RULING T-081/04

EMPLOYER- Assumption of liability for debt in health payments.

HEALTH-PROMOTING ENTITY-Attention to the user when life is in danger even though employer is on payment default/HEALTH-PROMOTING ENTITY-Restitution against the employer or FOSYGA.

In certain cases the entity may not remove itself from the duty of attending to a person that suffers a downturn in her/his health conditions, even though the employer is in default of transferring the payments corresponding to the employee's social security. The aforementioned, considering the principle of continuity of the service's rendering, of solidarity and, in general, of the objectives that have been set forth by the Constitution and the Law. Such situation occurs when there are certain events in which the affiliate or her/his beneficiaries face a situation that undermines or places her/his physical or psychological integrity at risk, in such a way that the right to life worthy of human dignity is violated. This does not mean, however, that the Health-Promoting Entity must assume the costs generated by the rendering of the services, because with the intention of preserving the system's viability, it is clear that they may claim restitution against the employer for the cost incurred, by means of the corresponding recovery actions, or against the Solidarity and Guarantee Fund (FOSYGA), according to each case.

INAPLICABILITY OF MANDATORY HEALTH PLAN REGULATIONS- Cases in which one proceeds for exclusion of high cost medication and treatment.

PSYCHOLOGICAL DIMINISHMENT- Situation of manifest weakness. / **HEALTH-PROMOTING ENTITY-** Examination of magnetic resonance with contrast dye.

Reiteration of Jurisprudence

Reference: File T-796297
Constitutional Action filed by Rodrigo Alberto Valencia Echeverri against Cafesalud E.P.S.
Magistrate:
Dr. CLARA INES VARGAS HERNANDEZ

Bogotá, D.C., February four (4), two thousand and four (2004)

The Ninth Revision Chamber of the Constitutional Court, in exercise of it constitutional and legal competence, in particular those contained on articles 86 and 241, numeral 9, of the Constitution and Decree 2591 of 1991, has issued the following

RULING

Within the process of revision of the judgment issued by the Ninth Civil Municipal Judge of Medellin, in the proceedings of Constitutional Action initiated by Rodrigo Alberto Valencia Echeverri against Cafesalud EPS.

I. BACKGROUND

1. Facts

Mr. Rodrigo Alberto Valencia Echeverri brought Constitutional Action against Cafesalud EPS, under the pretense of having his fundamental rights to health and social security violated. The plaintiff affirms that the cited Health-Promoting Entity (EPS) is not administering a medicine called "contrast dye", which is required for practicing an exam of "brain magnetic resonance", which was approved by the defendant on May 6, 2003, by means of the corresponding service order.

To sustain his request for Constitutional protection, the plaintiff has set forth the following factual basis:

The plaintiff points that the exam of magnetic resonance was ordered by a neurologist working for the defendant, because it was considered necessary within the treatment he requires as a consequence of a cranial fracture he suffered in a transit accident. He adds that he is affiliated to the Social Security System through Cafesalud EPS since February 9, 2001, and for this reasons considers that he has a right to have his health service guaranteed.

He claims, in consequence, that the defendant be ordered to administer the medicine "contrast dye", which is indispensable for the performance of the magnetic resonance of his brain.

2. Defendant's Intervention

The manager for Cafesalud EPS in Medellin, by means of official letter of June 26, 2003, opposed the claims of the plaintiff and informed the court that, in effect, Mr. Rodrigo Alberto Valencia Echeverri is affiliated to Cafesalud EPS since February 17, 2001, as a dependent employee of Maria del Carmen Arroyave Jaramillo, who is in default of the payments to the General System of Health and Social Security.

In consequence, the EPS points that it may not authorize the required services, for in virtue of the applicable law (article 57 of Decree 806 of 1998) they must be rendered directly by the employer who has failed in its duties. It adds that once the employer has paid all the pending payments, the EPS will resume the rendering of the services to the plaintiff, but otherwise will proceed with the cancellation of the affiliation process as stated on article 11 of Decree 1703 of 2002.

On the other hand, the defendant points out that, in relation to the requested service, named "gadolinium contrast dye" (sic), "it cannot be authorized by Cafesalud EPS with charge to the Mandatory Health Plan (POS), for it is not found among the list of medicines and therapies elaborated by the Government and as such, in case the attention required is not part of the POS, it will be the State, for its omission, who will be the one responsible for rendering it, through the Health Ministry, Solidarity and Guarantee Fund (FOSYGA)", and because of this request the said entity should be brought into the action, for it is the State who must respond for the omissions and limitations imposed to the rendering of health services through the POS, and not private entities.

