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STATEMENT OF FACTS

This is a workers' compensation case involving the Industrial Commission of Ohio's denial of Appellant-Relator Delores Roxbury's request for temporary total disability benefits (TTD) based solely upon Appellant's psychological condition of "dysthymic disorder, late onset." Thereafter, Appellant filed a complaint in mandamus, wherein the Magistrate of the Tenth District Court of Appeals issued findings of fact and conclusions of law and denied Appellant's mandamus request. Appellant filed no objection to the Magistrate's findings of fact and filed a single objection to the Magistrate's conclusions of law. Thereafter, the Tenth District, accepted the Magistrate's Decision and denied Appellant's mandamus request.

A. Background

On September 21, 2004, Appellant suffered a work-related injury while employed with Appellee Catholic Healthcare. See "Magistrate's Decision," (attached to Appellant's Merit Brief as Appendix A), at A-2.¹ As fully set forth below, although the Commission ruled that Appellant can work, the Appellant has chosen not to work since the date of injury. (A-2, A-27).

Appellant's claim, No. 04-861036, was initially allowed for: lumbar strain, aggravation of pre-existing spondylosis L3-4, L4-5, retrolisthesis L3 on L2 and spinal stenosis. (A-2). On July 10, 2006 Appellant reached maximum medical improvement for all of these allowed conditions and her TTD benefits were terminated. Id.

(1) TTD Benefits for Psychological Condition Denied

On September 10, 2007, Appellant filed a motion with the Industrial Commission of Ohio ("Commission") requesting the additional allowance of the psychological condition of "dysthymic disorder, late onset" and further requested temporary total disability benefits solely

¹ Appellee's Statement of Facts all cite to the Magistrate's Decision and 10th District Decision found in Appellant's Appendix and cited as A-1, A-2 etc.

for this psychological condition from August 24, 2007 through November 14, 2007, based upon the medical reports of Dr. Raymond Richetta, Ph.D. (A-2).

On October 17, 2007, Appellant was examined by Walter Belay, Ph.D. (A-3). Therein, Dr. Belay indicated that Appellant was not temporarily and totally disabled based upon dysthymic disorder, late onset. Id.

On November 14, 2007, Staff Hearing Officer Meriweather denied Appellant's request for TTD benefits for her dysthymic disorder from 8/24/2007 through 11/24/2007. (A-4). SHO Meriweather based her decision upon the October 17, 2007 report of Dr. Belay. Id. Further, SHO Meriweather specifically found Dr. Richetta's C-84 to be unpersuasive and further found that Dr. Richetta failed to discuss Appellant's ability to work in his narrative report. Id.

(2) Appellant's Permanent Total Disability Application Denied

After the Commission finally determined that Appellant's dysthymic disorder was not disabling and did not preclude her from working, Appellant sought permanent total disability benefits (PTD). (A-4). However, the Commission also denied this request. (A-5).

In its Record of Proceedings dated June 13, 2009, the Commission determined that Appellant was not permanently and totally disabled for any of her allowed conditions, both physical and psychological. (A-5). Specifically, the Commission ruled that Appellant had not reached MMI for her dysthymic disorder. (A-5, A-6). Further, "the Injured Worker testified today that her allowed psychological condition [of dysthymic disorder] is not work prohibitive." Id. The Commission further found that "the Injured Worker retains the physical ability to engage in sedentary employment" based upon all of her allowed conditions. Id.

B. Issue at Bar - Second Application for TTD Also Denied

On July 16, 2009, and merely four weeks after receiving the Commission's denial of her PTD application, Appellant was examined, for the first time, by Jamie Lichstein, Psy.D. (A-6). On that date, Dr. Lichstein completed a C-84 wherein she indicated that Appellant has been TTD for nearly two years, since August 24, 2007, based solely upon the mental condition of dysthemic disorder, late onset. Id. However, Dr. Lichstein's July 16, 2009 C-84 never accepts, or even mentions, any of the previous examining psychologists or any prior reports concerning TTD, including Dr. Belay's. (A-6, A-7).

