

ORIGINAL

In the  
Supreme Court of Ohio

BUILDERS FIRSTSOURCE OHIO  
VALLEY, LLC,

Appellant,

v.

JOSEPH STARKEY, et al.,

Appellees.

Case No. 2010-0924

On Appeal from the Hamilton  
County Court of Appeals,  
First Appellate District

Court of Appeals  
Case No. C-081279

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MERIT BRIEF OF APPELLEE MARSHA RYAN,  
ADMINISTRATOR, BUREAU OF WORKERS' COMPENSATION

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## INTRODUCTION

This case asks whether a workers' compensation claimant, in defending on appeal his right to participate in the system and receive benefits for a certain medical claim, should be restricted to arguing only the precise theory of causation that he argued in the administrative process, or whether he may argue any theory that supports the same claim for the same medical condition. The Court should hold that claimants may argue any available theory, because the only limit on the scope of review is that the claimant may not raise new medical claims.

This issue arises because of the unique, hybrid nature of right-to-participate appeals under R.C. 4123.512. Such appeals are indeed *appeals* of administrative orders, so only claims that were presented administratively can proceed to judicial review. But such appeals are also new civil actions with de novo review, allowing for the introduction of any type of new evidence—and the allowance for new testimony and new documentation of a condition must logically include new factual theories of causation of the condition or claim at issue.

*Ward v. Kroger* illustrates the “appeal” side of this hybrid nature: The Court held that a claimant may not add new or distinct medical conditions when moving from the administrative process to judicial review under R.C. 4123.512. 106 Ohio St. 3d 35, 2005-Ohio-3560 at ¶ 17. That is, if a claimant submits an administrative claim for, say, an injured arm, he may not, on judicial review, add a new claim for an injured leg, or even for a medically distinct injury to his arm. Allowing entirely new medical claims to be raised for the first time in court would bypass and undermine the entire administrative scheme. See *id.* at ¶ 9.

This case demonstrates the “de novo” aspect of this hybrid nature: Claimant Joseph Starkey does not seek to introduce a new condition on appeal, but seeks only to argue that his condition, if not directly caused by his work injury, was instead a pre-existing condition that was “aggravated” by his work injury. Starkey’s employer, Builders FirstSource Ohio Valley LLC,

insists that Starkey may not argue an “aggravation” theory on appeal after arguing “direct causation” at the administrative stage. In other words, Builders asks the Court to extend *Ward*, limiting the scope of appeal not just to the same resulting medical condition, but to the precise causative theory developed administratively. The Court should reject Builders’ request and allow Starkey to argue any theory that supports the same medical claim.

The statutory scheme, *Ward*, and the de novo nature of these appeals all support allowing claimants to argue any theory of causation, regardless of what was argued at the administrative stage. The statutes all center on a “claim,” so *Ward* rightly noted that allowing different claims to be added on appeal would undermine the statutory scheme. But theories of causation have developed as a matter of case law, not statute, and a “claim” that is *justified* by varying theories is still the same *claim*. Indeed, *Ward* recognized this distinction when it expressly reserved the question in this case. *Id.* at ¶ 15, n.1. Meanwhile, the thrust of the remaining analysis in *Ward* unmistakably favors Starkey’s position. Specifically, *Ward* was concerned about ensuring that the relevant *agencies*, the Bureau of Workers’ Compensation and the Industrial Commission, provide the first review of a claim. In that administrative review, the Bureau and the Commission may freely consider *all* theories of causation for that claim; they are not limited by the claimant’s framing. More important, de novo review allows for new evidence of any type, and a new argument or theory logically accompanies new evidence for the same claim.

Finally, a rule barring different theories of causation at the trial level would actually undermine the administrative process. No one disputes that claimants may file a series of separate claims, for different conditions, arising from the same injury. If different theories count as different claims, then, claimants might re-file separately for each theory, but for the same

medical condition, leading to redundant, piecemeal litigation. Or, in the alternative, claimants could consume resources arguing multiple theories for each claim, merely to preserve them.

For these and other reasons below, the Bureau urges the Court to hold that a claimant may assert a different theory of causation in the first instance on appeal under R.C. 4123.512, as long as the new theory supports a claim for an injury or condition that was raised below.