II. DECISION SUBJECT TO REVISION

In its judgment of July 4, 2003, the Ninth Civil Municipal Judge of Medellin denied the requested protection. It considered that, in order to access health services, the obligations set forth to employer and employee must be fulfilled because, if not, an EPS would be brought before the law without legal cause. In consequence, the court estimated that the person legally obligated to the rendering of the service claimed by the plaintiff was his employer, Maria del Carmen Arroyave Jaramillo, for even though article 24 of Law 100 of 1993 establishes the recovery actions regarding employers, a court may not order the rendering of a service without legal grounds.

III. EVIDENCE

The documents brought before the court are the following:

- Photocopy of the affiliation card for Mr. Rodrigo Alberto Valencia Echeverri (page 1)

- Photocopy of the identification of Mr. Rodrigo Alberto Valencia Echeverri (page 2)

- Service Order No. 4746024 dated May 6, 2003, issued by Cafesalud EPS, by means of which the magnetic resonance exam is ordered and "epilepsy of a non-specified degree" is diagnosed and, as observations, "do not charge co-payment or moderating fee, suffered during car accident in 1986, memory compromised". (page 3)

- Official letter of January 22, 2004, addressed to the Constitutional Court, by means of which Mr. Rodrigo Alberto Valencia Echeverri reiterates his arguments of the constitutional Action, adding that "the medicine- contrast dye" and the requested exam are necessary and urgent for my epilepsy treatment". Likewise, he indicates that to date, he has not been able to be examined, resulting in as a consequence that his physical condition worsens day by day, as well as his economic situation and his family's, since such an expensive treatment may not be afforded when taking into account that he has a daughter in his charge. He concludes by adding that his life is endangered (pages 49-50).

IV. CONSIDERATIONS AND GROUNDS.

1. Jurisdiction

This Court is competent, in light of what is disposed by articles 86 and 241 of the Constitution, as well as Decree 2591 of 1991, to revise the Constitutional Judgment in reference.

2. Legal Issue

We must determine if it corresponds to the EPS the assumption of the rendering of the health service for an employee, when the employer has omitted the transfer of the payments to the Contributory Regime of the General Social Security Health System. In addition, it must be

established if such a responsibility falls on the owing employer or on FOSYGA, taking into account that the medication, examination or procedure is excluded from the POS.

3. Default on the payment does not always exonerate the EPS from administering the medications, examinations or medical treatments required by the employee. Responsibility must be the employer's.

The Constitutional Court has pointed out in numerous opportunities[1] the importance of guaranteeing the viability, financial balance and effective realization of the principles of solidarity and universality of the Healthcare System. For this, it is fundamental the obligations of the employer regarding the timely payment of the amounts owed for his employee be fulfilled, for it is evident that the default in its payments results in Health-Providing entities being unable to render their service adequately.

There are also applicable laws that precisely contemplate the obligations of the employer in this regard and the consequences generated by their breach. Thus, Article 22 of Law 100 of 1993 established that "the employer will be responsible for the payment of his and the employee's quota. To this effect, it will deduce from the salary, at the moment of its payment, the amount of the employee's mandatory quota and that of the ones he/she voluntarily determines to the entity of the employee's choosing, together with the amounts corresponding to the employer's quota, within the terms established by Government. The employer will respond for the entirety of the payment, even in the events where the deduction from the employee has not taken place".

In the same manner, article 161 of Law 100 of 1993 contemplates the duties of the employers, indicating that they must "2. In consonance with articles 22 of this law, contribute to the financing of the General Healthcare System, by means of actions such as the following: a) timely paying their contributions, b) deducting from the salary the contributions corresponding to the worker; C) timely transferring the contributions to the EPS, according to the regulations issued by the government", under penalty of being liable for the sanctions prescribed on articles 22 (assumption of the total contribution even if it was not discounted) and 23 (default sanction)[2].