On September 15, 2009, Appellant submitted a motion with the Commission requesting TTD benefits from November 15, 2007 through to the present and to continue, based solely upon her psychological condition. (A-6 through A-8). This motion was based specifically on the July 16, 2009 C-84 of Dr. Lichstein and Dr. Lichstein's September 9, 2009 letter. Id. Dr. Lichstein's September 9, 2009 letter opines that the Claimant is TTD and relies upon the opinion of Dr. Richetta. (A-7). However, as set forth above, Dr. Richetta's opinion regarding TTD was already discredited and was specifically not relied upon by SHO Meriweather in her November 14, 2007 Order when she first denied TTD based upon her psychological condition. (A-4).

Dr. Lichstein also relies upon the opinion of Dr. Shapiro, wherein she opined that Appellant had not yet reached maximum medical improvement ("MMI"). (A-7, A-8). However, Dr. Shapiro rendered her opinion based upon Claimant's application for *permanent total disability* which again was ultimately denied by the Commission. (A-5). Finally, Dr. Lichstein's letter failed to reference the October 31, 2007 report of Dr. Belay, which, as set forth above, found that Appellant was not TTD based upon her psychological condition and which was relied upon by SHO Meriweather in her November 14, 2007 Order denying TTD. (A-4).

After the District Hearing Officer denied TTD benefits and the Staff Hearing Officer denied TTD benefits in part, a full Commission hearing was held on June 22, 2010. (A-11). Therein, the Commission specifically denied TTD benefits for the entire period requested from 11/15/2007 through 06/22/2010. (A-11, A-12). First, the Industrial Commission denied TTD benefits because Dr. Lichstein “failed to review all of the relevant prior medical evidence and her retrospective certification of temporary total disability compensation.” (A-13). As such, the Commission found the staff hearing officer’s decision contrary to the Supreme Court’s decision in *State ex rel. Bowie v. Greater Cleveland Regional Transit Auth* (1996), 75 Ohio St.3d 458. Id. at 1-2. Id.

Second, the Commission further determined that Appellant voluntarily abandoned the workforce and was therefore precluded from receiving TTD benefits as per *State ex rel. Pierron v. Indus. Comm.*, 120 Ohio St.3d 40, 2008 Ohio 5245. (A-13, A-14). The Commission first found that Appellant’s allowed physical conditions had reached maximum medical improvement on July 10, 2006. (A-14). Moreover, pursuant to a prior Industrial Commission order dated June 13, 2009, the Industrial Commission determined that Appellant’s dysthemic disorder is not preventing her from working and that, based upon all of the allowed conditions, Appellant is physically capable of sedentary work. Id. Finally, in referencing the November 6, 2009 District Order, the Industrial Commission found that “the Injured Worker has made no attempt to return to work... [and] accordingly, the Commission finds the Injured Worker voluntarily abandoned the entire workforce and the claimed temporary total disability, from 7/16/2009 to 06/22/2010, is not causally related to the claim.” Id.

Appellant subsequently filed a mandamus action with the Tenth Appellate District Court. However, on March 27, 2012, the Tenth Appellate District Court adopted the Magistrate's Decision and denied Appellant's mandamus request.

ARGUMENT

Herein, the Tenth District Court of Appeals found "some evidence" to support the Commission's denial of the Appellant's TTD application. The basis for the Tenth District's Decision is two-fold. First, the Commission determined, based upon the facts and testimony presented, that Appellant voluntarily abandoned the workforce and was not entitled to TTD benefits pursuant to *State ex rel. Pierron v. Indus. Comm.*, 120 Ohio St.3d 40, 2008 Ohio 5245. Second, Appellant's TTD request was denied because the Commission determined that the award of TTD benefits was based upon the improper retrospective certification of Appellant's physician, Dr. Jamie Lichstein, Psy.D. in violation of the Supreme Court's decision in *State ex rel. Bowie v. Greater Cleveland Regional Transit Auth* (1996), 75 Ohio St.3d 458.

Importantly, Appellant only raised objection to the Magistrate's legal conclusion that Appellant voluntarily abandoned the workforce. Appellant failed to raise any objection to the Magistrate's legal conclusion regarding the Commission's denial of TTD benefits based upon Dr. Lichstein's improper retrospective certification of TTD. As fully set forth below, Appellant's appeal on the retrospective certification issue has been waived pursuant to Civ. R. 53(D)(3)(b) and Appellant's Proposition of Law II is not properly before this Court.

