LIU, J.

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SUPREME COURT
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IN THE SUPREME COURT OF CALIFORNIA

ELAYNE VALDEZ,

Applicant,

vs.

WORKERS' COMPENSATION APPEALS BOARD and WAREHOUSE DEMO SERVICES et al.,

Respondents.

No. S204387

2nd Civ. No. B237147

Elayne Valdez v. Warehouse Demo Services, et al., WCAB Case No. ADJ7048296

RESPONDENT WCAB's ANSWER IN SUPPORT OF PETITION FOR REVIEW

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IN THE SUPREME COURT OF CALIFORNIA

ELAYNE VALDEZ, *Applicant,* **vs.** **WORKERS' COMPENSATION APPEALS BOARD and WAREHOUSE DEMO SERVICES et al.,** *Respondents.*	**No. S204387** **2nd Civ. No. B237147** **Elayne Valdez v. Warehouse Demo Services, et al., WCAB Case No. ADJ7048296**

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IN THE SUPREME COURT OF CALIFORNIA

ELAYNE VALDEZ, ***Applicant,*** **vs.** **WORKERS' COMPENSATION APPEALS BOARD and WAREHOUSE DEMO SERVICES et al.,** ***Respondents.***	**No. S204387** **2nd Civ. No. B237147** **Elayne Valdez v. Warehouse Demo Services, et al., WCAB Case No. ADJ7048296**

RESPONDENT WCAB'S ANSWER IN SUPPORT OF PETITION FOR REVIEW

TO THE HONORABLE CHIEF JUSTICE OF CALIFORNIA AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF CALIFORNIA:

Respondent, the Workers' Compensation Appeals Board (WCAB), files this Answer in support of the Petition for Review (Petition) filed by Warehouse Demo Services and Zurich North America (collectively, Zurich). As part of its Answer, the WCAB incorporates Zurich's entire Petition by reference. (Cal. Rules of Court, Rule 8.504(e)(3).)

The WCAB fully concurs with Zurich's Petition that the Court of Appeal's published opinion in *Valdez v. Workers' Comp. Appeals Bd.* (2012) 207 Cal.App.4th 1 (*Valdez*), if left to stand, would effectively nullify the comprehensive statutory scheme created by the Legislature—which provides for the creation of medical provider network (MPNs) as the exclusive means of diagnosing and treating industrial injuries—by

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allowing employees to obtain and rely on medical reports from non-MPN doctors.[1]

This is a very significant issue for the workers' compensation as a whole because, as established by the attached Declaration of Rosa Moran (Declaration), the Administrative Director of the Division of Workers' Compensation (DWC),[2] there are well over 1000 approved MPNs in California that are actively treating industrially-injured employees (Declaration,¶ 4, at pp. 2-3) and these MPNs provide approximately 75% to 85% of all treatment here for industrially-injured employees (Declaration,¶ 5, at p. 3).

The WCAB answers separately, however, to emphasize that the Court of Appeal assumed, without any evidentiary basis, that Independent Medical Review (IMR) reports are commonly used to resolve disputes over treatment or diagnosis where an employer or its insurance carrier have established an MPN. However, the Administrative Director has general responsibility for the approval and oversight of MPNs (Lab. Code, § 4616, subds. (b) & (g)), as well as for the assignment of IMR physicians and receipt of their reports (Lab. Code, § 4616.4, subds. (b)-(i); Cal. Code Regs., tit. 8, § 9767.7 et seq.). The Administrative Director's Declaration, however, establishes that, ***since MPNs were first authorized in California over seven years ago, not a single IMR report has ever been issued, statewide.***

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[1] The Petition discusses the WCAB's en banc decisions in *Valdez v. Warehouse Demo Services* (2011) 76 Cal.Comp.Cases 330 (*Valdez I*) and *Valdez v. Warehouse Demo Services* (2011) 76 Cal.Comp.Cases 970 (*Valdez II*). (Petition, at pp. 7-9.) The position taken by the Petition, however, is somewhat more narrow than the conclusions reached by the WCAB in those en banc decisions. In filing this Answer in support of Zurich's Petition, the WCAB does not repudiate or disavow its decisions in *Valdez I* and *Valdez II*, but merely recognizes that this case is before the Supreme Court on the more limited issue framed by Zurich's Petition.

