defendant, State Compensation Insurance Fund, conducted a timely utilization review.

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3. Applicant is entitled to pain management follow-ups with Dr. Kenly. All other disputed medical treatment issues are deferred, with jurisdiction reserved.

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IT IS FURTHER ORDERED that this matter is RETURNED to the trial judge for further proceedings and decision in accordance with this opinion.

WORKERS' COMPENSATION APPEALS BOARD

DEPUTY

NEIL P. SULLIVAN

I CONCUR,

DEPUTY

CRISTINE E. GONDAK

FRANK M. BRASS

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

JUL 18 2014

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

ASVAR LAW
SHALISA CHAMBERLAIN
STATE COMPENSATION INSURANCE FUND

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

**CASE NUMBER: ADJ6945720**

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| **SHALISA CHAMBERLAIN** | **-vs.-** | **HUMPHREY & GIACOPUZZI VETERINARY HOSPITAL; STATE INSURANCE FUND** |
| **WORKERS' COMPENSATION ADMINISTRATIVE LAW JUDGE:** | | **CRAIG A. GLASS** |

# REPORT AND RECOMMENDATION ON PETITION FOR RECONSIDERATION

## I

## INTRODUCTION

Petitioner, defendant Humphrey & Giacopuzzi Hospital, insured by State Compensation Insurance Fund, has filed an verified Petition for Reconsideration contending: (1) that it is appropriate for the Court to rely on surmise, innuendo and/or "double hearsay" in finding for a party; (2) that the Court should rely on "evidence" not presented at trial: (3) that the *Dubon* decision is a "change in the law" rather than an interpretation of existing law; and, (4) that the Court is not permitted to award treatment to "cure, relieve or treat" and admitted industrial injury.

## II

## RELEVANT PROCEDURAL HISTORY

Applicant, Shalisa Chamberlain, filed an Application for Adjudication of Claim, by and through her (then) counsel, on 9/19/09, alleging injury arising out of and in the course of her employment to her hips, back, head, "excretory", and neck after being kicked by a horse.

Applicant was seen by a number of doctors and medical facilities regarding her injury.

Applicant requested an expedited hearing on 8/13/13.

The matter was assigned for an expedited trial with WCJ Seiden at the Goleta District office of the WCAB.

Defendant filed a "Petition for Automatic Reassignment" challenging the setting before WCJ Seiden.

PWCALJ Robert Hjelle, acting as he presiding Judge of the combined Goleta (now Santa Barbara) and Oxnard District offices, transferred the case to the Oxnard district office and set the matter before the undersigned for an "Expedited Hearing" on 9/24/13.

After hearing arguments of the parties, the matter was Ordered to proceed through the "IMR" process as to requested treatment(s).

Applicant filed a "Petition for Removal" raising multiple issues that she wanted the Court to address.

The Order to proceed through the IMR process was rescinded and the matter was set before the undersigned as a "Status Conference" to determine which of the multiple issues raised were ready for hearing, on 10/31/13.

The matter proceeded to a "Mandatory Settlement Conference" on12/19/13. The parties completed the "Pre-Trial Conference Statement", and the matter was set for trial before the undersigned on 1/14/14, a date selected by and agreed to by the parties.

On the date of trial, neither applicant personally appeared nor did any witnesses for either party appear.

No subpoenas for any witnesses were issued.

Applicant moved the deposition of "Jessica Kohler" into evidence (See Applicant's Exhibit 14, marked for identification only).

The matter proceeded to trial based on the documentary and medical evidence only.

As to the specific issue of the deposition of "Jessica Kohler", the Court made the following interim ruling:

**LET THE MINUTES REFLECT** that the Court will take Exhibits 1 through 19, with the exception of 14, into evidence. The decision on Exhibit 14 is deferred. Applicant's attorney has 10 days to prepare Points & Authorities as to why the Court should accept the deposition into evidence. State Fund has 10 days to respond to their Points & Authorities.

At the conclusion of the "reading into the record" of the documents, the Court made the following inquiries:

THE COURT: Are there any witnesses offered on behalf of the applicant?
MR. ASVAR: No, your Honor.
THE COURT: All right. Does applicant have any other documents it requests to put in at this time?
MR. ASVAR: No, your Honor.
THE COURT: Does applicant rest?
MR. ASVAR: Yes, your Honor.
THE COURT: Does defendant have any witnesses it would like to put on at this point?