I. Standard of Review

In order for the Court to issue a writ of mandamus as a remedy from a determination of the Commission, the Appellant must show a clear legal right to the relief sought and that the Commission has a clear legal duty to provide such relief. *State ex rel. Pressley v. Indus. Comm.*

(1967), 11 Ohio St.2d 141. A clear legal right to a writ of mandamus exists where the Appellant shows that the Commission abused its discretion by entering an order which is not supported by any evidence in the record. *State ex rel. Elliot v. Indus. Comm.* (1986), 26 Ohio St.3d 76. Where the record contains some evidence to support the commission's findings, there has been no abuse of discretion and mandamus is not appropriate. *State ex rel. Lewis v. Diamond Foundry Co.* (1987), 29 Ohio St.3d 56. Furthermore, questions of credibility and the weight to be given evidence are clearly within the discretion of the Commission as fact finder. *State ex rel. Teece v. Indus. Comm.* (1981), 68 Ohio St.2d 165.

II. Temporary Total Disability Benefits

R.C. § 4123.56 “provides compensation for workers who suffer injuries that result in temporary total disability. ‘[T]emporary total disability is defined as a disability which prevents a worker from returning to ... his former position of employment.’” *State ex rel. Heffernan v. Melrose Capital, LLC*, 2007 Ohio 6532 at ¶ 51, citing *State ex rel. Ramirez v. Indus. Comm.* (1982), 69 Ohio St.2d 630, syllabus. Generally, there are three main defenses to the payment of temporary total disability benefits: (1) claimant is medically able to return to the former position; (2) claimant’s condition has reached maximum medical improvement; and (3) claimant’s inability to return to the former position of employment is not due to injury. *State ex rel. Ellis Super Valu, Inc. v. Indus. Comm.* (2007), 115 Ohio St.3d 224, 226, 2007 Ohio 4920, ¶ 7, citing *State ex rel. Ramirez, at, 632*; R.C. § 4123.56(A).

Appellee's Response to Appellant's Proposition of Law I: Appellant's Proposition of Law I is Without Merit. The Industrial Commission of Ohio Did Not Abuse Its Discretion When It Determined That Appellant Voluntarily Abandoned the Workforce and Is Therefore Not Entitled to TTD Benefits.

Appellant Delores M. Roxbury filed a single objection to the Magistrate's Decision based upon the Tenth District's adoption of the Magistrate's legal conclusion that Appellant voluntarily abandoned the workforce pursuant to *State ex rel. Pierron v. Indus. Comm.* (2008), 120 Ohio St.3d 40, 2008 Ohio 5245. Specifically, Appellant argues that the facts herein render *Pierron* inapposite. However, Appellant's arguments are without merit.

As clearly set forth in *Pierron*, temporary total disability "is intended to compensate an injured worker for the loss of earnings incurred while the industrial injury heals." *State ex rel. Pierron, supra* at ¶ 9. However, "there can be no lost earnings . . . or even a potential for lost earnings, if the claimant is no longer part of the active work force." *Id.* Moreover, "a claimant who leaves the labor market 'no longer incurs a loss of earnings because he is no longer in a position to return to work.'" *Id.* "When the reason for this absence from the work force is unrelated to the industrial injury, temporary total disability is foreclosed." *Id.* Finally, quoting this Court's earlier decision in *State ex rel. Baker v. Indus. Comm.* (2000), 89 Ohio St.3d 376, 380-381, "when a claimant 'chooses for reasons unrelated to his industrial injury not to return to any work when able to do so, that employee has abandoned both his employment and his eligibility for [temporary total disability].'" *Id.*

It is undisputed that Appellant has not worked since 2004. Appellant's sole argument, set forth on pages eight through nine of her Brief, is that, unlike the injured worker in *Pierron*, Appellant did not voluntarily leave her employment but left the workforce because of her allowed conditions. Appellant's argument fails on several grounds.

First, Appellant claims on page eight of her Brief that her departure from the workforce is entirely related to her “injuries suffered on September 21, 2004.” However, this argument also cannot support a claim for TTD benefits by operation of law. On July 10, 2006, the Industrial Commission made a final determination that Appellant had reached maximum medical improvement (MMI) on all of the allowed physical conditions of the claim. That issue is not under appeal and remains final. Thus, Appellant’s TTD application cannot be based upon her allowed physical conditions because TTD benefits cannot be awarded on conditions that have reached maximum medical improvement. R.C. § 4123.56(A).