[2] Pursuant to Rule 8.504, subdivision (d)(4), of the California Rules of Court, the WCAB asks the Chief Justice to permit and consider Administrative Director Moran's attached declaration.

Therefore, the WCAB joins in Zurich's request that its Petition for Review be granted. Alternatively, the WCAB supports Zurich's alternative request that, if review is not granted, this Court should order depublication of the Court of Appeal's opinion under Rule 8.1125(c) of the California Rules of Court.

STATEMENT OF THE CASE

In addition to the Statement of the Case set out in Zurich's Petition, the WCAB will briefly highlight the statutory and regulatory scheme for treatment of industrially-injured employees through MPNs.

The MPN statutes (Lab. Code, §§ 4600, subd. (c), 4616-4616.7), enacted by Senate Bill 899 and effective January 1, 2005 (Stats. 2004, ch. 34, §§ 23, 27), allowed employers and insurance carriers to establish MPNs and, thereby, returned some limited control over injured employees' medical treatment to those employers who establish an MPN. (*Knight v. United Parcel Service* (2006) 71 Cal.Comp.Cases 1423, 1430-1432 (WCAB en banc).)

Under the MPN process, an employer arranges an injured employee's initial medical evaluation with an MPN physician. (Lab. Code, § 4616.3, subd. (b); Cal. Code Regs., tit. 8, § 9767.6, subd. (d). Thereafter, the employee may treat with any physician of his or her choice within the MPN. (Lab. Code, § 4616.3, subds. (b)-(d); Cal. Code Regs., tit. 8, § 9767.6, subds. (d) & (e).)

If an injured employee disputes either the diagnosis or the treatment prescribed by any MPN treating physician, the employee may obtain second and third opinions from physicians within the MPN. (Lab. Code, § 4616.3(c); Cal. Code Regs., tit. 8, §§ 9767.7, 9768.9, subd. (a).)

If the injured employee disputes the diagnosis or treatment recommended by the third opinion physician, the employee may request IMR from the Administrative Director. (Lab. Code, § 4616.4, subd. (b); Cal. Code Regs., tit. 8, §§ 9767.7, subd. (h), 9768.9, subd. (b).)

The substance of the statutory and regulatory scheme for the IMR process is as follows.

An application by an injured employee for an IMR must be submitted to the Administrative Director on a one-page form entitled "Independent Medical Review Application" (IMR Application).[3] (Lab. Code, § 4616.4(c); Cal. Code Regs., tit. 8, §§ 9768.9, subd. (b), 9768.10.)

Among other things, the IMR Application shall contain a signed release from the injured employee, or a person authorized pursuant to law to act on behalf of the injured employee, authorizing the release of medical and treatment information. (Lab. Code, § 4616.4, subd. (c).) In addition, the employee's IMR Application must designate whether he or she is requesting an in-person IMR examination or just and IMR medical record review, and the Application must state the reasons for requesting an IMR. (Cal. Code Regs., tit. 8, §§ 9768.9, subd. (b), 9768.10.)

Upon the receipt of a valid IMR Application, the Administrative Director assigns a physician to conduct the IMR. (Lab. Code, § 4616.4, subd. (c); Cal. Code Regs., tit. 8, § 9768.9, subds. (d)-(f.))

The employer or insurer and the employee provide the IMR with all information to be considered in relation to the disputed treatment or diagnosis, including all relevant medical records. (Lab. Code, § 4616.4, subd. (d); Cal. Code Regs., tit. 8, § 9768.11, subd. (a).)

If an in-person examination is requested, the IMR conducts a physical examination of the injured employee. (Lab. Code, § 4616.4, subd. (e); Cal. Code Regs., tit. 8, § 9768.11, subd. (a).)

The IMR also may order additional diagnostic tests. (Lab. Code, § 4616.4, subd. (e); Cal. Code Regs., tit. 8, § 9768.11, subds. (b) & (c).)

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[3] The IMR Application form is available online at http://www.dir.ca.gov/dwc/forms/IndependentMedicalReviewApplication.pdf.

