

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM SOUTH CAROLINA WORKERS'
COMPENSATION COMMISSION
Appellate Panel of South Carolina Workers'
Compensation Commission

Appellate Case No.: 2013-000764
WCC File No.: 1113278

Gary Jeter, Jr. Respondent
v.
All My Sons Moving & Storage, Inc, Employer Respondent
AND
Hartford Insurance Company of the Midwest, Carrier Appellant
AND
ULLICO Casualty Company, Carrier Respondent

Of whom Hartford Insurance Company of the Midwest is the Appellant

INITIAL BRIEF OF RESPONDENT

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STATEMENT OF ISSUES

I. WETHER THE COURT SHOULD AFFIRM THE FINDING OF THE SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION THAT THE RESPONDENT SUSTAINED A COMPENSABLE INJURY BY ACCIDENT ARISING OUT OF AND IN THE COURSE OF HIS EMPLOYMENT WHILE WORKING FOR ALL MY SON'S MOVING AND STORAGE, INC. ON SEPTEMBER 23, 2011.

II. WHETHER THE SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION CORRECTLY FOUND AS A FACT AND CONCLUDED AS A MATTER OF LAW THAT THE RESPONDENT IS ENTITLED TO TEMPORARY TOTAL COMPENSATION FROM THE DATE OF THE ACCIDENT, SEPTEMBER 23, 2011, UNTIL AUGUST 1, 2012 AND CONTINUING THEREAFTER UNTIL SUCH TIME AS HE IS FOUND BY THE SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION TO HAVE REACHED MAXIMUM MEDICAL IMPROVEMENT OR RETURNED TO WORK SUITABLE TO HIS CAPACITY.

III. WHETHER THE SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION'S ORDER FINDING AS FACT AND CONCLUDING AS A MATTER OF LAW THAT THE RESPONDENT SUSTAINED INJURY TO HIS BACK, NECK, AND LEFT ARM SHOULD BE AFFIRMED BASED UPON SUBSTANTIAL EVIDENCE.

IV. WHETHER THE SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION HAS SUBJECT MATTER JURISDICTION OVER THIS CASE.

and raised him out of the chair in which he was sitting. (TR pg. 27) The Respondent testified that he felt immediate sharp pain and numbness in his neck running down his left arm. Given the actions of the employer he left and began working. He testified that he continued to work a couple more hours but had pain in neck and low back. (TR pg 32) After returning to the office he reported he injury to his supervisor and was advised to discuss it with the employer. (TR pg. 32) The Respondent testified that the following day he tried to work and again reported to his supervisor that he was having pain in his neck, arm and back. He was told to wait until Monday and talk with the employer. (TR pg. 33) He said in the meantime he was having headaches. According to the testimony when he returned to work on Monday and requested medical treatment he was, "cussed out" and fired. (TR pg. 34) The Respondent contends the employer never provided medical care as required by the Workers' Compensation Act.

The Respondent sought medical care at the emergency room at Greenville Memorial Hospital on September 26, 2011. (TR pg. 34) In the medical records from the emergency room it states, "Patient arrived ambulatory through triage see/ neck pain left arm numbness to fingers onset arriving patient states his boss jerked him up by the neck." (APA 1) Respondent's complaints were pain in the neck, low back, left thumb and hand. (APA 2) The initial diagnosis was neck sprain and thumb pain. (APA 2) Ultimately, the emergency room physicians referred Respondent to an orthopedist. (APA 8) In the interim, the Respondent was placed on anti-inflammatory medications. (APA 8, 10, 11)

Respondent was seen at Greenville Memorial Emergency Room on October 9, 2011 complaining of the same problems he has previously. Again, a referral was made to an orthopedist. (APA 12, 13) On November 6, 2011 the Respondent had a cervical CT

scan that revealed mild degenerative changes in the neck, as well as disc bulging and central canal stenosis at C3-4, C5-6. (APA 16)