Additionally, on a paragraph on that same article it is established that "damages for negligence in the work information, including the sub-declaration of income, are the responsibility of the employer. The attention to labor accidents, risks and events for general illness, maternity and ATEP will be covered in their entirety by the employer in case the employee has not been subscribed or does not timely pay the contributions to the corresponding entity".

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[1] For example, on Ruling T-015/02, Magistrate Alfredo Beltrán Sierra and Ruling T-945/02 Magistrate Clara Inés Vargas Hernández.

[2] Article 23 of Law 100, 1993 sets forth: "Default Sanction. Contributions not paid during the term established for this effect, will generate a default interest to the employer, equivalent to the one established for the income tax and complements. These interests must be credited to the corresponding Distributing Fundo r to the individual accounts for pensional savings of each affiliate, according to each case. Those in charge of authorizing expenditure in public entities that, without just cause, do not order the timely payment of the contributions, will incur in cause for misconduct, that must be punished with the corresponding disciplinary regime. In all public sector entities it will be mandatory to include in the budget all necessary provisions for the payment of the pensional contributions to Social Security, as a requisite for the filing, proceeding and studying of the corresponding authority".

On the other hand, article 57 of Decree 806 of 1998 establishes that when the employer has not paid the contributions, he must guarantee the rendering of the services to workers who require them, "without prejudice to the obligation to pay for backlogged payments and the sanctions set forth for this fact, as established on paragraph or Article 210[3] and article 271 of Lay 100 of 1993[4]".

Likewise, the Constitutional Court's jurisprudence has set forth as basic postulate that the omission by an employer who does not timely pay its contributions to the system, since violating directly, among others, the fundamental rights to health, life, work and social security, causes the negation of the EPS's rendering of services required by users, constitutes an illegitimate conduct, leaving in the charge of the defaulted employer the responsibility of the service's rendering as consequence of his omission.

Nevertheless, the Court has also indicated that in certain cases the entity cannot refuse to attend to the person suffering a downturn in their health conditions, even if the employer is in arrears transferring the corresponding payments to the employee's social security. The aforementioned, considering the principle of continuity of the service's rendering, of solidarity and, in general, of the objectives that have been set forth by the Constitution and the Law. Such situation occurs when there are certain events in which the affiliate or her/his beneficiaries face a situation that undermines or places her/his physical or psychological integrity at risk, in such a way that the right to life worthy of human dignity is violated. Taking into account the responsibility of each one of the parties in the triangle formed by EPS, employer, and employee, it is not the latter who must endure the negligence of his employer.

This does not mean, however, that the Health-Promoting Entity must assume the costs generated by the rendering of the services, because with the intention of preserving the system's viability, it is clear that they may claim restitution against the employer for the cost incurred, by means of the corresponding recovery actions[5], or against the Solidarity and Guarantee Fund (FOSYGA), according to each case[6].

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[3] Article 210 of Lay 100, 1993, establishes: "Sanctions to the employer. The same sanctions contemplated on Articles 23 and 271 of this Law will b contemplated for employers who prevent or attempt in any way against the employee's right to freely and voluntarily choose the Health Providing Entity to which she/he wishes to join. The sanctions set forth for whoever delays the payment of contributions shall also apply.
Paragraph: No employer of the public or private sector will be exempt of the payment of its corresponding contribution to the General Healthcare and Social Security System.

[4] Article 271 of Lay 100, 1993. "Sanctions to the employer. The employer, and in general any person, civil or corporate, the prevents or in any way attempts against the employee's right to her/his affiliation and selection of entities of the Integral Social Security System will be liable in each case and per each affiliate, for a fine imposed by the authorities of the Labor and Social Security Ministry, or the Health Ministry, in each case, that may not be less than one monthly minimum wage nor exceed fifty. The amount of these fines will be destined to the Solidarity and Guarantees Fund of the General Healthcare and Social Security System, The respective affiliation will be rendered ineffective and may be done again in a free and spontaneous manner by the employee".

[5] Article 24 of Law 100, 1993 contemplates that "it is the administering offices of the different regimes' responsibility to carry out recovery actions originated by the breach of the employer's obligations, in accordance with the regulations issued by the National Government. For this effect, the discharge by means of which the administration determines the pending amount will have executive merit.

[6] Constitutional Court, Rulings T-1002 of 2000, T-484 of 2001 y T-945 of 2002. M.P. Clara Inés Vargas Hernández.

