WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

JAIME TORRES TAVERA, *Applicant,* vs. T AND P FARMS; ZENITH INSURANCE COMPANY, *Defendants.*	Case No. ADJ7373420 (Redding District Office) OPINION AND DECISION AFTER RECONSIDERATION

The Workers' Compensation Appeals Board (Appeals Board) previously granted reconsideration in order to further study the factual and legal issues raised in this case. This is our Decision After Reconsideration.

In the August 6, 2014 Findings, Award and Order, the workers' compensation administrative law judge (WCJ) found that applicant sustained an industrial injury on July 5, 2010 and was air-lifted to Mercy San Juan where reasonable and necessary medical services were rendered, including a below-knee amputation. The WCJ found that the services rendered were life threatening and/or urgent within the meaning of California Code of Regulations, title 8, section 9792.1(c)(2) and, therefore, lien claimant is exempt from the Official Medical Fee Schedule (OMFS).

Defendant, in a well-written petition, contends that Labor Code section 5307.1(b) which allows payment in excess of the OMFS for medical treatment related to extraordinary circumstances was deleted in 2004 and this eliminated the enabling statute for Rule 9792.1(c)(2).

We have considered the Petition for Reconsideration and we have reviewed the record in this matter. We have received an answer from lien claimant. The WCJ prepared a Report and Recommendation on Petition for Reconsideration (Report), recommending that we deny reconsideration.

For the reasons stated below, we will grant reconsideration, rescind the WCJ's decision and find that lien claimant is entitled to payment pursuant to the 2004 OMFS and, thus, is entitled to nothing further on its lien.

We begin by noting that defendant and lien claimant stipulated that lien claimant has been paid the entire amount due under the 2004 OMFS. (February 13, 2014 Minutes of Hearing, p. 2.)

Labor Code 5307.1(e)(1) provides that: "Prior to the adoption by the administrative director of a medical fee schedule pursuant to this section, for any treatment, facility use, product, or service not covered by a Medicare payment system, including acupuncture services, the maximum reasonable fee paid shall not exceed the fee specified in the official medical fee schedule in effect on December 31, 2003.

The OMFS in effect on December 31, 2003 included California Code of Regulations, title 8, section 9792.1(a) which provides that: "Maximum reimbursement for inpatient medical services shall be determined by multiplying 1.20 by the product of the health facility's composite factor and the applicable DRG weight or revised DRG weight..." Rule 9792.1(c) provides that: "The following are exempt from the maximum reimbursement formula set forth in subdivision (a)...(2) Inpatient services provided by a Level I or Level II trauma center."

Rule 9792.1 was last amended in 2002 and is part of the OMFS in effect on December 31, 2003. The 2004 OMFS changed the formula for maximum reimbursement for inpatient medical services and that formula is now found at California Code of Regulations, title 8, section 9789.22(a).

Because 2004 OMFS is the fee schedule authorized by Labor Code section 5307.1, the WCJ should not have relied on Rule 9792.1(c)(2) which addresses an exception to the pre-2004 fee schedule. While subdivision (c)(2) provides an exception to subdivision (a), neither subdivision (a) nor subdivision (c) are applicable in this case because it must be decided pursuant to the 2004 OMFS. Given that the Administrative Director has adopted the 2004 OMFS and the parties stipulated that defendant paid correctly pursuant to the 2004 OMFS, we will find that lien claimant is entitled to nothing further.

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For the foregoing reasons,

IT IS ORDERED, as the Decision After Reconsideration of the Workers' Compensation Appeals Board, that the August 6, 2014 Findings, Award, and Order is **RESCINDED** and the following is **SUBSTITUTED** in its place:

FINDING AND ORDER

FINDING

1. Lien claimant is entitled to payment pursuant to the Official Medical Fee Schedule.

ORDER

IT IS HEREBY ORDERED that lien claimant Mercy San Juan shall take nothing further on its lien.

