

1 **WORKERS' COMPENSATION APPEALS BOARD**

2 **STATE OF CALIFORNIA**

3
4 **CHRISTOPHER TORRES,**

5 *Applicant,*

6 **vs.**

7 **CONTRA COSTA SCHOOLS INSURANCE**
8 **GROUP; STATE COMPENSATION**
9 **INSURANCE FUND,**

10 *Defendants.*

Case Nos. ADJ3011154 (SAC 0309784)
ADJ3631113 (SAC 0309785)

OPINION AND DECISION
AFTER RECONSIDERATION
(Significant Panel Decision)

11 We previously granted applicant's petition for reconsideration of the February 18, 2014 Findings
12 Of Fact And Order of the workers' compensation administrative law judge (WCJ) who dismissed
13 applicant's appeal of a November 12, 2013 Independent Medical Review (IMR) determination because it
14 was not verified.¹

15 Applicant contends that defendant's utilization review (UR) and the IMR determination were
16 both flawed and that it is unjust to dismiss his IMR appeal for lack of verification.

17 The February 18, 2014 decision of the WCJ is rescinded as our Decision After Reconsideration.
18 The WCJ correctly concluded that applicant's IMR appeal is subject to dismissal because Labor Code
19 section 4610.6(h) provides that such a determination "may be reviewed only by a *verified* appeal."
20 While lack of verification does not automatically require dismissal of an unverified petition, an appeal
21 may be dismissed for lack of verification if the appealing party does not cure the defect within a
22 reasonable time after receiving notice of the defect.

23
24 ¹ The Appeals Board has designated this as a significant panel decision. Significant panel decisions are not binding precedent
25 in workers' compensation proceedings; however, they are intended to augment the body of binding appellate court and en
26 banc decisions and, therefore, a panel decision is not deemed "significant" unless, among other things: (1) it involves an issue
27 of general interest to the workers' compensation community, especially a new or recurring issue about which there is little or
no published case law; and (2) all Appeals Board members have reviewed the decision and agree that it is significant. (See
Elliott v. Workers' Comp. Appeals Bd. (2010) 182 Cal.App.4th 355, 361, fn. 3 [75 Cal.Comp.Cases 81]; *Larch v. Workers'*
Comp. Appeals Bd. (1999) 64 Cal.Comp.Cases 1098, 1099-1100 (writ den.); 25 Cal. Workers' Comp. Rptr. 197 [News Brief,
August 1997].)

1 The case is returned to the trial level for further proceedings on applicant's IMR appeal. If the
2 lack of verification is cured by applicant within 20 days of service of this decision as allowed herein, the
3 merits of the IMR appeal should be addressed by the WCJ. If verification of the appeal is not provided
4 by applicant as allowed herein, the WCJ may again dismiss the IMR appeal for lack of verification.

5 **BACKGROUND**

6 It is admitted that applicant sustained industrial injury to his left knee while working for
7 defendant as a claims examiner on October 15, 1998, causing 27% permanent disability and need for
8 future medical treatment (SAC 0309784, ADJ3011154). It is also admitted that while in that same
9 employ on July 28, 2000, applicant sustained industrial injury to his neck and spine causing a need for
10 medical treatment (SAC 0309785, ADJ3631113).

11 For a period of time, defendant authorized the Duragesic patches and Norco prescribed by
12 applicant's primary treating physician, Douglas Grant, M.D., to relieve the pain caused by applicant's
13 industrial injuries.² However, after Dr. Grant requested authorization to refill additional prescriptions for
14 Duragesic patches and Norco in June 2013, defendant's UR physician Claudio Palma, M.D., issued a
15 July 9, 2013 UR determination certifying the request for Norco, but conditionally denying certification of
16 the request for Duragesic patches. In denying certification, Dr. Palma wrote in the UR determination that
17 additional information had been requested concerning "specific reasons as to why the patient was
18 initially prescribed Duragesic patches over other medications, include history of all medications tried,
19 specifically history with opioids," along with a copy of applicant's most recent lab test if available, but
20 that the requested information had not been received. Dr. Palma further wrote that the conditional non-
21 certification "represents an administrative action taken to comply with regulatory time frame constraints,
22 and does not represent a denial based on medical necessity," and that the request for authorization for
23 Duragesic patches "will be reconsidered upon receipt of the information requested."