At the hearing before the Workers' Compensation Commission the Respondent testified that he continued to have pain in his low back, between his shoulder blades, in his neck and left shoulder pain into his left arm. (TR pg. 36-39) He also complained of headaches and difficulty turning his head. Respondent opinion was that he would be unable to work with his present condition. On November 16, 2011 the Respondent was evaluated at University Medical Group. They noted he has been unable to work since September 26, 2011 due to his injury. (APA 3 pg 25) The doctor opined that the Respondent had a possible C6-7 radiculopathy and mechanical back problems, he recommended "supervised PT for his low back with our manual spine therapist at Proaxis to focus on core strengthening, back strengthening, and pelvic stabilization exercise. I provided the patient with information on back care and we discussed activity modification including no bending, lifting." (APA 3 pg 27) The doctor indicated that he also discussed alternating heat and ice. The Respondent had MRI of his cervical spine on December 6, 2011 at C3-4 there was a mild diffuse annular bulge. It was noted that it could be secondary to recent trauma. A small amount of edema in the C4 vertebral body was also noted. At C4-5 disc was slightly desiccated and degenerated with mild annular bulge. Also at the C5-6, disc space level disc appeared to mildly desiccated and degenerated with mild annular bulge. Respondent has been unable to follow-up on any of the medical recommendations or testing due to the employer's refusal to provide benefits provided for by the Workers' Compensation Act.

ARGUMENT I

I. WHETHER THE COURT SHOULD AFFIRM THE FINDING OF THE SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION THAT THE RESPONDENT SUSTAINED A COMPENSABLE INJURY BY ACCIDENT ARISING OUT OF AND IN THE COURSE OF HIS EMPLOYMENT WHILE WORKING FOR ALL MY SON'S MOVING AND STORAGE, INC. ON SEPTEMBER 23, 2011.

It is submitted that the Order of the Appellate Panel of the South Carolina Workers' Compensation Commission should be affirmed with regard to the finding that the Claimant sustained a compensable injury arising out of and in the course of his employment. The law in South Carolina limits judicial review of workers' compensation Commission's Findings of Fact to whether there is substantial evidence to support the finding. Gadson v. Mikasa Corp., 368 S.C. 214, 628 S.E.2d 262 (Ct. App. 2006); Frame v. Resort Servs., Inc., 357 S.C. 520, 593 S.E.2d 491 (Ct. App. 2004); Corbin v. Kohler Co., 351 S.C. 613, 617, 571 S.E.2d 92, 94-95 (Ct. App. 2002). The Appellate Panel's decision must be affirmed when there is substantial evidence in the record. To support the decision Shuler v. Gregory Elec., 366 S.C. 435, 622 S.E.2d 569 (Ct. App. 2005) (citing Sharpe v. Case Produce, Inc., 336 S.C. 154, 519 S.E.2d 102 (1999)). It has been held that a reviewing Court may not substitute its judgment for the judgment of the administrative agency as to the weight of the evidence on questions of fact. S.C. Code Ann. § 1-23-380(A)(5)(d)(e); see also Hall v. United Rentals, Inc., 371 S.C. 69, 77, 636 S.E.2d 876, 881 (Ct. App. 2006). An Appellate Court may reverse or modify a decision of the Appellate Panel if the findings, conclusions, or decisions of the panel are "clearly erroneous in view of the reliable, probative and substantial evidence on the whole record." S.C. Code Ann. § 1-23-380(A)(5)(e); Bass v. Kenco Group, 366 S.C. 450, 457, 622 S.E.2d 577, 580 (Ct. App. 2005); Bursey v. S.C. Dep't of Health & Env'tl. Control, 360 S.C. 135, 600 S.E.2d 80 (Ct. App. 2004) aff'd 369 S.C. 176, 631 S.E.2d 899 (2006).

The Appellate Court should not disturb the findings of fact found by the Workers' Compensation Commission Appellate Panel if they are supported by substantial evidence. Etheredge v. Monsanto Co., 349 S.C. 451, 454, 562 S.E.2d 679, 681 (Ct. App. 2002) (citing Hoxit v. Michelin Tire Corp., 304 S.C. 461, 405 S.E.2d 407 (1991)); Muir v. C.R. Bard, Inc., 336 S.C. 266, 519 S.E.2d 583 (Ct. App. 1999). The Court has held that the possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's findings from being supported by substantial evidence. Sharpe, 336 S.C. at 160, 519 S.E.2d at 105; Smith v. NCCI Inc., 369 S.C. 236 631 S.E.2d 268 (Ct. App. 2006); DuRant v. S.C. Dep't of Health & Env'tl. Control, 361 S.C. 416, 604 S.E.2d 704 (Ct. App. 2004).