WORKERS' COMPENSATION APPEALS BOARD

I CONCUR,

MARGUERITE SWEENEY

KATHERINE ZALEWSKI

RONNIE G. CAPLANE

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

MAR 20 2015

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

COOK & GUSHI
HANSON BRIDGETT
MERCY SAN JUAN
MULLEN & FILIPPI
LAW OFFICES OF REID STEINFELD

MWH/ebc

APPLICANT: JAIME TORRES TAVERA

CASE NUMBER: ADJ7373420

DEFENDANT: T AND P FARMS; ZENITH PLEASANTON

DATE OF INJURY: 5 JULY, 2010

JUDGE SHARYN LYNNE SALA

REPORT AND RECOMMENDATION ON DEFENDANT'S PETITION FOR RECONSIDERATION

SUBSTANTIVE AND PROCEDURAL FACTS:

Applicant was employed in California, as a farm laborer by T AND P FARMS, whose workers' compensation insurance company was ZENITH PLEASANTON. He sustained industrial injury on 5 July, 2010 when his leg was caught and mangled in a harvester; this was exacerbated by a prolonged extrication process (30 minutes), with nearly complete amputation, and loss of sensation or motor activity. Applicant had to be air lifted from the original facility, where his condition was so severe they were unable to render proper care, to MERCY SAN JUAN RANCHO CORDOVA, where a trauma team actually performed the services; upon admission to the ER he was x-rayed in the resuscitation suite, "and then was taken immediately to the operating room"---as opposed to waiting around in the ER or, after initial evaluation, left to lag about and scheduled for surgery at some later date or time, substantial evidence of immediacy of the treatment needed, which included a below-knee amputation. He was hospitalized between 5 and 9 July 2010.

Lien Claimant MERCY SAN JUAN RANCHO CORDOVA filed a timely lien for services rendered on 9 December, 2011. Lien Claimant billed $110,337.00 for services rendered, Defendant paid $11,701.52 consistent with the 2004 OMFS, or about 10 ½% of

the amount billed and leaving a balance of $98,635.48; Lien Claimant claims further payment in the amount of $87,601.78 (approximately 90% of the unpaid balance)[1].

The case in chief was resolved by Compromise and Release, with Order Approving, signed by the Honorable Kathleen Ortega, PWCJ, on or about 18 March, 2013. The lien of MERCY SAN JUAN RANCHO CORDOVA remained outstanding, with the sole issue being the applicability of the OMFS.

The matter originally came on for hearing on 13 February, 2014 and was submitted on 24 February, 2014. Parties stipulated that Lien Claimant had been paid in accordance with the OMFS-2004. Parties also stipulated that Lien Claimant was exempt under the 2003 OMFS.

After review of the issues and the evidence, the WCJ felt clarification was needed and the matter was set for phone conference 21 March, 2014. At that time the parties requested further time to negotiate settlement, and leave was granted until 10 April, 2014. It was also stipulated that Lien Claimant is a Level II Trauma Center within the meaning of Title 22 CCR §§100260 and 100261. Parties also stipulated that the terms "inpatient health facility" and "inpatient hospital" are synonymous for purposes of these proceedings.

No resolution was reached, the matter was resubmitted. Consequently, on 10 April, 2014, an Opinion on Decision, Findings and Order issued on 10 April, 2014, that §§ finding, inter alia:

That CCR §§9792 and 9792.1 were neither modified, nor altered, nor revoked in 2004 and remain in full force and effect at the time of injury herein[2] and were in fact viable.

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[1] Despite additional subsequent dates of treatment and billing having been submitted, based on party stipulations as to what was billed and paid, and comparison with the billing records submitted, only the original admission, billed at $110,337.00 appears to be in dispute. The later dates are considered only to the extent that follow up treatment was provided.

[2] CCR §9792.1(e) indicates the section applies to covered inpatient hospital stays for which the day of admittance is on or after 1 April, 1999; there is no expiration.

That either section, *if applicable*, would exclude Lien Claimant from the strict fee restrictions of the 2004 OMFS.

That there was no sufficient substantial medical evidence to justify a finding of the circumstances were extraordinary or the nature of the services rendered unusual within the meaning of CCR §9792(c) or of "life threatening" and/or "urgent" under CCR §9792.1(c)(2) as applied to this facility and the services rendered.