### STATEMENT OF THE CASE AND FACTS

**A. Starkey was injured on the job, and his claim for degenerative osteoarthritis of the left hip was allowed.**

Starkey was employed with Builders FirstSource Ohio Valley LLC, when, on September 11, 2003, he injured his hip. *Starkey v. Builders FirstSource Ohio Valley, L.L.C.* (1st App. Dist.), 2010-Ohio-3855 (“App. Op”), ¶ 2; see Transcript of Proceedings (“Tr.”), Appellate Docket item 6, at 9, lines (“L.”) 1-24. Starkey injured his left hip while installing a window, and had had no prior complaint or problem with that hip. Tr. at 11, L. 1-15. He sought immediate medical attention at the emergency room, but his problems did not go away. Tr. at 12, L. 1-11. Eventually, Starkey sought treatment with an orthopedic surgeon. Tr. at 12, L. 20-25. Various forms of care, including arthroscopic surgery, were unsuccessful, and eventually Starkey underwent a total hip replacement. Tr. at 15, L. 6-8.

In addition to several earlier allowed conditions, Starkey submitted a claim to the Bureau for the additional condition of degenerative osteoarthritis of the left hip. See Commission Orders, attached to Defendant’s Trial Brief, Trial Docket (“TD”) item 17. The Commission allowed this claim. *Id.*

**B. On judicial review, Starkey argued an “aggravation” theory along with “direct injury”; the trial court barred that theory, but the appeals court allowed it.**

Builders appealed the allowance under R.C. 4123.512 to the Hamilton County Court of Common Pleas, and the court held a bench trial on September 30, 2008. See TD items 17-18.

Starkey's doctor, John Gallagher, M.D., testified at trial that the various tests he had performed, including an MRI, showed that Starkey had osteoarthritis in the left hip. Gallagher Deposition Transcript, TD 15, at 9, L. 1-25; 10, L. 1-19. Gallagher agreed that the osteoarthritis pre-dated the injury. *Id.* at 13, L. 23-25; 14 at L. 1-3. Dr. Gallagher opined that Starkey's pre-existing osteoarthritis was aggravated as a result of the injury. *Id.* at 25, L. 21-25; 26, L. 1-9.

The trial court entered judgment for Builders, finding that Starkey could not participate in the workers' compensation system for aggravation of osteoarthritis in the left hip because he had not specifically argued an aggravation theory in the administrative proceedings. See Com. Pl. Op. at 2-3, Builders' Appx. C.

The appeals court reversed, holding that Starkey was not limited to a "direct causation" theory and noting that the claim remained the same. The court explained that the administrative order being reviewed had allowed the condition—osteoarthritis of the left hip—with no mention of causation. App. Op. at ¶ 29.

Builders appealed to this Court, which accepted review.

## ARGUMENT

### **Administrator's Proposition of Law:**

*A workers' compensation claim for an identified medical condition encompasses both direct causation and aggravation as theories of causation of that condition, and therefore evidence for "aggravation" of an allowed condition submitted on appeal is not a separate claim for purposes of R.C. 4123.512 or res judicata.*

This case arises because of the unique, hybrid nature of "right-to-participate" appeals under R.C. 4123.512, as such appeals are limited by the scope of the administrative claim below, but such appeals are subject to a de novo review that allows for new evidence. See, e.g., *Robinson v. B.O.C. Group* (1998), 81 Ohio St. 3d 361, 368 (explaining that "[a]lthough labeled an appeal," it "is not a traditional error proceeding," as it involves "a full and complete de novo determination

of both facts and law” without deference to administrative findings). As detailed below, the appellate aspect requires a claimant to present a “claim” to the agencies before that claim may be presented in court, but the de novo nature allows for any new theory, along with new evidence, to be presented in support of that claim. Moreover, a rule requiring “administrative exhaustion of each theory” would undermine the administrative process.

