WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

BRICE SANDHAGEN,

Applicant,

vs.

COX & COX CONSTRUCTION, INC.; and STATE COMPENSATION INSURANCE FUND,

Defendant(s).

Case No. RDG 0115958

OPINION AND DECISION AFTER RECONSIDERATION (EN BANC)

On October 5, 2004, the Appeals Board granted reconsideration of the July 21, 2004 Findings and Award and Order of the workers' compensation administrative law judge ("WCJ"), which related to the October 22, 2003 neck, back, left elbow and left wrist injury that applicant, Brice Sandhagen ("applicant"), sustained while employed as a construction foreman by Cox & Cox Construction, the insured of defendant, State Compensation Insurance Fund ("SCIF").

In her July 21, 2004 decision, the WCJ found that the cervical and upper thoracic MRI recommended by applicant's treating physicians, Noel Goldthwaite, M.D., and Robert Josey, M.D., falls within the American College of Occupational and Environmental Medicine's Occupational Medicine Practice Guidelines ("ACOEM guidelines") and that applicant is entitled to this treatment. In making these findings, the WCJ concluded that, because SCIF had not complied with the deadlines of Labor Code section 4610(g)(1),[1] it was barred from reliance on the utilization review process and, accordingly, the report of its utilization review physician was inadmissible. Further, the WCJ concluded that where a defendant does not comply with the deadlines for the utilization review process established by section 4610(g), the burden is on the defendant to timely object to the treating physician's determination under section 4062. Here,

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

however, SCIF did not make such a timely objection and, therefore, no agreed medical evaluator ("AME") or qualified medical evaluator ("QME") had been obtained. Thus, there was no admissible medical report to contest the treatment recommended by Drs. Goldthwaite and Josey. Finally, the WCJ determined that ACOEM does not limit MRIs to those cases that have already been determined to be surgical, and that an MRI is a valid diagnostic tool under ACOEM for applicant's condition.

In its petition for reconsideration, SCIF contended in substance: (1) the exclusion of a utilization review report from evidence is not one of the statutorily-specified consequences for a defendant's failure to comply with the section 4610(g)(1) deadlines; rather, the specified consequences are administrative penalties (see, Lab. Code, §4610(i)) and section 5814 penalties, if there has been an unreasonable delay in the completion of the utilization review process (see, Lab. Code, §4610.1); (2) under section 4062, it is the employee's burden, and not the defendant's burden, to timely object to a utilization review decision made pursuant to section 4610 to modify, delay, or deny a treatment recommendation; and (3) a cervical and upper thoracic MRI is not consistent with the ACOEM guidelines, which are presumptively correct, and Drs. Goldthwaite and Josey have not rebutted the presumption.

Applicant did not file an answer to SCIF's petition. The WCJ, however, prepared a Report and Recommendation on Petition for Reconsideration ("Report"), recommending that the petition be denied.

Because of the important legal issues presented, and in order to secure uniformity of decision in the future, the Chairman of the Appeals Board, upon a majority vote of its members, has assigned this case to the Appeals Board as a whole for an en banc decision. (Lab. Code, §115.)[2] Based on our review of the relevant statutory and case law, we hold:

> (1) The utilization review time deadlines of section 4610(g)(1) are mandatory and, if a defendant fails to meet these mandatory

[2] The Appeals Board's en banc decisions are binding precedent on all Appeals Board panels and WCJs. (Cal. Code Regs., tit. 8, §10341; *Gee v. Workers' Comp. Appeals Board* (2002) 96 Cal.App.4th 1418, 1425, fn. 6 [67 Cal.Comp.Cases 236, 239, fn. 6]; see also, Govt. Code, §11425.60(b).)

> deadlines, it is precluded from using the utilization review procedure for the particular medical treatment dispute in question;
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> (2) If a defendant undertakes an untimely utilization review procedure, any utilization review report obtained as to the particular treatment in dispute is not admissible in evidence, and any utilization review report obtained cannot be forwarded to an AME or QME if section 4062(a) procedures are timely pursued; and
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> (3) When a defendant does not meet the section 4610(g)(1) deadlines, it may use the procedure established by section 4062(a) to dispute the treating physician's treatment recommendation; however, the defendant (not the applicant) is then the "objecting party" and the defendant must meet the section 4062(a) deadlines, unless those deadlines are extended for good cause or by mutual agreement.