The lack of evidence was due, at least in part, to the WCJ ruling excluding certain evidence offered by lien claimant of which the WCJ did not at the time of submission recognize the full import and that lien claimant had reserved the right to offer the evidence. Consequently, the lien claimant was entitled to augment and develop the record as to these issues by way of exhibits and argument, and that Defendant is entitled to further rebut. The matter was ordered continued to further develop the record.

No appeal was taken from this order.

The matter came on again for further hearing on 17 July, 2014[3], and, further attempts at resolution having proved fruitless, was resubmitted on 28 July, 2014 based upon the prior Opinion on Decision, dated 10 April, 2014, and on further trial briefs with narrowed issues as to whether or not MERCY SAN JUAN RANCHO CORDOVA and the services rendered herein falls within the limited exceptions and thereby excludes it from the strict limits of the OMFS, upon and exhibits as marked and admitted without objection as follows: medical records of Mercy San Juan Medical Center including: Lien Claimant exhibit 1: medical reports dated 5 July, 2010 through 9 July, 2010, including a trauma evaluation and surgical report (13 pages); Lien Claimant exhibit 2: medical reports dated 12 -13 August, 2014; Lien Claimant exhibit 3: medical report dated 5 September, 2010; Lien Claimant exhibit 4: billing for the original ER and

[3] Delay was in part due to the WCJ's unavailability during the month of June.

hospital services 5-9 July, 2010, totaling $110,337.00[4]; Lien Claimant exhibit 5: billing for 12 - 13 August, 2010 dates of service totaling $12,157.00[1]; Lien Claimant exhibit 6: billing for 6 September, 2010 date of service totaling $3,198.00[1].

An Opinion on Decision, Findings, Award, and Order issued on 4 August, 2014, finding, inter alia, that, in light of the health facility composite factor, there was insufficient evidence the services rendered were for extraordinary circumstances related to the unusual nature of the services rendered; she did, however, find the services rendered were life threatening and/or urgent within the meaning of CCR §9792.1(c)(2), supra, and therefore fell within the exemption and that lien claimant was entitled to reasonable fees for services rendered not bound by the OMFS.

It is from this latter finding that Defendant timely seeks reconsideration.

DISCUSSION:

Apparently the WCJ was struck with a fit of dyslexia in drafting her opinion; frequently throughout she discusses the provisions of Labor Code §5703.1, rather than the appropriate section, §5307.1. This apparently escaped, or did not confuse, the parties; nevertheless the WCJ respectfully requests that the Opinion et al be read as intended, not as drafted.

The sole issue presented is whether Lien Claimant is exempt from 2004 OMFS as an exception as provided by California Code of Regulations, title 8, §§9792(c) and 9792.1(c)(2).

There is no issue of treatment rendered or benefits provided.

By stipulation, Lien Claimant is a Level II Trauma Center within the meaning of Title 22 CCR §§100260 and 100261.

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[4] These numbers reflect a decimal point not contained in the original documents, but do conform to the trial briefs. It is conceivable, however, that they are off by a factor of 100. These are also different from the figures originally stipulated, but seem to be the ones utilized by the parties and are those utilized and considered herein.

Defendant contends it has paid consistent with the 2004 OMFS and that no further funds are owed, while conceding that Lien Claimant was exempt from the provisions of the OMFS under the 2003 provisions, that these regulations are defunct and should not be considered.

Defendant does not challenge the WCJ's findings regarding CCR §§9792(c).

Neither does Defendant dispute that the treatment rendered was for a life threatening and/or urgent injury.

Defendant's whole argument rests on the theory that despite its continuing and persistent existence within the California Code of Regulations, CCR, that the WCJ can simply ignore §§9792 (c) and 9792.1(c)(2); that we should presume that the legislature either a) intended them to exist but be meaningless, or b) intended to eliminate them but somehow overlooked it.

Defendant contends (page 3, point 8) that the WCJ found that CCR §§9792 (c) and 9792.1(c)(2) are applicable to medical services rendered after 1 January, 2004 in her F & A issued 4 August, 2014. This is inaccurate. The WCJ found this to be the case in her earlier, 10 April, 2014 decision see Findings 9 and 10. No appeal, either Removal or Reconsideration, was taken therefrom. The only issue presented for the 28 July, 2014 submission was whether these sections applied to the facts herein.