**A. The statutory scheme, *Ward v. Kroger*, and the de novo review standard all allow a claimant to argue any theory of causation on appeal, as long the theory relates to the same medical condition that was raised administratively.**

The statute, *Ward*, and the de novo standard of review all support Starkey and the Bureau here, and all three bases for decision are intertwined rather than fully separate points. *Ward* relied, properly, on the statutory scheme, and it relied upon the importance of the appellate nature of review of a “claim,” so a contrasting consideration of the de novo nature of review here shows why different *theories* fall on the other side of the line from different *claims*. In *Ward*, the Court held that a workers’ compensation claimant may not amend a complaint in an appeal under R.C. 4123.512 to add new or distinct *conditions* on appeal. *Ward*, 2005-Ohio-3560, ¶ 17. Builders argues that *Ward*, by barring a new claim on appeal, also supports its view that Starkey may not argue a new theory of causation in his R.C. 4123.512 appeal. But Builders is wrong. *Ward*’s reasoning shows why a new causative theory, in contrast to a new medical claim, may be raised for the “first time” upon judicial review in an appeal under R.C. 4123.512.

First, the workers’ compensation statutes center on a “claim” as the central organizing unit of the entire administrative scheme, see *Ward*, 2005-Ohio-3560, ¶¶ 11-17, but the statutes do not require claimants to argue any particular theory of causation. The key statute says that a claimant, if he seeks to participate in the workers’ compensation system, must have been injured in the course of, and arising out of, his employment. R.C. 4123.01(C). The statute says nothing

that would require a claimant to use any specific “theory” to show the causal link between the work-related event and the injury.

Instead, theories of causation have developed over the years in caselaw, as this Court has explained how several types of theories of causation exist, any one of which can satisfy the statute. For example, the Court has explained how an injury may be caused by either direct causation or aggravation of a pre-existing condition. Direct causation has been defined as “a proximate causal connection between the injury and the subsequent” death or condition. *Fox v. Indus Comm’n* (1955), 162 Ohio St. 569. But a claim still exists when the injury did not cause a condition anew, but when the claimant suffers a work-related aggravation of a pre-existing condition. *Schell v. Globe Trucking, Inc.* (1990), 48 Ohio St. 3d 1. Originally, an aggravation-based claim did not have to show that the aggravation was of any particular magnitude to entitle the claimant to participate and receive benefits. *Id.* at 4. But the General Assembly superseded *Schell* in 2006 by enacting a requirement that a claimant show “substantial aggravation” of an existing condition before he may receive benefits. See R.C. 4123.01(C)(4). Although that standard is now codified, the basic idea of “aggravation” as a theory was not created by statute, as the Court has upheld the right to participate based on aggravation for over seventy years, long before any statutory mention of the term “aggravation.” *Indus. Comm’n v. Gotshall* (1937), 127 Ohio St. 295, 295 (holding “it was error for the trial court to refuse to give to the jury before argument the special requests to charge dealing with an aggravation of a preexisting condition”); see *Ackerman v. Indus. Comm’n* (1936), 131 Ohio St. 371 (holding that claims for acceleration of existing condition and consequent death require showing that condition existed before injury).

Indeed, the Court has recognized and labeled other theories of causation, all based on the basic idea of “injury” in the statute. For example, under the “flow-through” or “secondary

conditions” theories, if a claimant experiences a loss or impairment of bodily functions developing in a part of the body not specified in the original notice of injury, he may nevertheless be entitled to compensation if the loss or impairment was due to, or a residual of, the injury to one of the parts of the body originally specified. *Lewis v. Trimble* (1997), 79 Ohio St. 3d 231. And under the “acceleration” theory, if a claimant’s death from a pre-existing cause is accelerated by a substantial period of time as a direct and proximate result of the industrial accident, he is also entitled to apply for benefits. *Oswald v. Connor* (1985), 16 Ohio St. 3d 38.

Thus, the Revised Code has little to say about theories of causation—and nothing requiring claimants to label their theories—while different *claims*, by contrast, matter a great deal under the statutory scheme. As *Ward* explained, a “claim” is the core of the entire workers’ compensation scheme. *Ward*, 2005-Ohio-3560, ¶¶ 11-17. The “right to participat[e] is not a generic request,” and there “is no such thing as a claim for ‘an injury.’” *Id.* at ¶ 11. Instead, a claim is for a “specific injury or medical condition,” *id.*, so adding new conditions in the trial court would undermine that scheme. But since the statute does not require “theories” to be itemized the way “conditions” must be, a “theory” need not be presented first to the Bureau and the Commission.