I. BACKGROUND

Applicant sustained an admitted industrial injury to his neck, back, left elbow, and left wrist on October 22, 2003, when, while walking along a road construction project, he was hit by a car traveling approximately 10 mph.

For the first several months after his injury, applicant was treated by Akua Agyeman, M.D.. On April 23, 2004, Dr. Agyeman stated that applicant has a pinched nerve in his mid-thoracic spine causing muscle spasms, that he continues to have significant mid-back pain, and that he has had no significant improvement in his pain control even with pain medications.

At some point, Dr. Agyeman referred applicant to Dr. Goldthwaite and Dr. Josey for a surgical consultation. These physicians took a history of applicant's injuries and complaints, reviewed x-rays of his cervical spine, and performed a thorough physical examination. In their joint report of May 14, 2004, Drs. Goldthwaite and Josey diagnosed applicant to have cervical and upper thoracic facet syndrome (C7–T1). They then stated, in relevant part:

> "Our first plan would be to get an MRI of the cervical and upper thoracic spine to determine if there are any disc herniations or disc degeneration accounting for [applicant's] neck pain. [¶] We will see him back in follow up after his MRI. If his MRI is within normal limits, then most likely the next recommendation would be upper thoracic and lower cervical facet injections."

The May 14, 2004 report reflects it was served by mail on SCIF at its address of record. Also, on May 24, 2004, the report was faxed to SCIF's utilization review department, together with a cover sheet stating: "We are requesting authorization for a cervical & upper thoracic MRI. Please refer to the attached report. Thank you!"

On June 10, 2004, applicant filed a declaration of readiness to proceed to an expedited hearing. The declaration of readiness recited:

> "Consulting surgeon requested authorization for cervical and upper thoracic MRI on 5/24/04. SCIF has not approved or denied, despite follow up phone calls to them. SCIF has now exceeded the outside time limit of 14 days set forth in Labor Code Section 4610(g)(1). The 14th day was June 7, 2004."

On June 21, 2004, Allen C. Krohn, M.D., a medical consultant for SCIF's Redding district office, issued a report. It stated, in relevant part:

> "I am performing Utilization Review for [SCIF] … [in] the case of your patient: Brice Sandhagen. [¶] I feel we must deny liability for cervical MRI on the following basis: [¶] [Drs. Goldthwaite and Josey's] exam is very thorough and detailed, as usual … . Thank you for the consultation. But as you know, the indications for imaging are surgical intervention, according to Section 8 of ACOEM, which is what guides these decisions. Your consultation clearly indicates that surgery is not your commendation [sic], to be confirmed with imaging. We no longer approve imaging 'to look for surgical problems' since imaging is less than perfect and often misleads patients to believe that incidental findings are the cause of their symptoms. We rely on the exam and expertise of the examining physician. [¶] As you know, Medical Utilization decisions must now be made on the basis of evidence-based medical studies and/or guidelines. There are no evidence based decision guidelines to cover this particular request."

On July 15, 2004, the expedited hearing took place. At that hearing, the reports discussed above were admitted in evidence. In addition, SCIF submitted in evidence Chapter 8 of the ACOEM guidelines (pages 165-193), entitled: "Neck and Upper Back Complaints."

On July 21, 2004, the WCJ issued her decision, which found that applicant is entitled to the cervical and thoracic MRI recommended by Drs. Goldthwaite and Josey, and which excluded from evidence the utilization review report of Dr. Krohn because SCIF had not complied with the section 4610(g)(1) deadlines.

II. DISCUSSION

A. The Utilization Review Time Deadlines Of Section 4610(g)(1) Are Mandatory And, Therefore, A Defendant That Fails To Meet The Mandatory Deadlines Is Precluded From Using The Utilization Review Procedure.

The utilization review provisions of section 4610 establish a process by which a defendant may prospectively, retrospectively, or concurrently review the treatment recommendation of a treating physician and then decide whether to approve, modify, delay, or deny authorization for the treatment, based in whole or in part on its medical necessity to cure and relieve the effects of the injury in accordance with section 4600. (Lab. Code, §4610(a)-(f).)