Defendant also contends that (page 3) that "[t]o disregard the Labor Code in this case and rely upon an old regulation would set a precedent that would allow a facility to be entitled to essentially choose which OMFS it wanted to use depending upon the situation." This is a "down the slippery slope" argument, and is incorrect; to begin with, these sections don't provide an alternative OMFS; rather they provide for reasonable fees. To qualify for exemption, a facility, on a case by case basis, would have to meet the requirements of either or both CCR §§9792(c) or 9792.1(c)(2).

The provisions of Labor Code §5307.1, which authorizes the Administrative Director to adopt, and revise periodically an official medical fee schedule, are relevant

herein. The OMFS was revised in 2004, as mandated by Labor Code §5307.1 and as contained in CCR Article 5. Pursuant to CCR §9789.20(a): the Inpatient Hospital Fee Schedule section of the OMFS covers charges made by a hospital for inpatient services provided by the hospital. Per CCR§9789.20(c), CCR §9789.20 to §9789.24 applies to all bills for inpatient services, including Level II Trauma Centers.

One critical change was the elimination of Labor Code §5307.1(b) from the 2004 revision.

However, in revising and updating most of the relevant sections with the additions commencing with CCR §9789 as contained in newly added Article 5.3, CCR §§9792 and 9792.1, contained in Article 5.5, were neither modified, nor altered, nor revoked in 2004[5]; there is no expressed legislative intent to delete them, except as may be implied by the elimination of Labor Code §5307.1(b).

Usually, a Labor Code section trumps a Regulation. However, the elimination of language in the Labor Code does not automatically eliminate preexisting similar language in the Regulations; in the instant case, it merely shifts its point of emphasis, keeping it more appropriately and consistently in the Regulations. It is noted that there was no "similar" language to §9792.1(c) to eliminate.

Defendant cites Lockheed; the problem is that here, the legislature did *not* delete express provisions from the Regulations, something it clearly could have done. These sections remain intact. The WCJ agrees: the Board's task is to inquire into the legality of the regulation, not its wisdom.

So the question is how to incorporate both the code and the regulations.

Generally, maximum reimbursement for the within date of injury and for services at an inpatient health facility/hospital, including a Level II Trauma Center, is defined pursuant to the provisions of §§9789.22(a) to 9789.24 and 9792.1(a), which both

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[5] CCR §9792.1(e) indicates the section applies to covered inpatient hospital stays for which the day of admittance is on or after 1 April, 1999; there is no expiration.

provide for payment equal to 120% of the DRG[6] (Diagnosis Related Grouping, a value determined by MEDICARE for certain groupings of services) multiplied by the health facility composite factor (as determined by MEDICARE).

Provision for the nature and services generally rendered by a Level I and Level II Trauma Center are addressed through the health facility composite factor, which is a multiplier in determining appropriate fees under the OMFS. It is therefore apparent that it was not the legislative intent to exempt every Level I and II trauma center from the OMFS.

Lien Claimant does not fall within any of the express exclusions as enunciated in CCR §§ 9789.22(k) or 9792.1(c)(1).

However, CCR §9792(c) provides that "A medical provider or licensed health care facility *may* be paid a fee in excess of the reasonable and maximum fees *if* the fee is reasonable, accompanied by itemization, and justified by an explanation of extraordinary circumstances related to the unusual nature of the services rendered." (emphasis added)

CCR §9792.1(c)(2), provides that a facility is *exempt* from the maximum reimbursement formula where: "Inpatient services provided by a Level I or Level II Trauma Center, as defined in Title 22, California Code of Regulations sections 100260 and 100261, to a patient with an *immediately life threatening or urgent injury*." (emphasis added)

By leaving these sections intact, the legislature contemplated that such exceptions would arise or the regulations would be meaningless. It also contemplated that not every service provided by a Level II Trauma Center would constitute an "extraordinary" circumstance exception, or the language of CCR §9792.1(c)(2) would be redundant. Routine services are not exempt under "extraordinary circumstances

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[6]Or, as provided by and limited under CCR§9792.1, a revised weight if a revised weight has been adopted by the administrative director.

related to the unusual nature of the services rendered." Nor does the mere fact that a facility is a trauma center, by itself, meet this requirement. Even in the facts here, the WCJ did not find there was sufficient evidence to meet this requirement in light of the health facility composite factor.

