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8 **STATE OF CALIFORNIA**

9 **WORKERS' COMPENSATION APPEALS BOARD**

10 Yeimi Venegas )

11 Applicant, )

12 vs. )

13 Chuy and Sons Labor; )

14 State Compensation Insurance Fund. )

15 Defendant )

16 GIBRALTAR ELECTRO MEDICAL )

17 SERVICES )

18 Lien Claimant )

Case No.: OXN 0134803  
WCAB: Oxnard

**PETITION SEEKING ORDER TO  
SHOW CAUSE HEARING FOR  
CONTEMPT OF THE RULES OF  
THE WCAB**

19 Gibraltar Electro Medical Services, lien claimant herein, humbly petitions  
20 this Honorable Court to issue an Accusation, Citation, and Order to Show Cause  
21 (OSC) as to why the employer's insurer, in the above captioned matter should not  
22 held in contempt for failing and/or refusing to comply with the Rules of the  
23 Workers' Compensation Appeals Board (WCAB) and/or the pertinent California  
24 Code of Regulations (CCR) regarding the service of medical reports upon demand  
25 pursuant to CCR §10608(a).

1 **STATEMENT OF THE FACTS**

2 Applicant, Yeimi Venegas, while employed by defendant employer,  
3 sustained injury arising out of and in the course of employment. The Applicant  
4 filed a claim for benefits, (DWC-1) as well as an Application for Adjudication of  
5 Claim (DWC WCAB form 1) triggering the jurisdiction of the Workers'  
6 Compensation Appeals Board (WCAB).

7 The defendant employer's workers' compensation insurance carrier is State  
8 Compensation Insurance Fund.

9 The workers' compensation insurance carrier, is represented by State  
10 Compensation Insurance Fund (hereafter SCIF).

11 Lien claimant, Gibraltar Electro Medical Services, (hereafter GEMS), at the  
12 request of the treating physician, provided treatment to the above indicated  
13 applicant. Lien claimant demanded copies of all medical reports, pursuant to CCR  
14 §10608(a) from the insurer on 1/16/2004, 4/6/2004, 7/13/2004, 10/4/2004,  
15 12/29/2004, and 4/5/2005. The insurer, SCIF, failed and/or refused to comply with  
16 these demands.

17 On 8/15/2005, lien claimant filed a DWC Form 6 (Green Lien). The lien  
18 was served on SCIF on 4/27/2006, along with correspondence demanding service  
19 of all medical reports in possession of the insurer, SCIF.

20 This Green Lien, along with correspondence demanding service of copies of  
21 all medical reports relating to the claim in the possession of insurer, was addressed  
22 to and served on both the insurer, as well as counsel for the insurer on 4/27/2006.

23 The insurer, as well as their counsel, failed and/or refused to serve GEMS  
24 any medical reports in response to these demands until 3/29/2007.

25 At that time, only some medical reports were served, not all medical reports.

1 In addition, the SCIF employee who did partially serve GEMS with some medical  
2 reports filled out the Proof of Service indicating the package containing the  
3 medical reports were sent from Pinedale, California. The postage cancellation  
4 demonstrates the package was actually mailed from Oxnard, California.

### 5 **JURISDICTION**

6 An Administrative Law Workers' Compensation Judge has been vested with  
7 the authority to conduct proceedings to determine if a party has committed direct,  
8 or hybrid, contempt.

9 The appeals board may, in accordance with rules of practice and  
10 procedure which it shall adopt and upon the agreement of the parties,  
11 on the application of either, or of its own motion, and with or without  
12 notice, direct and order a workers' compensation judge:

13 “(c) To issue writs or summons, warrants of attachment, warrants of  
14 commitment, and all necessary process in proceedings *for direct and*  
15 *hybrid contempt* in a like manner and to the same extent as courts of  
16 record. For the purposes of this section, "hybrid contempt" means a  
17 charge of contempt which arises from events occurring in the  
18 immediate presence of the workers' compensation judge for reasons  
19 which occur outside the presence of the workers' compensation judge.  
20 Labor Code §5309(c)(emphasis added)

21 A workers' compensation judge or a deputy commissioner may issue  
22 writs or summons, warrants of attachment, warrants of commitment  
23 and all necessary process in proceedings for *direct and hybrid*  
24 *contempt* in a like manner and to the same extent as courts of record.  
25 CCR §10348 (emphasis added)

### 26 **MEMORANDUM OF POINTS AND AUTHORITIES**

27 Initially, it should be noted that the California Constitution specifically has  
28 vested the legislature with the power to create and enforce a complete system of  
29 workers' compensation and “that the administration of such legislation shall  
30 accomplish substantial justice in all cases *expeditiously, inexpensively, and without*  
31 *incumbrance of any character*, all of which matters are expressly declared to be the

1 social policy of this State...” See, *California Constitution, Article XIV, Labor*  
2 *Relations, Section 4, Workers’ Compensation.*) (Italics added.)