Second, another final decision by the Commission, dated June 13, 2009, determined that Appellant was physically capable of sedentary work based upon all of her allowed conditions. Moreover, the Commission concluded, based upon the Appellant’s own testimony, that her allowed psychological condition of dysthemic disorder, late onset, did not prevent her from working. That decision is also not under appeal and also remains final. As correctly cited by Appellant on page eight of her Brief, “a claimant can only abandon a former position of employment or remove herself from the workforce only if she has the physical capacity for employment at the time of the abandonment or removal.” *State ex rel. Brown v. Indus. Comm.* (1993), 68 Ohio St.3d 45, 48. Herein, the Commission has already clearly determined, on two different occasions, that Appellant is capable of work based upon both her physical and mental allowances. Thus, Appellant’s argument that she could not work because of her allowed conditions is unsupported by the Commission’s own final, unappealed decisions, which state that Appellant can work.

Moreover, the Magistrate further noted that Appellant’s subsequent requests for PTD were also denied because the Industrial Commission determined that she could still work.

Magistrate's Decision at 26. The Magistrate returned to the Industrial Commission decision at issue:

Returning to the June 22, 2010 hearing and the commission's reliance on *Pierron* and findings that Appellant's lack of earnings was not related to the allowed psychological condition, the above recitation of facts provides evidence to the contrary. It was not an abuse of discretion for the commission to find that Appellant's lack of earnings was not due to her psychological condition and that her failure to make any efforts to pursue vocational rehabilitation or seek other work was some evidence that she had voluntarily abandoned the work force.

Magistrate's Decision at 26-27.

Finally, the injured worker in *Pierron* did not voluntarily leave his employment either. This Court specifically stated that "Pierron did not initiate his departure from Sprint/United." *Pierron*, at ¶11. Indeed, this Court further noted that "the injured worker did not choose to leave his employer in 1997, but once that separation nevertheless occurred, Pierron had a choice: seek other employment or work no further. Pierron chose the latter." *Id.* at ¶ 11. This Court further ruled: "We also recognize, however, that there was no causal relationship between his industrial injury and either his departure from Sprint/United or his voluntary decision to no longer be actively employed. When a departure is not motivated by injury, we presume it to be a lifestyle choice, and as we stated in *State ex rel. Pepsi-Cola Bottling Co. v. Morse* (1995), 72 Ohio St.3d 210, 216, workers' compensation benefits were never intended to subsidize lost or diminished earnings attributable to lifestyle decisions." *Id.*

As is clear, Appellant's argument that *Pierron* is distinguishable from the case at bar is erroneous. Both Appellant and the injured worker in *Pierron* had a choice – seek other employment or work no further. Neither chose employment and TTD benefits were properly denied in both cases.

Appellant also relies upon *State ex rel Pretty Products Inc. v. Indus. Comm.* (1996), 77 Ohio St.3d 5 to argue that, because Appellant was disabled when the separation from the workforce occurred, she cannot be found to have abandoned the workforce. Appellant Brief at 7. However, as fully set forth in the Magistrate's Decision, the Industrial Commission twice determined during Appellant's requested period of TTD that Appellant was not disabled. Appellant has simply decided not to reenter the workforce. In its July 22, 2010 order, the Industrial Commission found that Appellant has not returned to work since her injury date of September 21, 2004. Despite its finding that none of Appellant's allowed conditions precludes her from employment, the Industrial Commission further found that "the Injured Worker has made no attempt to return to work." The Magistrate agreed, finding some evidence to support the Industrial Commission's decision. As such, *Pretty Products* is inapposite.

Because the Commission relied upon some evidence in rendering its decision that Appellant voluntarily abandoned her employment, the Tenth Appellate District Court properly denied Appellant's request for a writ of mandamus and its decision must be affirmed.

Appellee's Response to Appellant's Proposition of Law II: Appellant Failed to Object to the Magistrate's Decision Regarding Dr. Lichstein's Retroactive Certification of Disability and Has Therefore Waived Any Error On This Issue.

Appellant's "Proposition of Law No. II" states that "the Industrial Commission of Ohio can grant temporary total disability compensation when an examining physician reviews all relevant medical evidence generated prior to the date of disability." Appellant argues that the Commission abused its discretion when it relied upon *State ex rel. Bowie v. Greater Cleveland Regional Transit Auth.* (1996), 75 Ohio St.3d 458 in finding that Dr. Lichstein failed to review all

of the relevant prior medical evidence and that her retrospective certification of temporary total disability was not “some evidence” upon which the Commission may rely. Appellant then states that “the court of appeals found no abuse of discretion in this decision [and] bases this decision on Dr. Jamie Lichstein’s lack of reference to the reports of Dr. Belay.” Appellant Merit Brief at 9. However, the Tenth District never rendered such a decision because Appellant never raised an objection to the magistrate’s findings on this issue. As such, Appellant has waived any assignment of error on this issue for appeal.