MR. FALL: No, your Honor.
THE COURT: Does defendant have any other documents it would like to present at this time?
MR. FALL: We have received first this morning -- or this afternoon a Trial Brief today. I would like -- I believe your Honor said 15 days to respond to the Trial Brief, if I may.
THE COURT: I will give you 20 since we have 10 already plus 10. So I'll give you 20 days from today.
MR. FALL: Thank you, your Honor. I appreciate your consideration.
THE COURT: Otherwise, are there any other documents you'd like to put in at this time?
MR. FALL: No, your Honor.
THE COURT: Does State Fund rest?
MR. FALL: Yes, your Honor, defendants rest.

(See "Minutes of Hearing, Summary of Evidence dated 1/14/14, and served by the WCAB on 1/21/14, at page 5, line 20 through page 6, line 9).

The case was submitted for decision based on the documentary and medical evidence submitted.

A decision favorable to applicant issued regarding the "Independent Medical Review" and need for treatment.

It is from these "Findings and Awards" that defendant, Humphrey & Giacapuzzi Veterinary Hospital, insured by State Compensation Insurance Fund, files its "Petition for Reconsideration".

## III

## DISCUSSION

The Court notes that defendant Petitioner Humphrey & Giacapuzzi Veterinary Hospital, insured by State Compensation Insurance Fund, claims that it is somehow harmed by the *en banc* decision issued by the WCAB in *Jose Dubon v. World Restoration* (2014) 79 CCC 313. This decision was issued after trial but before a Findings and Order issued in this matter.

*Dubon* (*ibid*) did not set forth any "new law" but interpreted the existing law. As this trial was specifically set on the issue of the timeliness of the IBR referral, the *Dubon* decision merely "clarified" the procedure rather than "changed" the procedure. The argument by Petitioner appears to involve its trial "strategy" rather than WCAB action and should not be considered by the WCAB.

Petitioner apparently attempts to "bootstrap" its argument that it made a timely request for IBR based on the medical reporting of Allen Moelleken, M.D., (see Exhibit "3").

There is no documentary evidence offered by Petitioner as to requests for extension of time or that Petitioner's UR physician was requesting further information or even that the "UR Department" attempted to contact the treating doctor, as alleged on page 4 of the Petition for Reconsideration. Petitioner apparently attempts to prevail as to its arguments based on its post-trial representations, its own interpretations of **applicant's exhibits**, and documents referred to "second hand" (double hearsay) in admitted documents.

This does not appear to be appropriate.

The case was tried as to the timeliness of the UR (and the IMR rules). While Petitioner' "arguments" are inspiring, its paucity of **evidence** presented **at trial** resulted in the decision issued by the Court. Argument is not the equivalent of evidence.

## IV

## MEDICAL TREATMENT

The Court agrees with Petitioner in that it was "mystified" at applicant's absence at the trial. The Court was unable to make any determination as to applicant's credibility and/or any physical or emotional condition. The Court relied on the documentary **evidence** and medical **evidence** presented.

The **evidence** presented **at trial** was neither contradictory nor difficult to review. Essentially, applicant was kicked by a horse and suffered moderate injuries.

Applicant has required and does require in home care of 12 to 16 hours per week. For reasons unknown, Petitioner terminated these services.

Applicant has at least one treating doctor and has had one throughout the course of the case. As set forth in its "Opinion of Decision", the Court determined:

In *Jose Dubon v World Restoration Inc*. (2014) (*en banc*) ADJ4274323, ADJ1601669, the Workers' Compensation Appeals Board held that:

> "[a] UR decision is invalid if it is untimely. If a defendant's UR is found invalid, the issue of medical necessity is not subject to IMR but is to be determined by the WCAB based upon substantial medical evidence, with the employee having the burden of proving the treatment is reasonably required."

Here, the defendant obtained and filed an untimely UR decision. If the medical reporting is substantial, reasonable and reliable, it must furnish treatment per the Primary Treating Physician's (PTP) request for treatment authorization.

Title 8 of the California Code of Regulations, section 9792(c) (1) states that:

> "a prospective or concurrent decision must be made within five (5) working days from the date of receipt of the request of authorization."