3 A “Lien claimant’ is “any person claiming payment under the provisions of  
4 Labor Code §4903 or Labor Code §4903.1” WCAB Rules of Practice and  
5 Procedure, Article 1, §10301(j).

6 On January 1, 2003, WCAB Rules of Practice and Procedure, Article 8,  
7 §10608 was amended and subsection (a) was added. CCR §10608(a) states,

8 After the filing of an Application for Adjudication, if a party is  
9 requested by another party or lien claimant to serve copies of  
10 physicians’ reports relating to the claim, the party receiving the  
11 request **shall** serve copies of the reports on the requesting party or  
12 lien claimant within six (6) days of the request; the party receiving the  
13 request **shall** serve a copy of any subsequently-received physicians’  
14 report within six (6) days of receipt of the report.  
15 (**bold** emphasis added)

16 Labor Code (LC) §15, which addresses the definitions of certain words,  
17 clearly instructs the regulated public that, ““Shall” is mandatory and “may” is  
18 permissive.”

19 In addition, WCAB Rules of Practice and Procedure, Article 2, §10341  
20 states: “ En banc decisions of the Appeals Board are binding on panels of the  
21 Appeals Board and workers’ compensation judges as legal precedent under the  
22 principle of *stare decisis*.”

23 In the case of *In Re Alleged Contempt of State Compensation Insurance*  
24 *Fund v. W.C.A.B. Misc. No. 9, (1975) 40 CCC 674*, an en banc decision of the  
25 WCAB, the court determined that failure of State Compensation Insurance Fund  
(SCIF) to serve medical reports, pursuant to CCR §10608, was contemptuous in  
that “there is disregard by State Compensation Insurance Fund of the Workmen’s  
Compensation Appeals Board’s rules of practice and procedure.” *Ibid* at 675.

1 SCIF claimed that the delay in service of medical reports “was not willful  
2 because the delay was occasioned by the absence of key personnel, excessive work  
3 load and ‘inadvertent clerical delay inherent in operating a large office.’” *Ibid* at  
4 676.

5 In addressing the explanation offered by SCIF the en banc panel explained,  
6 **“The Board cannot agree that this explanation makes the noncompliance with  
7 the Board’s rules any less willful. The term willful as pertaining to contempt  
8 is not limited to deliberate disregard of the Board’s rules, but includes “an  
9 indifferent disregard of the duty to obey” them. (In re Karpf, [(1970)] 10 Cal.  
10 App. 3d 355, 372, 88 Cal. Rptr. 895)” (bold added)(*Ibid* at 677.**

11 In the present case, the insurer, and/or their counsel, (respondents) failed  
12 and/or willfully refused to comply with CCR §10608(a). Lien claimant has made  
13 multiple requests for medical reports, and the respondents have failed/refused to  
14 timely serve all medical reports to which lien claimant was lawfully entitled. This  
15 is a violation of the WCAB Rules of Practice and Procedure.

16 In addition, when service of the medical reports was effectuated by  
17 respondent SCIF, there was only partial service of the medical reports. The Proof  
18 of Service issued by the SCIF employee, made under penalty of perjury, states that  
19 respondent SCIF served the “complete medical file for Yemi Benegas” on GEMS.  
20 Further, the Proof of Service signed by the SCIF employee under penalty of  
21 perjury indicates the package containing the “complete medical file for Yemi  
22 Benegas” furnished lien claimant GEMS on 3/29/2007 was mailed from Pinedale,  
23 California. The postage cancellation on this envelope clearly delineates this  
24 package was mailed from Oxnard, California, zip code 93030.

1 **CONCLUSION**

2 Lien claimant petitions this Court to hold an Order to Show Cause hearing to  
3 determine why the offending insurer, or their counsel, should not be held in  
4 contempt of the WCAB Rules of Practice and Procedure for the failure to timely  
5 serve lien claimant medical reports relating to the claim pursuant to CCR  
6 §10608(a).

7  
8  
9 Dated April 28, 2008

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1 **AFFIDAVIT OF YORK MCGAVIN**

- 2 1. I, York McGavin, am the President and sole owner of Gibraltar Electro  
3 Medical Services.
- 4 2. As the President of Gibraltar Electro Medical Services, a lien claimant in  
5 *Yeimi Venegas v. Chuy and Sons Labor, State Compensation Insurance*  
6 *Fund*, OXN 0134803, pursuant to California Code of Regulations  
7 §10608(a), I made a request upon the party named as the accused  
8 respondent, State Compensation Insurance Fund, to serve Gibraltar  
9 Electro Medical Services with copies of all medical reports relating to the  
10 claim on 1/16/2004, 4/6/2004, 7/13/2004, 10/4/2004, 12/29/2004,  
11 4/5/2005.
- 12 3. The party, named as the accused, State Compensation Insurance Fund,  
13 failed or refused to timely comply with the requests to be served all  
14 medical report relating to the claim made by Gibraltar Electro Medical  
15 Services.

16 **I swear under penalty of perjury that the above statements contained in**  
17 **this affidavit are true and correct.**

18 Dated April 28, 2008

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21 \_\_\_\_\_  
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