The IMR then issues a report to the Administrative Director determining whether the disputed treatment is consistent with the medical treatment utilization schedule (MTUS) established by the Administrative Director pursuant to Labor Code section 5307.27. (Lab. Code, § 4616.4, subds. (e)-(g); Cal. Code Regs., tit. 8, §§ 9768.11, subds. (e), (f), & (i), 9768.12.)[4]

If the IMR determines that the treatment is consistent with the MTUS, the Administrative Director must adopt the IMR questions determination and the employer or insurer must provide the treatment, either within or outside the MPN at the employee's choice. (Lab. Code, § 4616.4, subds. (h)-(i); Cal. Code Regs., tit. 8, §§ 9768.16, 9768.17.)

Section 4616.6 provides: "No additional examination shall be ordered by the appeals board and no other reports shall be admissible to resolve any controversy arising out of this article."

ARGUMENT AND AUTHORITIES

The Court Of Appeal's Focus on IMRs Was Misplaced Because, In the More Than Seven-Year State-Wide History Of MPNs In California, No IMR Report Has Ever Been Issued.

In the opening paragraph of its opinion in *Valdez*, the Court of Appeal stated its essential holding as follows: "We conclude that the rule of exclusion laid down by Labor Code section 4616.6 applies only when there has been *an independent medical review performed* under the authority of Labor Code section 4616.4." (*Valdez*, 207 Cal.App.4th at p. 3 [italics added].) Later in its opinion, the Court of Appeal went on to state:

> Thus, the "report" that is admissible and not precluded by section 4616.6 is the report of the independent medical review that is prepared pursuant to subdivision (f) of section 4616.4. The controversy that it resolves is that which is the subject of the entire article—the use of the MPN.

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[4] The MTUS is found at Cal. Code Regs., tit. 8, § 9792.20 et seq.

> Considering the thoroughness of an independent medical review, once that review has been concluded and the controversy of treatment or diagnosis has been resolved, the matter should be at an end. Further medical reports and examinations would not only be likely to be duplicative, but would also add time and expense to the process. This also explains why section 4616.6 specifically bars the WCAB from ordering additional medical examinations.
>
> (*Valdez*, 207 Cal.App.4th at pp. 8-9.)

This sounds cogent and sensible in theory, but it is not so in practice. This is because the Court of Appeal assumed, without any evidentiary basis, that IMR reports are commonly used to resolve disputes over treatment or diagnosis where an employer or its insurance carrier have established an MPN. The reality is otherwise.

As shown by Administrative Director Moran's declaration, ***not a single IMR report has ever actually issued, statewide, in the more than seven years since the institution of MPNs in California*** and not even once has an IMR resolved a controversy of treatment or diagnosis or brought it to an end (Declaration, ¶ 10, at p. 6). Specifically, since the January 1, 2005 institution of MPNs in California: (1) only approximately 20 IMR Applications have been submitted to the Administrative Director, statewide; (2) of these approximately 20 IMR Applications, only one was valid; (3) although an IMR physician was assigned in conjunction with this one valid IMR Application, the disputed treatment issue was resolved before the IMR ever issued a report (*id.*).

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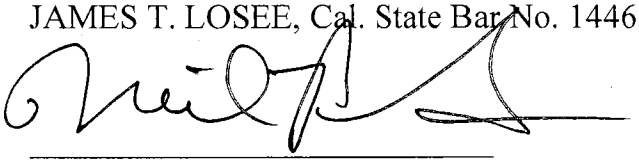
CONCLUSION

For the reasons stated in Zurich's Petition, and for the additional reasons stated above, the WCAB respectfully request that this Court grant review or, in the alternative, ordered depublication of the Court of Appeal's opinion.

Dated: August 20, 2012

Respectfully submitted,

NEIL P. SULLIVAN, Cal. State Bar No. 112113
JAMES T. LOSEE, Cal. State Bar No. 144618

By: 

NEIL P. SULLIVAN
Attorneys for Respondent
Workers' Compensation Appeals Board

Verification omitted pursuant to Code of Civil Procedure section 446 and *Wings West Airlines v. Workers' Comp. Appeals Bd.* (*Nebelon*) (1986) 187 Cal.App.3d 1047, 1055.