Second, *Ward*’s reasoning supports allowing any theory of causation to be raised on appeal, because it distinguished between a claim on the one hand and theories of causation on the other. In particular, *Ward* identified, and reserved, the question here: whether a workers’ compensation claim for direct causation of a particular condition includes a claim for aggravation as a cause of the same condition for purposes of either R.C. 4123.512 or *res judicata*. *Id.* at ¶15, n. 1. The Court in *Ward* recognized that the “different claim” issue differs from the “different theory” issue, and one does not necessarily control the other.

The contrast between claims and theories is sharp. In *Ward*, the claimant applied administratively for two narrow conditions related to his knee—namely, a medial meniscus tear and chondromalacia. When the Commission disallowed these conditions, the claimant appealed to a common pleas court under R.C. 4123.512. He then amended his complaint to add two *new* medical conditions: aggravation of preexisting degenerative joint disease and aggravation of preexisting osteoarthritis. Neither of these conditions had been included in the administrative appeal, and neither constitutes an “aggravation” of the meniscus tear or chondromalacia. *Id.* at ¶ 17. The Court explained that allowing these conditions would undermine the entire purpose of having the administrative scheme, because it would allow claimants to present conditions for the first time in court, without allowing the agencies to review the conditions.

But Starkey’s new causation theory is not akin to a new claim, and does not trigger *Ward*’s concern, because it is just another way of linking his workplace injury to the very medical condition that the Bureau and Commission reviewed. As the appeals court properly noted, the administrative order did not even cite any “theory”; it merely allowed a claim for an identified condition. The order allowed Starkey’s claim for “osteoarthritis of the left hip,” with no more to the order. See Orders attached to TD 17. Put another way, the order is for a condition, not for a method of proof. In the agency’s internal administrative process, the condition giving rise to a claim may be allowed if it is *directly* caused by an injury or occupational disease contracted in the course and scope of the claimant’s employment, R.C. 4123.54(A), or by the *aggravation* of a pre-existing medical condition due to a work-related injury or exposure, R.C. 4123.54(G), or for any of the non-statutory theories that this Court has developed.

Builders mistakenly emphasizes that Starkey’s doctor first used the term “aggravation” in the appeal to the common pleas court, when the doctor opined that Starkey’s osteoarthritis had

been aggravated by the injury. On Builders' appeal, Depo. at 25, L. 21-25; 26, L. 1-9. Builders incorrectly conflates "aggravation" with "diagnosis." The medical diagnosis here is osteoarthritis of the left hip, not what caused it. "Aggravation" is a theory of causation. That is, the doctor was opining that the *cause* of Starkey's osteoarthritis was the aggravation of previously existing osteoarthritis by the work injury, rather than that the osteoarthritis was caused directly by the injury. Starkey is not asserting a new condition, but a new theory as to the cause of his condition.

The Commission's own procedures recognize the difference between claims and theories of causation. A hearing examiner is not instructed to consider any and all possible conditions and claims. But hearing examiners are specifically admonished to consider both direct causation and aggravation as potential causes for a condition:

If there is evidence on file or presented at hearing to support both the theories of direct causation, or aggravation . . . [or] substantial aggravation . . .<sup>1</sup>, a request to allow a condition in a claim is to be broadly construed to cover either theory of causation (i.e. direct v. aggravation/substantial aggravation).

Hearing Officer Manual, December 01, 2007, at S-11, attached to TD 18, Plaintiff's Trial Brief. The manual both makes clear that "aggravation" is a theory and not a medical condition, and that hearing officers are to broadly construe the medical claim at issue to be covered under either theory. Thus, the Commission is obligated, through its hearing officers, to consider both direct causation and aggravation for any medical condition.

The Court has recognized the difference between workers' compensation decisions that turn on the reasoning that an administrative decision adopts, versus those right-to-participate

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<sup>1</sup> Both aggravation and substantial aggravation are included in the Manual because of the statutory change to R.C. 4123.54(G) in 2006. For injuries occurring before August 25, 2006, aggravation would support a claim for relief; for injuries occurring after that date, the claim will not be allowed unless the aggravation is "substantial." As the injury here occurred before 2006, Starkey need prove only aggravation.