24
25 ² We take permissive judicial notice pursuant to Evidence Code section 452(h) that "Duragesic" is the registered trademark
26 name for a transdermal system that delivers fentanyl, an opioid pain medication, slowly through the skin and into the body, as
described on the following Janssen Pharmaceutical website as of August 21, 2014: <<http://www.duragesic.com/>>

27 We also take notice that "Norco" is the registered trademark name for an opioid analgesic tablet containing a combination of
hydrocodone bitartrate and acetaminophen, as described on the following website as of August 21, 2014:
<<http://www.rxlist.com/norco-drug.htm>>

1 Applicant disagreed with the UR determination and submitted an application for IMR on
2 August 2, 2013. On August 15, 2013, applicant's attorney sent the IMR organization an additional report
3 by Dr. Grant concerning applicant's history and use of Duragesic patches.

4 An IMR determination dated November 12, 2013 was sent to applicant's attorney, stating without
5 further explanation that Duragesic patches were "not medically necessary and appropriate." On
6 December 18, 2013, applicant's attorney filed an appeal of the IMR determination regarding the
7 Duragesic patches, writing that the "reviewer failed to review documents submitted by applicant and
8 applicant's representative before making the determination," contrary to applicant's right to due process.³
9 Although the IMR appeal was signed by the attorney, it was not verified. On that same date applicant's
10 attorney filed a Declaration of Readiness to Proceed (DOR) to expedited hearing on the issue of
11 entitlement to medical treatment per Labor Code section 4600, declaring under penalty of perjury as
12 follows:

13 "Applicant received notice of IMR determination. Applicant appeals said
14 determination regarding: Duragesic patches. Per [Labor Code section]
15 4610[.6(h)] Applicant has a right to appeal said determination. Also notice
16 provided failed to advise of procedure of filing appeal. Determination
indicates that the reviewer failed to review documents submitted by
applicant before making determination. This is violation of applicant's due
process rights. Court intervention requested."⁴

17 An expedited hearing was conducted on January 9, 2014 to address applicant's appeal. Received
18 into evidence at that time were copies of the UR and IMR determinations, reports by treating physician
19 Dr. Grant and copies of correspondence. In addition to other procedural arguments, the Minutes of
20 Hearing reflect defendant's contention that applicant's IMR appeal is defective because "It is not verified
21 as required under the Labor Code." Following submission of the matter the WCJ issued his February 18,
22 2014 decision dismissing the IMR appeal for lack of verification, as described above.

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25 ³ The date on which the IMR determination was mailed to applicant is unknown. For that reason, the WCJ rescinded his
26 initial determination that the IMR appeal was not timely filed and served "within 30 days of the date of mailing of the
determination" as provided in section 4610(h).

27 ⁴ Quotations converted from upper case to lower case. Citation to Labor Code section "4610(H)" was corrected to
"4610.6(h)" based upon the context of the citation and the subsequent January 9, 2014 Minutes of Hearing that show the
intended reference was to Labor Code section 4610.6(h).

1 **DISCUSSION**

2 Labor Code section 4610.6(h) provides that a determination of the administrative director
3 pursuant to that section “may be reviewed *only by a verified appeal* from the medical review
4 determination of the administrative director.”⁵ That statutory verification requirement is consistent with
5 Workers’ Compensation Appeals Board Rules of Practice and Procedure, Rule 10450(a), which
6 addresses the form of requests for action filed with the Workers’ Compensation Appeals Board (WCAB),
7 and provides that *all* such requests “shall be made by petition.” (Cal. Code Regs., tit. 8, § 10450(a).)
8 Rule 10450(e) in turn requires that all such petitions be verified under penalty of perjury, as follows:

9 “All petitions and answers shall be verified under penalty of perjury *in the*
10 *manner required for verified pleadings in courts of record*. A failure to
11 comply with the verification requirement constitutes a valid ground for
summarily dismissing or denying a petition or summarily rejecting an
answer.” (Cal. Code Regs., tit. 8, § 10450(e), emphasis added.)