Certificate of Interested Entities or Persons omitted pursuant to California Rules of Court, Rule 8.494(c)(1).

CERTIFICATION THAT BRIEF DOES NOT CONTAIN MORE THAN 8,400 WORDS CALIFORNIA RULES OF COURT, RULE 8.504(d)

Pursuant to California Rules of Court, Rule 8.504(d), I certify that the attached brief contains less than 8,400 words, including footnotes and quotations, according to the counter of the word processing program with which it was prepared. Specifically, according to the computer word count, this brief contains 1,647 words.

I further certify that, pursuant to California Rules of Court, Rules 8.204(b)(3) & (4), the attached brief was prepared using 13-point Times New Roman font, including footnotes and quotations.

Dated: August 20, 2012

Respectfully submitted,

NEIL P. SULLIVAN, Cal. State Bar No. 112113
JAMES T. LOSEE, Cal. State Bar No. 144618

By: _____
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IN THE SUPREME COURT OF CALIFORNIA

ELAYNE VALDEZ, ***Applicant,*** **vs.** **WORKERS' COMPENSATION APPEALS BOARD and WAREHOUSE DEMO SERVICES et al.,** ***Respondents.***	**No. S204387** **2nd Civ. No. B237147** **DECLARATION OF ROSA MORAN, ADMINISTRATIVE DIRECTOR OF THE DIVISION OF WORKERS' COMPENSATION**

I, **Rosa Moran**, declare as follows:

1. I am the Administrative Director of the Division of Workers' Compensation (DWC) of the Department of Industrial Relations of the State of California. As the Administrative Director, I am responsible for approving any Medical Provider Network (MPN) plan submitted by any employer or insurer (Lab. Code, § 4616, subd. (b)) and for adopting regulations governing MPNs (Lab. Code, § 4616, subd. (g)). I am also responsible for assigning Independent Medical Review (IMR) physicians when an injured employee disputes the treatment prescribed or diagnosis made by MPN physicians and for receiving the reports issued by any such IMR physicians (Lab. Code, § 4616.4, subds. (b)-(i); Cal. Code Regs., tit. 8, § 9767.7 et seq.).

2. The Court of Appeal's opinion in *Valdez v. Workers' Comp. Appeals Bd.* (2012) 207 Cal.App.4th 1 (*Valdez*) focused in significant part on the IMR procedure available when an industrially-injured employee disputes either the diagnosis or treatment determinations of MPN physicians.[1] However, as discussed in greater detail below, ***not a single IMR report has ever actually issued***, statewide, in the more than seven years since the institution of MPNs in California. There have been a total of only 20 IMR requests made, only four of which were valid. Of those four, only one IMR was assigned but the issue was resolved before an IMR report issued.

3. Effective January 1, 2005, the Legislature allowed California employers and their workers' compensation insurance carriers to provide medical treatment to industrially injured employees through the establishment of MPNs. (Lab. Code, § 4616, subd. (a)(1).)

4. The staff of the DWC Medical Unit has informed me that, currently, there are approximately 1890 approved MPNs. These MPNs are listed online.[2] I believe that well over 1000 of these approved MPNs are actively treating

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[1] For example, in the opening paragraph of its opinion, the Court of Appeal stated: "We conclude that the rule of exclusion laid down by Labor Code section 4616.6 applies *only when there has been an independent medical review performed under the authority of Labor Code section 4616.4*. We therefore annul the decision of the WCAB and remand with directions for further proceedings that are consistent with this opinion." (*Valdez*, 207 Cal.App.4th at p. 3 [italics added].)