decisions, like the one here, that do not rely on the agencies' reasoning. See *State ex rel. Mitchell v. Robbins & Myers, Inc.* (1983), 6 Ohio St. 3d 481. In *Mitchell*, the Court held that the agencies must provide reasons for their decisions, allowing for judicial review on mandamus, as opposed to conclusory orders: "district hearing officers, as well as regional boards of review and the Industrial Commission, must specifically state which evidence and only that evidence which has been relied upon to reach their conclusion, and a brief explanation stating why the claimant is or is not entitled to the benefits requested." *Id.* at 483-84. But notably, the Court explained how that rule does *not apply* to right-to-participate appeals: "This rule, however, has no application to commission orders which may be appealed under R.C. 4123.519 [the predecessor to current R.C. 4123.512], as the need is obviated due to de novo review in those cases." *Id.* at 484. Thus, the Commission can, as it did here, simply issue an order allowing the right to participate for a *condition*, without specifying in the order what causative theory justified the decision, just as it need not specify the evidence it relied upon. And in reviewing that order, the courts should look only to what was in the Commission's *judgment*, regardless of the grounds or theories for that judgment. Compare *State ex rel. Johnson v. Ohio Parole Bd.* (1997), 80 Ohio St. 3d 140, 141 ("[A] reviewing court will not reverse a correct judgment merely because erroneous reasons were assigned as a basis thereof.").

Not only does *Ward's* reliance on the statute, and the nature of a "claim," counsel in favor of the Bureau, but also, *Ward's* broader rationale does not apply here. *Ward* correctly pointed out that Ohio's workers' compensation system is predominantly administrative in nature, with the Bureau and Commission acting as primary decision makers, and appeals to a trial court limited to decisions as to the extent of disability. R.C. 4123.512; *State ex rel. Liposchak v. Indus. Comm'n*, 90 Ohio St. 3d 276, 279, 2000-Ohio-73. Appeals under R.C. 4123.512 represent

a narrow exception to the “administrative only” nature of workers’ compensation. “The statute clearly contemplates the general nonappealability of commission orders and, in the case of claims for initial allowance, withholding judicial review until after the claim runs the gamut of successive administrative hearings provided for under R.C. 4123.511.” *Ward*, 2005-Ohio-3560 at ¶ 9. In other words, the workers’ compensation system is intended to take care of claims administratively, with the Bureau and Commission making the decisions, and the role of the courts constrained in scope.

In this context, the *Ward* Court correctly found that allowing new conditions at the judicial level undermines the workers’ compensation system: “[t]he requirement that workers’ compensation claims be presented in the first instance for administrative determination is a necessary and inherent part of the overall adjudicative framework of the Workers’ Compensation Act.” *Id.* at ¶ 9. When a claimant asserts an *entirely new* claim at the appeals level, it undermines the intended administrative nature of the workers’ compensation system. The Bureau and Commission have no opportunity to analyze and evaluate the claim, and the Court of Common Pleas usurps the agencies’ roles as primary decision-makers.

But the Bureau and Commission do have the opportunity to hear and “broadly consider” all theories of causation at the administrative level for a particular medical condition, before it goes on appeal to the courts. The condition and the claim remain the same, whatever the basis for them.

Adding and attempting to prove a “new” theory of causation at the appeals level comports with the administrative nature of the workers’ compensation system, as well as the Bureau’s and Commission’s roles as primary decision-makers. The administrative system, by the time the

claim is appealed to court, will have had an opportunity to consider and rule on all causation theories for any medical condition in a claim.

And again, because the statute permits a *de novo* hearing, R.C. 4123.512 trials routinely permit new evidence to support participation, including new evidence to support one or more theories of causation. A claimant, or an employer, may call a new treating doctor, a new expert, or provide new documentation, and so on. It would make little sense to allow such new evidence if all of the new testimony and documentation must simply echo what was already said at the agency. Of course a new doctor may offer a new way of looking at the evidence—i.e., a new *theory* of the case—as long as the new explanation still relates to the same medical *condition* or claim that was presented below.

In short, nothing in *Ward*, the structure of the workers' compensation system, or the statutes, prevents a claimant from asserting a new theory of causation in a R.C. 4123.512 appeal.

**B. Disallowing different theories of causation on appeal under R.C. 4123.512 will clog the Commission and the courts with unnecessarily duplicative litigation.**

Moreover, disallowing different theories of causation at the trial level will clog the administrative and judicial systems with unnecessary and duplicative litigation.