Defendant cites Government Code §11342.2; again the WCJ agrees in theory. However this would first require a determination that the regulation was in fact in conflict; it is not.

Defendant implies that the WCJ took a convenient way around the deleted language and found entitlement only on CCR §9792.1(c)(2), which contains language never a part of Labor Code §5307.1. While an interesting thought in retrospect, the WCJ cannot lay claim to such forethought or connivance. Rather, and as is apparent in both her decisions, she considered both "exceptions" independently, but found the facts persuasive only to the language of CCR §9792.1(c)(2).

However, Defense argument does point up that there was no language to delete in the Labor Code, thus Defendant's argument of legislative intent falls woefully short.

Lastly, Defendant, after thorough and exhaustive iteration of the respective Labor Code sections, contends that "it was the intent of the Legislature to eliminate the statutory provisions that governed the old fee schedule and to require a new and entirely different fee schedule." Had it done so, we would not be here. The point is that despite adding a whole new section and/or revising certain express exceptions to the new fee schedule as contained in the Regulations, the Legislature *did not* delete the sections, supra, exempting services dealing with extraordinary circumstances and/or life threatening or urgent injuries[7].

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[7] While old §5307.1(b), provided that nothing prohibited payment higher than the OMFS, nothing in the language mandated it either. The language is purely permissive. It also did not address the carve out for Level II Trauma Center.

It is not the WCJ who is trying to rewrite the law, but rather Defendant who is trying to make it conform to a presumed intention, the contrary of which is expressly retained.

The Board has addressed these precise issues in Guillermo Bayley vs YMCA of the East Bay and Travelers Insurance, ADJ2367528 (2011), and expressly held, page 2: "we find that Rule 9792(c) continues to apply to allow fees in excess of the OMFS in cases when there are extraordinary circumstances related to the unusual nature of the services rendered tan the amount of the fee claimed is reasonable." The Board pointed out that the OMFS applied to services ordinarily provided and did not address additional fees that may reasonably be claimed for extraordinary circumstances....[t]hus payment of the amount allowed by the OMFS may not fully satisfy an employer's duty to provide reasonable medical treatment under Labor Code §4600." The Board noted that upon remand, that Defendant be permitted to show that the amount paid, and hence the OMFS, was in fact reasonable. As pointed out, page 6, and as expressly delineated in the Labor Code, §5307.1(f), the values established by the OMFS *must adequately ensure a reasonable standard of services and care;* that even the adjustments only apply to services *ordinarily* provided for specific DRGs and *do not* address fees that my reasonably be claimed for extraordinary circumstances related to services rendered. This case expressly found that CCR §9792(c) expressly contemplated that there might be extraordinary circumstances that would render the OMFS less than reasonable. In that case, no consideration was given by the OMFS to the prolonged hospital stay required due to an infection[8]. This was again affirmed on Reconsideration three months later.

Bayley centered primarily under CCR §9792(c), but §97902.1(c) is equally applicable.

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[8] The case was sent back to the trial level for further consideration and development of the record and ultimately resolved with lien claimant accepting $15,500.00 as against its claim for (reduced) $61,171.86. So there is no legal resolution or real guideline afforded.

While Defendant does not challenge the WCJ's findings regarding CCR §§9792(c). Lien Claimant, however, not having filed a Petition on its own, appears to argue far beyond what is necessary for determination of the within case, as if to expand the limited holding herein. Since it is not germane to the Petition, it is not addressed.

Lien Claimant first argues the provisions of Labor Code §5307.1(f). Unfortunately, it did not provide sufficient information to show that the health facility composite factor did not adequately take this into consideration.

That said, and with some awareness of medical costs, it seems absurd that the services herein could have been provided for the pittance allowed by the fee schedule.