[2] http://www.dir.ca.gov/dwc/mpn/ListApprovedMPN.pdf [sorted by date of MPN approval] & http://www.dir.ca.gov/dwc/mpn/ListApprovedMPN_Alpha.pdf [sorted by MPN name]

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industrially-injured employees.[3]

5. I believe that MPNs provide approximately 75% to 85% of all treatment for industrially-injured employees in California.[4]

6. Under the MPN process, an employer arranges an injured employee's initial medical evaluation with an MPN physician. (Lab. Code, § 4616.3, subd. (b); Cal. Code Regs., tit. 8, § 9767.6, subd. (d). Thereafter, the employee may treat

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[3] The Legislature has created the Commission on Health and Safety and Workers' Compensation (CHSWC) (Lab. Code, § 75, subd. (a)) and has declared that it "shall conduct a continuing examination of the workers' compensation system," including "conduct[ing] or contract[ing] for studies it deems necessary to carry out its responsibilities" (*id.*) CHSWC asked the RAND Corporation (RAND) to examine workers' compensation medical treatment issues and, in 2011, RAND published a study entitled "Medical Care Provided Under California's Workers' Compensation Program." In this 2011 study, RAND stated, "As of March 2011, there were 1,401 active MPNs." (http://www.dir.ca.gov/chswc/Reports/2011/CHSWC_MedicalCareReformsandOpps_2011.pdf, at p. 40.) The 2011 CHSWC Annual Report indicated that, in 2010, there were some 1600 approved MPN applications (http://www.dir.ca.gov/chswc/Reports/2011/CHSWC_AnnualReport2011.pdf, at p. 120), but the number of approved MPNs has subsequently increased.

[4] Under Labor Code section 5307.2, the Administrative Director is required to contract with an independent consulting firm to perform an annual study of access to medical treatment for injured workers. One of these annual studies was conducted by the University of Washington (UW) School of Public Health, which issued a publication entitled "Access, Quality, and Outcomes of Health Care in the California Workers' Compensation System, 2008." Based on surveys of industrially-injured employees conducted in 2006 and 2008, the UW study found that approximately 85% of employees received their treatment through an MPN. (http://www.dir.ca.gov/dwc/MedicalTreatmentCA2008/2008_CA_WC_Access_Study_UW_report.pdf, at p. 26).

A 2011 study by the California Workers' Compensation Institute (CWCI), which is a private, nonprofit organization of insurers licensed to write workers' compensation policies in California (https://www.cwci.org/), concluded that, in 2009, MPNs accounted for more than 75% of all physician-based outpatient services. (http://www.lexisnexis.com/community/workerscompensationlaw/blogs/workerscompensationlawblog/archive/2011/11/29/cwci-study-finds-use-of-physician-networks-in-california-workers-comp-is-at-a-record-high.aspx).

with any physician of his or her choice within the MPN. (Lab. Code, § 4616.3, subds. (b)-(d); Cal. Code Regs., tit. 8, § 9767.6, subds. (d) & (e).)

7. If an injured employee disputes either the diagnosis or the treatment prescribed by any MPN treating physician, the employee may obtain second and third opinions from physicians within the MPN. (Lab. Code, § 4616.3(c); Cal. Code Regs., tit. 8, §§ 9767.7, 9768.9, subd. (a).)

8. If the injured employee disputes the diagnosis or treatment recommended by the third opinion physician, the employee may request IMR from the Administrative Director. (Lab. Code, § 4616.4, subd. (b); Cal. Code Regs., tit. 8, §§ 9767.7, subd. (h), 9768.9, subd. (b).)

9. The substance of the statutory and regulatory scheme for the IMR process is as follows:

a. An application by an injured employee for an IMR must be submitted to the Administrative Director on a one-page form entitled "Independent Medical Review Application" (IMR Application).[5] (Lab. Code, § 4616.4(c); Cal. Code Regs., tit. 8, §§ 9768.9, subd. (b), 9768.10.)

b. Among other things, the IMR Application shall contain a signed release from the injured employee, or a person authorized pursuant to law to act on behalf of the injured employee, authorizing the release of medical and treatment information. (Lab. Code, § 4616.4, subd. (c).) In addition, the employee's IMR Application must designate whether he or she is requesting an in-person IMR examination or just and IMR medical record review, and the Application must state

[5] The IMR Application form is available online at http://www.dir.ca.gov/dwc/forms/IndependentMedicalReviewApplication.pdf.

the reasons for requesting an IMR. (Cal. Code Regs., tit. 8, §§ 9768.9, subd. (b), 9768.10.)