Section 4610, however, sets forth specific timeframes that govern the utilization review process. As relevant here, section 4610(g)(1) provides:

> "(g) In determining whether to approve, modify, delay, or deny requests by physicians prior to, retrospectively, or concurrent with the provisions of medical treatment services to employees all of the following *requirements must be met*:
>
> (1) Prospective or concurrent decisions *shall be made* in a timely fashion that is appropriate for the nature of the employee's condition, *not to exceed five working days from the receipt of the information reasonably necessary to make the determination, but in no event more than 14 days from the date of the medical treatment recommendation by the physician*. In cases where the review is retrospective, the decision shall be communicated to the individual who received services, or to the individual's designee, within 30 days of receipt of information that is reasonably necessary to make this determination. … (Lab. Code, §4610(g)(1) (emphasis added).)

It is a principle of statutory construction that the word "shall," as used in the Labor Code, ordinarily connotes a mandatory duty. (Lab. Code, §15 [" '[s]hall' is mandatory and 'may' is

permissive"]; see also, *Smith v. Rae-Venter Law Group* (2003) 29 Cal.4th 345, 357; *Jones v. Tracy School Dist*. (1980) 27 Cal.3d 99, 109; *Morris v. County of Marin* (1977) 18 Cal.3d 901, 907.) The word "must" is also normally mandatory. (*Long Beach Police Officers Assn. v. City of Long Beach* (1988) 46 Cal.3d 736, 743; *In re Angela M*. (2003) 111 Cal.App.4th 1392, 1398, fn. 4; *Larson v. State Personnel Bd*. (1994) 28 Cal.App.4th 265, 276; see also, Cal. Rules of Court, Rule 200.2(4) ["The words 'must' and 'shall' are mandatory and the word 'may' is permissive."]; Rule 1401(b)(1) [" 'Shall' and 'must' are mandatory and 'may' is permissive."].) Similarly, the word "require" means "to direct, order, demand, instruct, command, ... [and] compel." (*In re Barfoot* (1998) 61 Cal.App.4th 923, 931 [quoting from Black's Law Dict. (6th ed. 1990), at p. 1304.)

Here, we construe the deadlines for commencing utilization review established by section 4610(g)(1) to be mandatory.

Section 4610(g)(1) unequivocally speaks of "*requirements*" that "*must*" be met. (Lab. Code, §4610(g)(1) (emphasis added).) It also commands that prospective or concurrent utilization review decisions "*shall be made*" in a timely fashion, "*not to exceed*" five working days from the receipt of the necessary information, but "*in no event*" more than 14 days from the date of the medical treatment recommendation. (Lab. Code, §4610(g)(1) (emphasis added).) Thus, section 4610(g)(1) frames a defendant's duty to comply with the statutory deadlines in mandatory terms. The words of section 4610(g)(1) in no way imply a legislative intent that the declared deadlines are merely permissive.

Moreover, the implicit legislative purpose in establishing these deadlines is to ensure that, where a defendant decides to undertake the utilization review process, it must do so expeditiously (see Cal. Const., art. XIV, §4), so that any utilization review decisions regarding what medical treatment is "reasonably required" for the injured worker is not unduly delayed. In this regard, it has long been recognized: that the workers' compensation statutory scheme "is designed to help an employee obtain promptly the cure or relief he is entitled to under the law" and to "encourag[e] the employer and carrier to provide prompt medical treatment" (*Avalon Bay Foods v. Workers' Comp. Appeals Bd*. (*Moore*) (1998) 18 Cal.4th 1165, 1173, fn. 3, & 1178 [63 Cal.Comp.Cases 902];

Adams v. Workers' Comp. Appeals Bd. (1976) 18 Cal.3d 226, 229 & 230 [41 Cal.Comp.Cases 680]); that a delay in the provision of medical treatment "may impose a great hardship upon an employee, who due to the injury frequently is without funds to properly support himself and his family or is without funds to obtain the necessary care" (*Zeeb v. Workmen's Comp. Appeals Bd*. (1967) 67 Cal.2d 496, 501 [32 Cal.Comp.Cases 441]); and that "[t]he broad purpose of workmen's compensation is to secure an injured worker seasonable cure or relief from industrially caused injuries in order to return him to the work force at the earliest possible time." (*Carver v. Workers' Comp. Appeals Bd*. (1990) 217 Cal.App.3d 1539, 1547 [55 Cal.Comp.Cases 36]; *Davison v. Industrial Acc. Com*. (1966) 241 Cal.App.2d 15, 18 [31 Cal.Comp.Cases 77].) Accordingly, in addition to the express language of section 4610(g)(1), the basic and essential purposes of the workers' compensation statutory scheme support a construction that the time deadlines of section 4610(g)(1) are mandatory.