Under clear Ohio law, failure to object to any factual finding or legal conclusion constitutes a waiver on appeal. Civ. R. 53(D)(3)(a)(iii). That section provides that “a party shall not assign as error on appeal the court’s adoption of any factual finding or legal conclusion, whether or not specifically designated as a finding of fact or conclusion of law under Civ. R. 53(D)(3)(a)(ii), unless the party timely and specifically objects to that factual finding or legal conclusion as required by Civ. R. 53(D)(3)(b).” See also *State ex rel. Kolcinko v. Ohio Police and Fire Pension Fund* (2012), 131 Ohio St.3d 111, 2012 Ohio 46, ¶ 11, citing *State ex rel. Schmidt v. School Emps. Retirement Sys.*, 100 Ohio St.3d 317, 2003 Ohio 6086, ¶ 6 (Failure by a party to object to a specific finding of a magistrate’s decision constitutes a waiver of that finding). Finally, the Civ. R. 53(D)(3)(a)(iii) notice of any failure to object was also attached to the Magistrate’s Decision. (See Appendix A-27 of Appellant’s Merit Brief).

Herein, as found by the Tenth District, Appellant’s Objection to Magistrate’s Decision & Memorandum in Support raised only a single objection that relates solely to the Magistrate’s legal conclusion regarding voluntary abandonment of the workforce and never objected to the legal conclusion “concerning Dr. Lichstein’s retroactive certification of disability.” (A-29, ¶ 3). As such, the Tenth District never rendered an opinion as to the appropriateness of this particular

finding in the Magistrate's Decision. Under Ohio law, Appellant's failure to timely object to this particular conclusion of law constitutes a waiver of any objection to this conclusion of law.

Even assuming, *arguendo*, that the Court entertains Appellant's Proposition of Law No. II, the Magistrate correctly found that Dr. Lichstein's retroactive certification of temporary total disability was improper. "As a general rule, a doctor cannot offer an opinion on a claimant's extent of disability for a period that precedes the doctor's examination of the claimant." *State ex rel. Ado Staffing, Inc. v. Indus. Comm. of Ohio*, 2009 Ohio 5579, ¶ 40 (10th Dist., Oct. 22, 2009), citing *State ex rel. Foor v. Rockwell Internatl.* (1997), 78 Ohio St.3d 396, 299; *State ex rel. Foreman v. Indus. Comm.* (1992), 64 Ohio St.3d 70, 72, 1992 Ohio 3; *State ex rel. Abner v. Mayfield* (1992), 62 Ohio St.3d 423. However, "a doctor who does offer an opinion as to the claimant's extent of disability that is retrospective of the date of his examination is treated as a nonexamining doctor as to his retrospective opinion. Under such scenario, the doctor must observe certain safeguards if his retrospective opinion is to be accepted as evidence in a commission proceeding." *Ado Staffing, Id.* at ¶ 41, citing *State ex rel. Bowie v. Greater Cleveland Regional Transit Auth.* (1996), 75 Ohio St.3d 458, 1996 Ohio 142. Moreover, "If the doctor's retrospective opinion is to be relied upon by the commission as some evidence, it is imperative that the doctor has reviewed all of the relevant medical evidence generated prior to the date of the examination from which the retrospective opinion is rendered." *Id.*

Herein, the Magistrate ruled that the Commission correctly found that the Industrial Commission did not abuse its discretion. (A-15). SHO Meriweather's December 16, 2009 decision granting retrospective TTD benefits from November 20, 2007 through July 16, 2009 is

based solely upon the July 16, 2009 C-84 of Dr. Lichstein.² However, the July 16, 2009 C-84 fails to mention that Dr. Lichstein only first examined Appellant on that day and it further failed to document or review of all of the relevant medical evidence generated prior to the date of the examination from which the retrospective opinion was rendered. In fact, the C-84 failed to mention any other medical evidence at all.