c. Upon the receipt of a valid IMR Application, the Administrative Director assigns a physician to conduct the IMR. (Lab. Code, § 4616.4, subd. (c); Cal. Code Regs., tit. 8, § 9768.9, subds. (d)-(f.))

d. The employer or insurer and the employee provide the IMR with all information to be considered in relation to the disputed treatment or diagnosis, including all relevant medical records. (Lab. Code, § 4616.4, subd. (d); Cal. Code Regs., tit. 8, § 9768.11, subd. (a).)

e. If an in-person examination is requested, the IMR conducts a physical examination of the injured employee. (Lab. Code, § 4616.4, subd. (e); Cal. Code Regs., tit. 8, § 9768.11, subd. (a).)

f. The IMR also may order additional diagnostic tests. (Lab. Code, § 4616.4, subd. (e); Cal. Code Regs., tit. 8, § 9768.11, subds. (b) & (c).)

g. The IMR then issues a report to the Administrative Director determining whether the disputed treatment is consistent with the medical treatment utilization schedule (MTUS) established by the Administrative Director pursuant to section 5307.27. (Lab. Code, § 4616.4, subds. (e)-(g); Cal. Code Regs., tit. 8, §§ 9768.11, subds. (e), (f), & (i), 9768.12.)[6]

h. If the IMR determines that the treatment is consistent with the

[6] The MTUS is found at Cal. Code Regs., tit. 8, § 9792.20 et seq.

MTUS, the Administrative Director must adopt the IMR questions determination and the employer or insurer must provide the treatment, either within or outside the MPN at the employee's choice. (Lab. Code, § 4616.4, subds. (h)-(i); Cal. Code Regs., tit. 8, §§ 9768.16, 9768.17.)

10. Subparagraphs a through h of paragraph 9, above, accurately summarize the statutory and regulatory IMR scheme. Nevertheless, in the more than seven years since the January 1, 2005 effective date of MPNs in California (see Lab. Code, § 4616, subd. (a)(1)), the statistics of the DWC Medical Unit reflect that, statewide, there has never been any IMR that has been pursued to completion. Specifically, I have been informed by the DWC Medical Unit that, in this more than seven-year period:

a. Only approximately 20 IMR Applications have been submitted to the Administrative Director, statewide.

b. Of these approximately 20 IMR Applications, only one was valid.

c. Although an IMR physician was assigned in conjunction with this one valid IMR Application, the disputed treatment issue was resolved before the IMR ever issued a report.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct of my own knowledge except as to matters stated on my information and belief, and as to those matters I believe it to be true.

Executed on August 20, 2012, at Oakland, California.

Rosa Moran, Administrative Director
Division of Workers' Compensation
Cal. State Bar No. 133727

PROOF OF SERVICE BY MAIL
(Code Civ. Proc., §§ 1013a, 2009, 2015.5; Lab. Code, § 5954;
Cal. Rules of Court, Rules 8.25(a), 8.494(b))

STATE OF CALIFORNIA)
)ss.
CITY AND COUNTY OF SAN FRANCISCO)

I declare that I am a citizen of the United States and that I am employed in the City and County of San Francisco of the State of California. I am over the age of 18 years and not a party to the within entitled action. My business address is 455 Golden Gate Avenue, Suite 9328, San Francisco, CA 94102.

On August 20, 2012 I served the within Respondent WCAB's Answer in Support of Petition for Review in the matter of No. S204387, Elayne Valdez v. Workers' Compensation Appeals Board, et al., [2d Civ. No. B237147 & WCAB Case No. ADJ7048296], on the Supreme Court by hand-delivery and on the Court of Appeal and all parties and known amicus curiae in this action by placing true copies thereof in sealed envelopes with postage thereon fully prepaid in the United States mail in San Francisco, California addressed as stated below.

SEE ATTACHED SERVICE LIST

I declare under penalty of perjury that the foregoing is true and correct, and that this declaration was executed at San Francisco, California on August 20, 2012.

Betsy E. Aduviso

SERVICE LIST

Elayne Valdez v. Workers' Compensation Appeals Board, et al., No. S204387

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