It is well established that the Workers' Compensation Commission Appellate Panel is the ultimate fact finder in Workers' Compensation cases. They are not bound by the Single Commissioner's findings of fact but are free to weigh evidence and make their own findings. Bass v. Isochem, 365 S.C. 454, 617 S.E.2d at 369 (Ct. App 2005); Frame, 357 S.C. at 528, 593 S.E.2d at 495; Muir, 336 S.C. at 281, 519 S.E.2d at 591. The final determination of witness credibility and the weight assigned to the evidence is reserved to the Workers' Compensation Commission Appellate Panel. Shealy v. Aiken County, 341 S.C. 448, 455, 535 S.E.2d 438, 442 (2000); Frame, 357 S.C. at 528, 593 S.E.2d at 495. Where there are conflicts in the evidence over a factual issue, the findings of the South Carolina Workers' Compensation Commission Appellate Panel are conclusive. Brown v. Greenwood Mills, 366 S.C. at 379, 622 S.E.2d at 546 (Ct. App 2005); Etheredge v. Monsanto, 349 S.C. 451, 562 S.E.2d 679 (Ct. App 2002); see also Mullinax v. Winn Dixie Stores, Inc., 318 S.C. 431, 458 S.E.2d 76 (Ct. App. 1995) ("Where the medical evidence conflicts, the findings of fact of the [Appellate Panel] are conclusive.")

The findings of the Appellate Panel are presumed correct and will be set aside only if unsupported by substantial evidence. Bass v. Kenco Group, 366 S.C. 450, 622 S.E.2d 577; Frame, 357 S.C. at 528, 593 S.E.2d at 495; Broughton v. South of the Border 336 SC 488, 520, SE2d 634 (Ct. App 1999), 336 S.C. at 496, 520 S.E.2d at 637. The Appellate Court is prohibited from overturning findings of fact of the Appellate Panel unless there is no reasonable probability the facts could be as related by the witness upon whose testimony the finding was based. Liberty Mut. Ins. Co. v. South Carolina Second Injury Fund, 611 S.E.2d 297, 363 S.C. 612 (Ct. App. 2005) cert. denied July 2007; Hargrove v. Titan Text. Co., 360 S.C 276, 599 S.E.2d 604; Etheredge, 349 S.C. 455-56, 562 S.E.2d at 681. The Appellate Panel's factual findings will normally be upheld; however, such a finding may not be based upon surmise, conjecture, or speculation, but must be founded on evidence of sufficient substance to afford a reasonable basis for it. Tiller v. Nat'l Health Care Ctr. of Sumter, 334 S.C. 333, 339, 513 S.E.2d 843, 845 (1999); Muir, 336 S.C. at 282, 519 S.E.2d at 591; Sharpe v. Case Produce Co., 329 S.C. 534, 543, 495 S.E.2d 790, 794 (Ct. App. 1997) rev'd on other grounds.

It is contended that the South Carolina Workers' Compensation Commission correctly found that the Respondent sustained an injury arising out of and in the course of his employment on September 23, 2011. Submitted into evidence was video that shows the employer lifting the Respondent by his neck and dropping him back onto a chair. The Respondent testified as to the injury and the Appellants did not offer any evidence to contradict this testimony. The evidence before the Commission established that the Respondent had not previously been treated by a doctor for arthritis or pain in his spine. (TR p 22) He had never been placed on any medication for pain in his spine, neck, or arm prior to this accident. (TR p. 22) Nor had anyone previously diagnosed him or taken him out of work due to any physical problems. (TR p. 24-25) The

Respondent testified that he began work at 9:30 in the morning. He was seated in the office of his employer as indicated in the video, when he asked his employer if he was eligible for a raise. He testified that the employer told him he would give him a raise and at that time grabbed him by the neck and lifted him from the chair saying, "How high to you want to go?" (TR p. 27) The Respondent testified that he got up, left the office and went to work; however, he only worked a couple hours because he was in pain in his neck, (TR p 32) and in his lower back. (TR p. 32) He also testified that he reported the injuries went home and on the next work day requested referral for medical treatment. His request was denied.