So it was stated on Ruling T-015 of 2002, by Magistrate Alfredo Beltrán Sierra:

"All in all, it cannot be concluded that the breach on the employer's behalf generates an absolute absence of responsibility for the EPS, for it is known, the attention to health services is a public service in charge of the State (Art. 49 of the constitution) and, for this, they cannot shield themselves in the default of the employer in order to refrain from rendering healthcare services (…).

Because of this, when the EPS denies the rendering of healthcare services for an omission on behalf of the employer, jurisprudence has come up with a double solution, responsibility of the employer and as such responsibility for the rendition of the medical service and the delivering of the medication; or, the employee, if the employer does not respond, may demand it from the EPS by reason of its public service; leaving the EPS able to recover from the employer or the Solidarity Fund."

Such criteria was set forth in ruling SU-562 of 1999, Magistrate Alejandro Martinez Caballero, as follows:

"in the Colombian case, the ineludible application of the principles is based on Article 2 of the constitution, that points out as one of the objectives of the state to "guarantee the effectiveness of the principles." Accordingly, the continuity principle in the health public service of dependent workers cannot be affected, not even when there is a default of more than six months in the payment of the contributions, because the norm that allows the suspension of the service to those who are in this situation is an organizational rule within the social security, contained in Law 100 of 1993, which cannot be extended to the "social security guarantee" established as a minimum fundamental principle in article 53 of the P.C., which, for the effects of suspended work contracts, has an additional argument in law 222 of 1995.

(…)

As one can appreciate, the first subparagraph provides for the continuity in the provision of public services in cases where the employer is in agreement and in default with the providing entity. All the more reason the worker to whom the social security services are provided to, based on a current work relationship, must be covered by the continuity principle…
(…)

There is therefore a shared responsibility between the EPS and the employer, which is why it is viable that in certain cases, according to the particularities of certain situations, the Constitutional Action Judge orders one or the other, the provision of the health services that were necessary to protect a fundamental right…

Now, the jurisprudence is unanimous regarding the impossibility that the liability for the nonpayment of the employer's contribution falls on the worker, for this would "imply the transfer to the worker, active or retired, without a legal reason, of the prejudicial consequences of his employer's negligence or irresponsibility".[7] Accordingly, if the employer does not timely transfer the health employer-employee's contributions that were effectively deduced from the

[7] Constitutional Court, Ruling T-606 of 1996, M.P. Eduardo Cifuentes Muñoz

worker's salary, the legal consequences of said breach cannot affect the worker's right to health[8], even more when "the employer's omission is incompatible with the trust granted by the employee", therefore the good faith principle (P.C., art. 83), would be in this way broken"[9]…

And more recently, in constitutional ruling C-800/03 which was later reiterated in ruling C-1059/03, it was said:

> *"In conclusion, the constitutional jurisprudence based on the continuity principle of the public health service and in the distinction that there is between the relationship of the EPS with the employer and the relationship of the EPS with the employee, has guaranteed that a person continues to receive a specific medical service (treatment or medicine) that is necessary to protect mainly his right to life and to integrity. The effective protection of these fundamental rights leads the Constitutional Action Judge to forbid that, for contractual differences, the entity is allowed to default on the social responsibility that it has with the community in general, and with its affiliates and beneficiaries in particular.*
>
> *Based on the continuity principle of the public service, any type of effect on a person's right to access the health services must be a product of a due process. Accordingly, once the EPS declares the employer in default, it should proceed to notify the affiliates of this occurrence so that they know of the situation and the legal consequences that it may have, so that they can collaborate with the Health System organs in charge of correcting this irregularity (…)" .*

In this order, one must conclude that even though it is true that the E.P.S., in principle, has the ability to suspending the provision of the service when there is a breach of the employer's obligations with the system, it is also evident that this cannot be done in an abrupt manner without considering the concrete health conditions of its affiliates.

4. Medicines excluded from the Mandatory Health Plan required for the practice of medical exams in the treatment of diseases that put the affiliate in conditions of evident weakness.