Under Ohio law, if Dr. Lichstein's 7/16/2009 C-84 is to be relied upon by the Industrial Commission as "some evidence" to grant retrospective TTD benefits, "it is imperative that the doctor has reviewed all of the relevant medical evidence generated prior to the date of the examination from which the retrospective opinion is rendered." *Ado Staffing*, at ¶ 41, citing *Bowie*, at 460. Herein, Dr. Lichstein failed to reference or even mention any other medical evidence, including Dr. Belay's October 17, 2007 opinion, which was specifically relied upon by SHO Meriweather in her prior 2007 Order that initially denied TTD benefits. As such, Dr. Lichstein's July 16, 2009 C-84 cannot be relied upon as some evidence to support SHO Meriweather's order granting retrospective TTD benefits and the Magistrate found that the Commission properly vacated the decision.

Moreover, although SHO Meriweather's decision fails to mention Dr. Lichstein's September 9, 2009 letter, that letter also fails to reference Dr. Belay's previous opinion. As

² The July 16, 2009 C-84 requests TTD benefits from November 20, 2007 through October 16, 2009. A second C-84, dated October 13, 2009, requests TTD benefits from October 13, 2009 through January 13, 2010. (See A-6 to A-8). SHO Meriweather's Order grants TTD benefits from November 20, 2007 through the date of the hearing, December 16, 2009 and to continue based upon submission of medical evidence. (See A-10 to A11). Thus, retrospective TTD benefits are from November 20, 2007 to July 15, 2009. Regardless, there is no evidence of new and changed circumstances to support any prospective TTD benefits requested by Dr. Lichstein from July 16, 2009 and ongoing, and the Commission found that Appellant voluntarily abandoned the workforce. (See A-13 to A-14).

such, it also cannot be relied upon as “some evidence” because Dr. Lichstein failed to review all of the relevant medical evidence.

For instance, in *Bowie*, the Commission relied upon the retrospective report of Dr. Katz to deny TTD benefits. *Bowie*, Id. The Supreme Court denied Dr. Katz’s report as some evidence because Dr. Katz’s report failed to reference all of the relevant medical evidence generated prior to that time. *Bowie*, at 460-461. As set forth by the Supreme Court, “In this instance, the conspicuous reference to the emergency room reports coupled with the equally conspicuous lack of reference to Dr. McFadden’s reports suggest to us that Dr. Katz may have overlooked the latter. We cannot, therefore, find that Dr. Katz’s report is ‘some evidence’ upon which the commission could rely.” *Bowie*, at 460-461.

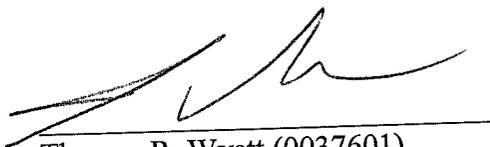
Herein, like the physician reports in *Bowie*, Dr. Lichstein’s conspicuous reference to Dr. Richetta’s and Dr. Shapiro’s reports, coupled with the equally conspicuous lack of reference to Dr. Belay’s report, suggests that Dr. Lichstein may have overlooked Dr. Belay’s report. As such, the Magistrate found that the Commission correctly vacated SHO Meriweather’s decision because Dr. Lichstein’s reports are not “some evidence” that she can rely upon in granting Claimant’s TTD request. Because of Dr. Lichstein’s flawed reports are some evidence that the Commission relied upon in rendering its decision denying TTD benefits, Appellant’s request for a writ of mandamus on this issue must also be denied as a matter of law.

CONCLUSION

The Tenth Appellate District Court correctly found that the Industrial Commission did not abuse its discretion and rendered its decision to deny Appellant’s request for temporary total disability benefits based upon some evidence in the record that Appellant voluntarily abandoned her employment and that Appellant’s physician failed to properly certify retrospective TTD

benefits. For all of the foregoing reasons, Appellee Catholic Healthcare Partners, Inc. respectfully requests this Honorable Court deny Appellant's Writ of Mandamus.

Respectfully submitted,



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CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing Appellee's Merit Brief has been served via regular U.S. mail, upon the following:

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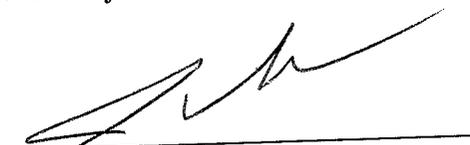
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