B. If A Defendant Undertakes An Untimely Utilization Review Procedure, Any Utilization Review Report It Obtains Is Not Admissible In Evidence With Respect To The Particular Medical Treatment Dispute In Question, And Any Utilization Review Report It Obtains Cannot Be Forwarded To An AME Or QME If Section 4062(a) Procedures Are Timely Pursued.

Having concluded that the deadlines of section 4610(g)(1) are mandatory, we now consider what consequences flow from a defendant's failure to comply with them.

We hold that if a defendant fails to comply with the mandatory deadlines of section 4610(g)(1), then any utilization review report obtained by a defendant that has not complied with the deadlines is inadmissible with respect to the particular medical treatment issue in question.[3]

Given that section 4610(g)(1) imposes a mandatory duty on a defendant to comply with its deadlines, it would be incongruous to permit a defendant that fails to comply with the deadlines to nevertheless obtain a utilization review report and to then enter it into evidence. The intent of section 4610(g)(1)'s deadlines is to ensure that a defendant makes its utilization review

[3] Of course, if a defendant does comply with the statutory deadlines, then any utilization review report is ordinarily admissible. (*Willette v. Au Electric Corporation* (2004) 69 Cal.Comp.Cases __, 2004 Cal. Wrk. Comp. LEXIS 308 (Appeals Board en banc).)

determination quickly. The natural consequence of a defendant's noncompliance with the mandatory deadlines is that it is precluded from instituting the utilization review procedure. If it attempts to use that procedure, any utilization review report it obtains in the attempt is inadmissible. Indeed, medical reports not timely obtained in accordance with statutory requirements are generally inadmissible in workers' compensation proceedings. (*Strawn v. Golden Eagle Insurance Co*. (2000) 28 Cal. Workers' Comp. Rptr. 105 (Appeals Board panel) [under former section 4061, the report of a QME obtained by the defendant was excluded where the defendant did not timely object to the opinion of the treating physician]; *County of Santa Barbara v. Workers' Comp. Appeals Bd*. (*Finch*) (1999) 64 Cal.Comp.Cases 907 (writ den.) [similar]; *San Diego Gas & Electric v. Workers' Comp. Appeals Bd*. (*Morgan*) (1997) 62 Cal.Comp.Cases 384 (writ den.) [if a party failed to timely object to the treating physician's opinion under former section 4062, it could not obtain a QME report under that section].)

Moreover, because the natural consequence of a defendant's noncompliance with the mandatory deadlines of section 4610(g)(1) is that it is precluded from employing the utilization review procedure, then any report generated by an untimely utilization review process cannot be used for any purpose. Thus, if a defendant has not complied with the deadlines of section 4610(g)(1), but it timely pursues the AME/QME procedure under section 4062(a) (see Section C, *infra*), then any utilization review report the defendant obtains may *not* be forwarded to the AME or QME. To conclude otherwise would mean that, if an AME or a QME considers or relies upon an untimely utilization review report, and then the AME or the QME's report is admitted in evidence, the untimely utilization review report effectively would be admitted through the back door when the front door is closed. Attempts at "back door" admissions of inadmissible evidence have long been denounced in California. (E.g., *Alling v. Universal Manufacturing Corp*. (1992) 5 Cal.App.4th 1412, 1438; *People v. Casas* (1986) 181 Cal.App.3d 889, 896; *People v. Rioz* (1984) 161 Cal.App.3d 905, 918-919; *City of Monterey v. Hansen* (1963) 214 Cal.App.2d 794, 797.) Further, although a utilization review report is generally a "medical record" within the meaning of section 4062.3(a)(2) (*Willette v. Au Electric Corporation*, *supra*, 69 Cal.Comp.Cases __, 2004 Cal.