Here, defendant received the request from the applicant's PTP, Dr. Moelleken on March 22, 2013 as stipulated on letter from the Defendant to Applicant regarding the UR process. Per rule 9792(c) (1), defendant had until March 29, 2013 to object, deny or respond to the request for treatment. However, defendant issued its UR determination on April 2, 2013, two working days past the deadline. It must be considered untimely.

The untimely UR invalidates the defendant's IMR request.

The Minutes of Hearing reflect that the entitlement to medical treatment of the following is at issue:

a) **Home healthcare.**

b) **Neurology consult.**

c) **Pain management (treatment).**

d) **Urology consult.**

e) **Chiropractic treatment.**

f) **Gym membership**

g) **Appointment of nurse case manager**

h) **Psyche treatment**

i) **Medication**

Within Dr. Moelleken's report for authorization (See Exhibit "1", at page 2) the treatment requested was the following:

(1) One year extension of the gym membership;

(2) Follow-up with a psychologist;

(3) Follow-up with a psychiatrist;

(4) Pain management follow-ups with Dr. Kenly;

(5) Urology consultation to evaluate her urinary retention and incontinence;

(6) Neurology consultation to address her headaches;

(7) 16 hours of home health assistance every week;

(8) Eight visits of additional chiropractic treatment for neck and back.

The defendant has apparently approved two items, a neurology consultation and physical therapy. (see Exhibit "16", at page 1).

In reviewing the reports of Dr. Moelleken, the Court finds his reporting to constitute "substantial evidence". His requests for medical treatment/medical care are deemed reasonable and necessary to "cure, relieve and/or treat" applicant's condition(s).

In defendant's trial brief, it claims that the gym membership has been approved. However, defendant did not present evidence to this point for the record. Thus, per the medical report of Dr. Moelleken, the Court orders a one-year extension to the gym membership.

Based on the medical report of Dr. Moelleken, the Court orders a psyche examination for the applicant.

Based on the medical report of Dr. Moelleken, the Court orders pain management follow-ups with Dr. Kenly. Additionally, the Court orders that medication recommended by Dr. Kenly for the pain management treatment be authorized.

Based on the medical report of Dr. Moelleken, the Court orders a urology consultation to evaluate the applicant's urinary retention and incontinence.

Based on the medical report of Dr. Moelleken, the Court orders sixteen (16) hours of home health care assistance each week for the applicant.

Based on the medical report of Dr. Moelleken, the Court orders eight (8) visits of additional chiropractic treatment for neck and back for the applicant.

A follow up with a psychologist for the applicant is not at issue in this case so the Court does not need to rule on this issue.

The treating doctor (at the time) Allen Moelleken, M.D., indicated that applicant required treatment and testing for her admitted industrial injury. There was no (timely) rebuttal to this request and the request appeared to the Court to be reasonable based on the nature of applicant's injury, the reporting of the treating doctor, and the Agreed Medical Examiner's reporting.

The Court made no determination of body parts injured other than noting the parties trial stipulations.

The doctor's requests for treatment were, in the Court's opinion, to "cure, relieve or treat" the industrial injury. As the treating doctor made these requests and Petitioner did not (timely) object and/or seek remedy to these requests timely, the Court is of the opinion that defendant should

provide the requested treatment, home health care, and testing regarding this admitted industrial injury.

The Court cannot and should not issue decisions based on inferences, surmise and/or argument of either party. Decisions should be based on the **evidence presented at trial**. Here, while neither party was particularly effective at trial, the **evidence** spoke for itself.

## V

## RECOMMENDATION

For the reasons stated above, it is respectfully recommended that the defendant's Petition for Reconsideration be **denied.**

DATE: 4/29/14

**CRAIG A. GLASS**
**WORKERS' COMPENSATION**
**ADMINISTRATIVE LAW JUDGE**

**SERVICE:**
ASVAR LAW LOS ANGELES, US Mail
SCIF INSURED OXNARD, US Mail
SHALISA CHAMBERLAIN, US Mail
Served on above parties by preferred method of service shown above at addresses shown on attached Proof of Service:
ON: 4/29/2014
BY: Jill Contreras
Jill Contreras