The medical evidence establishes the Respondent went to the emergency room at Greenville Memorial System, September 26, 2011. (TR p. 34-35) He gave a history of an onset of pain beginning Friday before when his boss jerked him by the neck. His complaints were pain in the neck, lower back, left thumb and hand. (APA 2) He was referred to an orthopedist. (APA 8) and placed on anti-inflammatories and muscle relaxer medication. (APA 8, 10, 11) He was later seen on October 9, 2011 at the Greenville Memorial Emergency Room continuing to complain of problems with left arm and tingling in left upper extremity. The report makes mention of the earlier evaluations and referral to the orthopedist. (APA 12, 13, 14) On November 6, 2011 he had a cervical CT scan that revealed mild degenerative changes in the area of the neck along with disc bulging which produced a mild degree of central canal stenosis C3-4 and C5-6. (APA 16) At the November 6, 2011 hospital visit the doctors provided the Respondent with information about herniated disc. (APA 19) He was again given an orthopedic referral to Southeastern Neurosurgical and Spine Institute. (APA 20) In addition to this the Respondent testified at the hearing that since the accident he has had pain in his lower back, pain

between his shoulder blades, difficulty turning his head, headaches, pain in his neck and left shoulder, and pain down into his arm. (TR p 36, 35)

The South Carolina Workers' Compensation Commission found based upon the testimony of the Respondent and the medical evidence presented above that he did have a compensable accident and sustained a compensable injuries. It is the Respondent's contention that the substantial evidence supports the Commission's finding that the injuries arose out of the course of his employment (SC Code Ann. 42-1-160) and are therefore compensable. An injury arises out of employment where there is apparent to the rational mind, when considering all of the circumstances a relationship between the conditions under which the job was performed and the resulting injury. Jennings v. Chambers Development Co. (SC App. 1999) 335 SC 249, 516 S.E.2d 453. Rehearing denied, Cert. Denied. An injury is in the course of employment when it occurs within a time period and at a place the employee is reasonable expected to be because of his employment. Baggott v. Southern Music Inc. 330 SC 1, 496 S.E.2d 852 (SC 1998) Rehearing denied. It is submitted that the Workers' Compensation Commission correctly found that the Respondent was in a place he was expected to be beginning his work day, that the assault by his employer arose out of his employment and it is submitted that the Findings of Fact and Rulings of Law are supported by the substantial evidence in the record.

AGRUMENT II

II. WHETHER THE SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION CORRECTLY FOUND AS A FACT AND CONCLUDED AS A MATTER OF LAW THAT THE RESPONDENT IS ENTITLED TO TEMPORARY TOTAL COMPENSATION FROM THE DATE OF THE ACCIDENT, SEPTEMBER 23, 2011, UNTIL AUGUST 1, 2012 AND CONTINUING THEREAFTER UNTIL SUCH TIME AS HE IS FOUND BY THE SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION TO HAVE REACHED MAXIMUM MEDICAL IMPROVEMENT OR RETURNED TO WORK SUITABLE TO HIS CAPACITY.

It is submitted that the South Carolina Workers' Compensation Commission as the trier of facts is the agency charged with determining findings of fact in this Workers' Compensation claim. The Commission found as a fact and ruled as a matter of law that the Respondent is entitled to past and ongoing temporary total compensation. Stated previously the Administrative Procedures Act established the "Substantial Evidence Rule" as the standard for judicial reviews of decisions of the South Carolina Workers' Compensation Commission. The Respondent contends that the reliable, probative and substantial evidence on the whole record supports the finding of the Commission that the Respondent has been unable to work since his accident on September 23, 2011 and is entitled to continuing temporary total compensation until such time as he is found to have returned to work suitable to his capacity or reached maximum medical improvement. (SC Code Section 1-23-380)