Wrk. Comp. LEXIS 308 (Appeals Board en banc)), section 4062.3(a)(2) expressly limits the "medical records" that a party may submit to a panel QME solely to those that are "*relevant* to [the] determination of the medical issue." (Lab. Code, §4062.3(a)(2) (emphasis added).) Of course, any decision by a WCJ or the Appeals Board "must be based [only] on *admitted* evidence in the record[,] … including *admitted* medical records." (*Hamilton v. Lockheed Corp.* (2001) 66 Cal.Comp.Cases 473, 476 (Appeals Board en banc) (emphasis added).) Accordingly, an untimely obtained and, therefore, *inadmissible* utilization review report does not constitute a medical record that is "*relevant*" to the determination of the disputed medical issue. Similarly, although section 4062.3(c) allows the parties to agree on what information is to be provided to an AME, we hold that the parties may not agree to provide an AME with an inadmissible and, therefore, irrelevant utilization review report that cannot be relied upon by either a WCJ or the Appeals Board.

SCIF suggests that the only consequences of a failure to comply with the mandatory timeframes of section 4610(g)(1) are: (1) the defendant may be assessed administrative penalties by the Administrative Director of the Division of Workers' Compensation ("DWC") (see, Lab. Code, §4610(i)); and/or (2) the defendant may be liable for section 5814 penalties if its delay in the completion of the utilization process is unreasonable. (Lab. Code, §4610.1.) We find no merit in this suggestion.

First, it is true that section 4610(i) allows the Administrative Director to assess administrative penalties if a defendant fails to meet any of the timeframes of section 4610. Yet, as pointed out by the WCJ's Report, section 4610(i) states, "The administrative penalties shall not be deemed an exclusive remedy for the administrative director." If the imposition of administrative penalties is not even the sole remedy available to the Administrative Director, who does not even have jurisdiction over workers' compensation proceedings (see, Lab. Code, §§111(a), 5300, 5301), then the availability of administrative penalties certainly does not limit the remedies of the WCAB. (See, Lab. Code, §133 [the WCAB "shall have power and jurisdiction to do all things necessary or convenient in the exercise of any power or jurisdiction conferred upon it"].)

Second, the possibility that the WCAB may impose section 5814 penalties against a defendant if it unreasonably delays completion of the utilization review process (see, Lab. Code, §4610.1) does not mean that the WCAB cannot also exclude from evidence a utilization review report that the defendant obtained without complying with the mandatory deadlines of section 4610(g)(1). Section 5814 is not the exclusive remedy against a defendant, even when its actions have been unreasonable. (See, e.g., *Rhiner v. Workers' Comp. Appeals Bd*. (1993) 4 Cal.4th 1213, 1227 [58 Cal.Comp.Cases 172]).

In this case, the May 14, 2004 joint report Drs. Goldthwaite and Josey that recommended a cervical and upper thoracic spine MRI, as well as a request for authorization of the MRI, were received by SCIF on May 24, 2004. The utilization review report of Dr. Krohn, however, did not issue until June 21, 2004, which was both well over five days after SCIF's receipt of the May 14, 2004 report (SCIF did not request any further "necessary information") and well over 14 days after Drs. Goldthwaite and Josey's treatment recommendation. Therefore, the WCJ properly excluded Dr. Krohn's June 21, 2004 utilization review report from evidence.

C. When A Defendant Does Not Meet The Section 4610(g)(1) Deadlines, It May Use The QME/AME Procedure Established By Section 4062(a) To Dispute The Treating Physician's Treatment Recommendation; However, The Defendant (Not The Applicant) Is Then The "Objecting Party" And The Defendant Must Meet The Section 4062(a) Deadlines, Unless Those Deadlines Are Extended For Good Cause Or By Mutual Agreement.

When a defendant fails to comply with the deadlines established by section 4610(g)(1), however, it may still be able to use the procedure established by section 4062(a) to dispute the treating physician's treatment recommendation.