Lien Claimant in its argument implies that the care rendered was immediately life threatening and urgent *because* it required a Trauma Level I or II trauma facility. That is not necessarily the case or every case treated there would fall under the exemption. Lien Claimant contends that costs for treatment at a trauma center greatly exceeds that for an acute care facility. However, this is a factor taken into account under the OMFS, specifically CCR§9789.20(c), CCR §9789.20 to §9789.24. Lien Claimant is not entitled under the law to an increased fee *purely* because it is a trauma center. Treatment must also be for a life-threatening or urgent injury.

Nevertheless, the services rendered were for a life threatening and urgent injury....a fact that not even Defendant contests.

Lien Claimant next contends that it is entitled to its usual and customary fees, and cites, inter alia, Wrenetta Howard vs Pasadena Unified School District, (2009), another panel decision. But Lien Claimant mis-cites the case holding, which provided for *reasonable* fees, not usual and customary. Whether usual and/or customary or not, Lien Claimant is only entitled to fees that are reasonable, and must establish this. However, this issue has not yet been addressed, and the Opinion did not determine the amount of additional reimbursement, if any, due. In fact the matter was referred back

to the trial court for a determination of *reasonable* fees, and an affirmation of the WCJ's opinion that the lien claimant billing was insufficient to establish this.

Lien Claimant next contends that under Labor Code §§5307.1(a), (e)(1), and (f), that they are entitled to exemption because the services were not covered by a MediCare payment system and the Administrative Director has not enacted a *separate* fee schedule for trauma centers. However, the only evidence produced at trial was that there was a MEDICARE payment system in effect and that had Applicant been a MEDICARE patient, there is a MEDICARE payment for these services. This was included as a finding contained in the Opinion and in the Findings and not challenged here.

Lien Claimant contends that the only way the old statute would be consistent would be if an immediately life threatening or urgent injure were also one of extraordinary circumstances. Originally, the WCJ was of the opinion that these were two distinct criteria which might often overlap, but the fact that they were enunciated separately in separate sections, each providing for exemption, implied they are not synonymous.

However, after further review of the case law, and the discussions therein, this WCJ has also reconsidered her stance on whether the circumstances herein were extraordinary as required for Labor Code §9792(c). What is extraordinary is dependent upon the specific facts of a case. What is extraordinary for one facility, such as an acute care facility, may not be extraordinary for a trauma center, which is already receiving a boost under the OMFS. As noted in the opinion, had Lien Claimant provided the likely unsuccessful but extremely intense level of intervention to *salvage* his leg, this might have met the requisite criterion of extraordinary (see exhibit 1, page 3). This was not done. The thing that makes this case extraordinary is the very life threatening and urgent nature of the injury. However, if every life threatening and urgent injury were to be deemed extraordinary as it applied to Level II Trauma Centers, then CCR

§9792.1(c)(2) would be redundant except to provide a specific example. In retrospect, and consistent with the discussions in Bayley et al, and taken as a whole, it appears that CCR §9792.1(c)(2) provides an express, but not encompassing, example of what constitutes extraordinary circumstances under CCR §9792(c), an explicit subset such that when the criterion for CCR §9792.1(c)(2) is met, so are those for of §9792(c). By reflecting back in this fashion, CCR §9792.1(c)(2) otherwise missing. By reflecting back this would also be consistent so as to provide for reasonable payment.

Of final persuasive value herein, the WCJ was unable to find anything in the recently proposed regulations that deleted or modified CCR§§9792(c) or 9792.1(c)(2).

CONCLUSIONS:

In the within circumstances, Lien Claimant should not be bound by the OMFS and may be paid a fee in excess of the reasonable maximum fee as defined therein, consistent with CCR §9792(c).

RECOMMENDATION:

For the foregoing reasons, it is respectfully requested that the Opinion on Decision, Findings, Award, and Order, be AFFIRMED as written, and that the matter be returned to the trial level for resolution by the parties or to develop the record as to the determination of a reasonable fee for the services rendered, which may or may not be consistent with the OMFS.

DATE: 8 SEPTEMBER, 2014

Sharyn Lynne Sala
WORKERS' COMPENSATION
ADMINISTRATIVE LAW JUDGE

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Filed and Served personally and/or by mail on: September 8, 2014
On all parties on the
Official Address Record.

By: SANDRA WELLS