If Builders' view prevails, and a new theory amounts to a new claim, then a claimant could re-litigate the same condition through both the administrative and judicial systems, once as a "direct causation claim" and again as "an aggravation claim." The Tenth District Court of Appeals identified this "second bite" problem, and properly rejected that possibility, in *Robinson v. AT&T*, 2005-Ohio-3560. The Tenth District held that the Commission's first order, denying Robinson's claim under direct causation, was a full adjudication of that condition. Robinson's later claim for the same condition, but under an aggravation theory, "for all intents and purposes, is identical to that of the first." *Id.* at ¶ 18. If Builders is right, however, then the Tenth District

in *Robinson* was wrong. And if different theories are treated as different claims, the number of R.C. 4123.512 trials will increase. Such an increase will add stress to the already-burdened workers' compensation docket in the agencies and courts.

Moreover, treating theories of causation as separate claims ignores the nature of workers' compensation procedure, both at the administrative and court levels. Administrative hearings are, by nature, short, informal affairs. The hearing officers are not bound by common law or the rules of evidence. The hearings, while public, are not recorded, and not transcribed unless one of the parties pays for a court reporter. While claimants have the right to counsel, many do not use counsel at the administrative level. To encourage quick decisions, continuances are discouraged and the hearing officers are required to make decisions within a short time. The claimant during the administrative process is not considered an adversary, rather the Bureau and Commission are supposed to champion the rights of the injured worker. Phillip J. Fulton, *Workers' Compensation Law*, 3d Ed. §4.5, 98-103.

In contrast, an appeal under R.C. 4123.512 is an adversarial legal proceeding. The Ohio Rules of Civil Procedure and Evidence are followed, and the hearing is *de novo*. R.C. 4123.512(D). The claimant, employer, and Bureau are all allowed to bring in new evidence. If the claimant appeals, the Bureau is no longer his champion, but his legal adversary. The claimant, as with any civil lawsuit, is on notice to present all possible theories of his case, and all relevant evidence.

The contrast illustrates the difference between bringing in different claims on appeal and bringing in different causative theories. The Bureau and Commission have an interest in knowing exactly what injuries a claimant has allegedly suffered, and in looking into the medical and other evidence of the injury before making a determination whether the claimant should be

allowed to participate in the system. As the Court recognized in *Ward*, bringing in a new injury at trial does not allow the Bureau and Commission to do their required review and undermines their role as primary decision-maker.

However, as explained above, as part of the administrative review, the Bureau and Commission are expected to consider both direct causation and aggravation. The informal and rapid administrative process does not provide for the claimant a full opportunity to argue every theory of causation with the precision that is best saved for appeals, if any. After all, if the employer does not appeal, and does not challenge the claimant's right to participate, the claimant is spared the expense of bringing more experts to bear on the question. Explicitly asserting aggravation for the first time on appeal does not prevent the administrative agencies from performing their administrative review and primary decision-making.

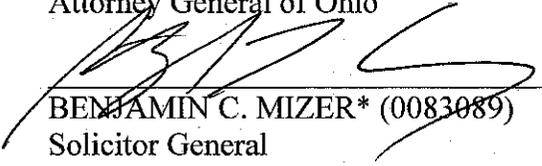
And again, as *Robinson* illustrated, allowing new appeals for each theory of causation will add to an already-burdensome docket of workers' compensation cases. In sum, either claimants will be forced to expand the scope of administrative hearings in the first instance, to preserve every theory at once, or they will go back and do repeat hearings with each theory presented as a new "claim." Either result is wasteful and unwarranted by statute. The better course is to simply allow expansion of rationales—but not of claims—at the trial court level.

## CONCLUSION

For the above reasons, the Administrator respectfully asks the Court to affirm the court below.

Respectfully submitted,

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Workers' Compensation

## CERTIFICATE OF SERVICE

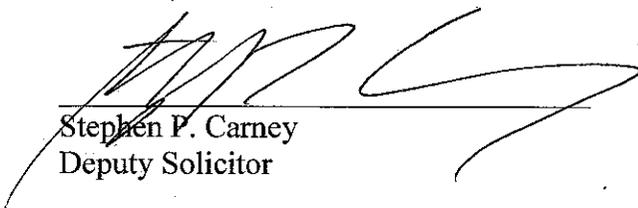
I certify that a copy of the foregoing Merit Brief of Appellee, Marsha Ryan, Administrator, Bureau of Workers' Compensation, was served by U.S. mail this 7th day of December, 2010, upon the following counsel:

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