Section 4062(a) states, in relevant part:

> "If either the employee or employer objects to a medical determination made by the treating physician concerning any medical issues not covered by Section 4060 or 4061 and not subject to Section 4610, the objecting party shall notify the other party in writing of the objection within 20 days of receipt of the report if the employee is represented by an attorney or within 30 days of receipt of the report if the employee is not represented by an attorney. … These time limits may be extended for good cause

> or by mutual agreement. If the employee is represented by an attorney, a medical evaluation to determine the disputed medical issue shall be obtained as provided in Section 4062.2 … . If the employee is not represented by an attorney, … the evaluation shall be obtained as provided in Section 4062.1 … ." (Lab. Code, §4062(a).)

Thus, section 4062(a) applies to any objection to a treating physician's medical determination not subject to section 4610, which would include a defendant's objection where it has failed to meet the mandatory time deadlines of section 4610(g)(1).) Accordingly, in situations where a defendant does not timely initiate or complete the utilization review process, or where a defendant chooses not to participate in the utilization review process, the defendant is essentially in the same position it would have been prior to the Legislature's enactment of utilization review, i.e., it is within the AME/QME procedure.

Section 4062(a), however, requires that *the objecting party* "shall" notify the other party in writing of the objection within 20 days of receipt of the physician's report if the injured employee is represented, or within 30 days if he or she is not represented, and then utilize the appropriate procedure for obtaining a QME or AME. Thus, the section 4062(a) procedure cannot be used if the party's objection to the treating physician's opinion is untimely. (*Cf.*, *Strawn v. Golden Eagle Insurance Co*., *supra*, 28 Cal. Workers' Comp. Rptr. 105; *County of Santa Barbara v. Workers' Comp. Appeals Bd*. (*Finch*), *supra,* 64 Cal.Comp.Cases 907; *San Diego Gas & Electric v. Workers' Comp. Appeals Bd*. (*Morgan*), *supra*, 62 Cal.Comp.Cases 384 (writ den.).)

Here, SCIF received the May 14, 2004 report of Drs. Goldthwaite and Josey no later than May 24, 2004, but it did not notify applicant (who is represented) of any objection to their medical determination within 20 days thereafter. Therefore, under the procedures announced here, SCIF would be precluded from obtaining a QME report in rebuttal to Drs. Goldthwaite and Josey's determination.

Nevertheless, we recognize that the statutory procedures established by section 4610(g)(1) and 4062(a) are relatively new and that no binding Appeals Board or Court of Appeal decision has previously interpreted the interplay between them. Therefore, we will rescind the WCJ's July 21,

2004 decision and remand the matter to the WCJ to give SCIF a reasonable opportunity to obtain a section 4062(a) evaluation.

Within 20 days of the date of this decision, SCIF may initiate the QME/AME process. (Lab. Code, §4062(a).) If SCIF elects to initiate this process, however, then neither it nor applicant *shall submit the untimely-obtained utilization review report to any QME or AME*.

Once the QME/AME process is completed (or if SCIF fails to initiate this process within 20 days of the date of this decision), applicant or SCIF may bring the matter on calendar before the WCJ by filing either a declaration of readiness to proceed (Cal. Code Regs., tit. 8, §10410) or a declaration of readiness to proceed to an expedited hearing. (Cal. Code Regs., tit. 8, §10415.)

Because we are rescinding the WCJ's decision and are remanding the matter to him so that SCIF may obtain a section 4062(a) report, if it so elects, we will not now address any ACOEM issues. Any QME or AME, if obtained, should address the ACOEM issues in the first instance, and then the WCJ may re-address the ACOEM issues at any new trial.

For the foregoing reasons,

IT IS ORDERED, as the Decision After Reconsideration of the Board (En Banc) that the Findings and Award and Order issued by the workers' compensation administrative law judge on

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July 21, 2004, be, and it is hereby, **RESCINDED** and that this matter be, and it is hereby, **REMANDED** to the trial level for further proceedings and a new decision consistent with this opinion.

WORKERS' COMPENSATION APPEALS BOARD (EN BANC)

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MERLE C. RABINE, Chairman

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WILLIAM K. O'BRIEN, Commissioner

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JAMES C. CUNEO, Commissioner

_____

JANICE J. MURRAY, Commissioner

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FRANK M. BRASS, Commissioner

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RONNIE G. CAPLANE, Commissioner

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA
11/16/04

SERVICE BY MAIL ON SAID DATE TO ALL PARTIES AS SHOWN ON THE OFFICIAL ADDRESS RECORD

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