This Corporation has reiterated that prima facie, the E.P.S. do not have the legal obligation of providing treatments, medicines or medical procedures that are excluded from the Mandatory Health Plan (P.O.S.). However the jurisprudence, considering the concrete conditions of each case and with the aim of protecting the rights to health and social security in connection with the right to life in dignified conditions, has defined the rules based on which it is appropriate that these entities provide the required health services, resorting to and based on the Superior[10] article 4, the direct application of the Constitution, reducing the said criteria to the following:

> *"That the lack of medicine or the procedure excluded from the legal norm or regulation threatens the fundamental rights to life or personal integrity of the interested person.*
>
> *"That the medicine or procedure cannot be substituted by one of those included in the Mandatory Health Plan or that, being able to be substituted, does not obtain the same level*

[8] Ruling T-606 of 1996, T-072 of 1997, T-171 of 1997, T-299 of 1997, T-202 of 1997, T-398 of 1997.
[9] Ruling T-323 of 1996. M.P. Eduardo Cifuentes Muñoz. It was reiterated in ruling T-299 de 1997.
[10] *Translator's note: When bringing up a "Superior" Article, it refers to an article of the Constitution.*

of effectiveness as the one excluded from the Plan, as long as that effectiveness level is necessary to protect the vital minimum of the patient.

"That the patient cannot truly assume the cost of the required medicine or the treatment, and that he cannot have access to same by any other way or system.

"That the medicine or treatment has been prescribed by a doctor who belongs to the E.P.S. with which plaintiff is affiliated.[11]*"*

If all of the abovementioned conditions are present, the corresponding E.P.S. shall immediately provide the required medicine or treatment, and without prejudice of being able to claim the refund of the costs from the Solidarity and Guarantee Fund – FOSYGA.

Additionally, it is important to reiterate the need of protecting those people who, due to their physical or mental condition, are diminished and thus submerged in a manifest weak condition, a condition which was expressly protected by our Fundamental Letter[12] in its article 11[13]. Accordingly, when a person is sensorially or psychologically disabled and the provision of the medicine, treatment or medical procedure is what guarantees reaching or maintaining an acceptable and dignified living standard, it is evident that the E.P.S. cannot refuse to provide it under any circumstance.

Therefore, we must analyze the concrete situation with the aim of determining who must assume in an immediate manner the protection, due to the threat against Mr. Rodrigo Alberto Valencia Echeverri's right to health, given the lack of the provision of the required medical attention.

5. **Concrete case**

The subject case raises the need to protect the right to health, which is fundamental due to its connection to the right to a dignified life, of a person who requires the performance of a medical exam "magnetic resonance imaging" with the contrast dye "gadolinium", required as a diagnostic exam for the treatment of the disease suffered by the plaintiff as a consequence of a cranial fracture caused by a traffic accident suffered in 1986.

The defendant entity refuses to perform this exam arguing two reasons: i) on one side, it considers that the provision is not enforceable because there an employer's default on the payment of the employee-employer health maintenance fees, ii) although it is willing to perform the magnetic resonance if the employer pays the pending contributions, the medicine "contrast dye" required for the performance of the resonance, is not included in the POS.

In this order of ideas, the Chamber shall determine if the plaintiff has the right to demand the provision of the required medicine for the performance of the brain's magnetic resonance from

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[11] Ruling T-300/01, T-593/03 M.P. Clara Inés Vargas Hernández.

[12] *Translator's note: Fundamental Letter refers to the Political Constitution.*

[13] Let's remember that article 47 of the Political Constitution says: "The State shall provide a prevision, rehabilitation and social integration policy for the physical, sensorial and psychological disabled, to whom the special attention they require shall be provided".

the defendant E.P.S., even if his employer is in default of paying the corresponding health maintenance fees and the required medicine is excluded from the POS.

For this, one shall first determine that even though the defendant E.P.S., states that there is an employer's default incurred by the plaintiff's employer, in this case it is observed that the performance of the exam, and therefore the medicine "contract dye" required by plaintiff, is indispensable for the continuation of the treatment of the disease that he suffers as a consequence of a cranioencephalic trauma suffered in 1986. It is possible to reach this conclusion after analyzing the plaintiff's clinical history in which the treating doctor states that he currently has effects consisting of absence crisis, work insecurities, difficulties when greeting and his temporal memory is compromised (page 4), circumstances which place him in a manifestly weak condition, clearly covered by article 47 of the Political Constitution.