12 Code of Civil Procedure section 446 requires in pertinent part that verified pleadings in courts of
13 record, “shall be by the affidavit of a party” or, under certain circumstances, by an affidavit from the
14 attorney for the party.⁶

15 Applicant’s December 13, 2013 IMR appeal includes no affidavit by either the applicant or his
16 attorney verifying the contents of the appeal under penalty of perjury as required by section 4610.6(h)
17 and Rule 10450.⁷ Rule 10450(e) plainly provides that an unverified petition filed with the WCAB may
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19 ⁵ Emphasis added. Further statutory references are to the Labor Code unless otherwise stated.

20 ⁶ Code of Civil Procedure section 446(a) provides in pertinent part as follows:

21 “In all cases of a verification of a pleading, the affidavit of the party shall state that the same is true of his own knowledge,
22 except as to the matters which are therein stated on his or her information or belief, and as to those matters that he or she
23 believes it to be true; and where a pleading is verified, it shall be by the affidavit of a party, unless the parties are absent from
the county where the attorney has his or her office, or from some cause unable to verify it, or the facts are within the
knowledge of his or her attorney or other person verifying the same. When the pleading is verified by the attorney, or any
other person except one of the parties, he or she shall set forth in the affidavit the reasons why it is not made by one of the
parties.

24 “When the verification is made by the attorney...the...affidavit shall state that he or she has read the pleading and that he or
25 she is informed and believes the matters therein to be true and on that ground alleges that the matters stated therein are true.
26 However, in those cases the pleadings shall not otherwise be considered as an affidavit or declaration establishing the facts
therein alleged...”

27 ⁷ Applicant does not contend that verification of the DOR satisfies the verification requirement of Labor Code section
4610.6(h). In that regard, we note that a DOR under Labor Code section 5502 et. seq. and Rule 10250 is not a “petition” as
described in Rule 10450(a). (Cal. Code Regs., tit. 8, §§ 10250, 10450(a).)

1 be summarily dismissed. However, in this instance we rescind the dismissal of applicant’s IMR appeal
2 for the reasons below, and allow applicant an opportunity to cure the verification defect.

3 Similar to an IMR appeal pursuant to section 4610.6(h), section 5902 requires that a petition for
4 reconsideration “shall be verified upon oath in the manner required for verified pleadings in courts of
5 record.”⁸ This parallels the verification requirement contained in Rule 10450(e), as discussed above.

6 Like other unverified petitions under Rule 10450(e), an unverified petition for reconsideration is
7 subject to dismissal for that reason. However, it has long been recognized that lack of verification does
8 not necessitate automatic dismissal of a nonconforming pleading. (*United Farm Workers v. Agricultural*
9 *Labor Relations Bd.* (1985) 37 Cal.3d 912, 915; *Mullane v. Industrial Acc. Com.* (1931) 118 Cal.App.
10 283, 286 [17 I.A.C. 328, 330]; *Wings West Airlines v. Workers’ Comp. Appeals Bd. (Nebelon)* (1986)
11 187 Cal.App.3d 1047 [51 Cal.Comp.Cases 609]; *Katzin v. Workers’ Comp. Appeals Bd.* (1992) 5
12 Cal.App.4th 703, 712, fn.3 [57 Cal.Comp.Cases 230].)

13 Failure to correct a lack of verification within a reasonable time after receiving notice of the
14 defect allows dismissal of the nonconforming petition. (*Lucena v. Diablo Auto Body* (2000) 65
15 Cal.Comp.Cases 1425 [significant panel decision]; *Smith v. Workers’ Comp. Appeals Bd.* (2001) 66
16 Cal.Comp.Cases 788 (writ den.); see also *Connor v. Workers’ Comp. Appeals Bd.* (1980) 45
17 Cal.Comp.Cases 370 (writ den.).)