Accordingly, it shall be Cafesalud E.P.S., who must carry on the treatment required by the plaintiff, particularly the magnetic resonance exam with gadolinium contrast dye ordered by the treating doctor, given that this is necessary for the protection of the right to health and social security, in connection to the right to life in dignified conditions. However, Cafesalud E.P.S. is legally enabled to sue the plaintiff's employer, in order to obtain payment of the employer-employee contributions, which are to date unpaid.

Looking at this case and applying the criteria that the constitutional jurisprudence has determined for the non-application of the regulations that contain the POS rules, it can be said that Mr. Valencia Echeverry complies with the required conditions so that the demanded medicine for the performance of the magnetic resonance exam is provided by the defendant E.P.S., with a charge to the Solidarity and Guarantee Fund – FOSYGA.

Let us consider the first requirement, this is, that due to the lack of the medicine or the procedure excluded by the legal norm or regulation, the fundamental rights to life and personal integrity of the plaintiff are threatened. As it was said before, in this event it is evident that the right to life in dignified conditions is gravely violated, and considering that he suffers from neurological problems due to the cranioencephalic trauma suffered years ago, it is crucial to perform the required exam in order to determine the treatment which must be followed. Consequently, provision of the medicine called "contrast dye" is indispensable for its performance.

Regarding the second requirement, related to the impossibility of substituting the medicine for another one which is included in the POS and which has the same effectiveness, the defendant entity did not point out in any manner that the "contrast dye" can be replaced for another included in the POS, with the same effectiveness as the one ordered by the treating doctor.

As for the third requirement regarding the lack of economic capacity to assume the costs of the required medicine, one can see in the dossier that there is an unchallenged statement of the plaintiff in which he states his impossibility of performing the exam. This statement was not controverted by the defendant entity, and it is covered by the good faith principle, which deserves full credibility.

Lastly, regarding the requirement that indicates that the medicine or treatment has been prescribed by a doctor who is part of the E.P.S., to which the plaintiff is affiliated, the Chamber could verify that in pages 5 and 6 of the Constitutional Action dossier there is a doctor's

prescription, which was supported by the corresponding service order (page 3) issued by Cafesalud E.P.S., in which the brain's magnetic resonance is authorized, but not the medicine "contract dye gadolinium".

In view of the above, and in accordance with the principles of constitutional supremacy and direct effectiveness, and finding that this case complies with all the requirements needed for the Political Constitution applying in a direct manner with respect to the regulation that excludes the medicine "contract dye gadolinium" from the POS, the Revision Chamber will order Cafesalud E.P.S., within the next forty eight hours counted as of the notification of this ruling, to provide the contrast dye gadolinium in order to perform the medical exam magnetic nuclear resonance that is required by the plaintiff for him to able to continue with his medical treatment, informing said health promoting entity that it has the possibility of requesting the refund of the corresponding costs from the Solidarity and Guarantee Fund – FOSYGA.

The health providing entity is informed that it also has the possibility of suing the employer María del Carmen Arroyave Jaramillo, for the total of the employer's contributions and the retained contributions from the plaintiff.

V. DECISION

For all the foregoing reasons, the Ninth Revision Chamber of the Constitutional Court, administering justice in the name of the people and mandated by the Constitution,

RESOLVES

First. REVOKE the ruling issued by Judge Ninth Civil Municipal of Medellin. Instead, **GRANT** the protection requested by Rodrigo Alberto Valencia Echeverri regarding his rights to health and social security in connection to the right of a dignified life.

Second. ORDER the E.P.S. CAFESALUD, within the forty eight (48) hours counted as of the notification of this ruling, to provide the contrast dye gadolinium and conduct the medical exam brain's magnetic nuclear resonance that is required by Mr. Rodrigo Alberto Valencia Echeverri in order to continue with his medical treatment, without prejudice of being able to claim the refund of the costs from the Solidarity and Guarantee Fund – FOSYGA, with the objective of recouping the costs of all concepts derived of the medical treatment and the medicine that is required by the plaintiff.

Third. By General Secretary, perform the communications set forth in article 36 of Decree 2591 of 1991, for the affects contained therein.

Notify, communicate, publish in the Gazette of the Constitutional Court and enforce.

CLARA INES VARGAS HERNAQNDEZ [SIC]
Presiding Judge

JAIME ARAUJO RENTERIA

Judge

ALFREDO BELTRAN SIERRA
Judge

IVAN HUMBERTO ESCRUCERIA MAYOLO
General Secretary (e)