18 In this case, defendant raised the issue of lack of verification of the IMR appeal as an issue at the
19 expedited hearing on January 9, 2014. However, applicant did not seek to cure the defect before the
20 appeal was dismissed by the WCJ for lack of verification or at anytime thereafter. Instead, applicant
21 argues in the petition that “the parties all know that the truth, the facts and the history all dictate that
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23 ⁸ Other workers’ compensation pleadings and documents also require verification. As noted above, Rule 10450 requires that
24 all requests for action filed with the WCAB be made by petition that is verified under penalty of perjury. In addition, section
25 4628(j) provides that a medical-legal report by a physician shall be verified. Section 5703 provides that a physician’s bill for
26 services is admissible in a proceeding “only if made under penalty of perjury that they are true and correct to the best
27 knowledge of the physician,” and requires that reports by a vocational expert shall state “under penalty of perjury” that there
has not been a violation of Section 139.3 and the contents of the report are true and correct to the best knowledge of the
author. A lack of verification on any of these documents may be addressed like the IMR appeal in this case, by ordering
dismissal if the author fails to cure the verification defect within a reasonable time after receiving notice of it.

1 Independent Medical Review and the UR decisions of the defendants were defective,” that it is clear that
2 “the individual who filed the request for review had reviewed the file, the reports and the evidence,” and
3 that justice and equity support consideration of the merits of applicant’s petition.

4 Even if applicant’s contentions are accepted as true, the verification requirement is plainly stated
5 in section 4610.6(h) and Rule 10450. Verification of a pleading under penalty of perjury is more than a
6 pro forma requirement. It helps assure the accuracy of factual statements made in pleadings, and may
7 provide evidentiary support that is necessary to obtain the requested relief. Willfully stating a material
8 fact under penalty of perjury that is known to be false is perjury, and may subject the person making the
9 verification to criminal prosecution, citation for contempt of court, the imposition of sanctions for bad
10 faith conduct and loss of privilege of appearing before the WCAB or practicing law. (Pen. Code, § 118;
11 Lab. Code, §§ 4907, 5813; Cal. Code Regs., tit. 8, § 10561; *In re: Escamilla* (2013) 78 Cal.Comp.Cases
12 134 (Appeals Board en banc).)

13 Applicant’s failure to timely cure the verification defect after receiving notice of it supports the
14 WCJ’s dismissal of the IMR appeal. However, we also recognize that the verification requirement in
15 section 4610.6(h) is relatively new, and that there is a strong public policy favoring the disposition of
16 cases on their merits that is consistent with our mandate under Article XIV, section 4 of the California
17 constitution to “accomplish substantial justice in all cases.” (*Bland v. Workmen’s Comp. Appeals Bd.*
18 (1970) 3 Cal.3d 324 [35 Cal.Comp.Cases 513]; *Denham v. Superior Court of Los Angeles County* (1970)
19 2 Cal.3d 557; *Martino v. Workers’ Comp. Appeals Bd.* (2002) 103 Cal.App.4th 485 [67 Cal.Comp.Cases
20 1273]; *Beveridge v. Industrial Acc. Com.* (1959) 175 Cal.App.2d 592 [24 Cal.Comp.Cases 274].)

21 Accordingly, we conclude under these circumstances that the appropriate course in this case is to
22 rescind the WCJ’s February 18, 2014 order dismissing applicant’s IMR appeal because of the procedural
23 defect of lack of verification, and return the case to the trial level for a new decision by the WCJ. If
24 applicant cures the procedural defect in the IMR appeal within 20 days after service of this decision by
25 filing an appropriate verification or amended appeal with the necessary verification, the WCJ should
26 address the substance of the IMR appeal. However, if applicant does not provide the verification
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1 required by section 4610.6(h) within 20 days after service of this decision, the WCJ may again dismiss
2 the IMR appeal for lack of verification.

3 For the foregoing reasons,

4 **IT IS ORDERED** as the Decision After Reconsideration of the Workers' Compensation Appeals
5 Board that the February 18, 2014 Findings Of Fact And Order of the workers' compensation
6 administrative law judge is **RESCINDED**, and the case is **RETURNED** to the trial level for further
7 proceedings and a new decision by the workers' compensation administrative law judge in accordance
8 with this decision.

9 **WORKERS' COMPENSATION APPEALS BOARD**

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11
12 /s/ Deidra E. Lowe
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14 **I CONCUR,**

15
16 /s/ Frank M. Brass
17

18 /s/ Marguerite Sweeney
19

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

21 8/28/2014

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

24 **CHRISTOPHER TORRES**
25 **RONALD METZINGER, ESQ.**
26 **STATE COMPENSATION INSURANCE FUND**

27 **JFS/abs**