Greenville Hospital Systems medical report from September 26, 2011 (APA 1 pg. 2) establishes that the Respondent was seen with a complaint of neck, lower back, left thumb and hand pain. He gave a history of being grabbed by the neck and lifted off a chair. Doctors diagnosed his symptoms as being severe. They noted tenderness present in the cervical spine at C2, C3, and C4. With regard to his back the doctor stated, "There is paraspinal tenderness, there is paraspinal tenderness in the right lower back area." He was released with a wrist brace

advised to wear it twelve hours on then take it off for twelve hours and to see an orthopedist within two to three days. On November 16, 2011 he was seen at University Medical Group. The doctor at that time stated, "Current work status patient has been out of work since September 26, 2011 due to this injury." (APA 3 p. 25) They noted neck pain into the left arm and thumb. (pg. 26) Doctor's treatment recommendation was supervised physical therapy for the low back pain as well as activity modification. The doctor indicated this was to include no bending or lifting. (pg. 27) It is submitted that under the Workers' Compensation Act the defendants had a duty to provide the Respondent with the treatment order by the physicians they failed to provide treatment and therefore the claimant has been unable to follow through with physical therapy and return doctor appointments. Further, the doctors ordered work restrictions, which included no bending or lifting. Since the Respondent's employment was packing and moving he was required to bend, stoop and lift on a continuous basis. Modified work was not provided by the employer and therefore it is contended that the Respondent is entitled to temporary total compensation as ordered by the South Carolina Workers' Compensation Commission. If an employee is on light duty and the employer does not provide light duty he is entitled to temporary total compensation as ordered by the Commission.

AGRUMENT III

III. WHETHER THE SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION'S ORDER FINDING AS FACT AND CONCLUDING AS A MATTER OF LAW THAT THE RESPONDENT SUSTAINED INJURY TO HIS BACK, NECK, AND LEFT ARM SHOULD BE AFFIRMED BASED UPON SUBSTANTIAL EVIDENCE

The South Carolina Workers' Compensation Commission found that as a result of the injury by accident arising out of and in the course of the Respondent employment he was entitled to further medical treatment for his lower back, neck, and left arm. (The issue of compensability of headaches was left for a later determination) The Respondent initially received medical care from Greenville Hospital System at Greenville Memorial Emergency Room. Thereafter, he was referred to Southeastern Neurosurgical and Spine Institute. The Workers' Compensation Commission found the Respondent was entitled to ongoing medical care for his work related injuries to the neck, left arm, and back. Further, that he had not reached maximum medical improvement and that the further medical care and treatment, most probably, would tend to lessen the period of the Claimant's disability as defined by SC Code Ann. 42-15-60. In the case of Dodge v. Bruccoli, Clark, Layman, Inc. 334 SC 570 4, 514 S.E.2d 593 (SC App. 1999) the Court held that the medical provisions of the South Carolina Workers' Compensation Act allows the Workers' Compensation Commission to award medical benefits beyond the ten weeks set in the statute from the date of the injury when the Commission determines such medical treatment would tend to lessen the period of disability. When the Commission finds that further medical care is necessary and orders it the Court has held implicit in the award is a finding that additional medical treatment will tend to lessen the period of disability, for on no other ground could liability for additional treatment be made. See Dykes v. Daniels Const. Co. 262 SC 98, 202 S.E.2d 646 (1974)

It is contended that throughout this file the evidence establishes that the Respondent is entitled to further medical care and treatment as found by the South Carolina Workers' Compensation Commission. The Respondent was initially seen in the Greenville Hospital System Emergency Room on September 26, 2011. At that time, the doctors noted that as a result of the accident he had neck, lower back, left thumb and hand pain. (APA 1 pg. 2) They noted tenderness in his right lower back as well as C2, C3 and C4 of his cervical spine. The hospital ordered referral to an orthopedic and use of a hand brace and medication. (APA 1 pg. 4) The Respondent could not obtain orthopedic care as the employer failed to provide it as required by law; therefore, on October 9, 2011, (APA pg. 12) he returned to the emergency room complaining of arm pain and swelling. They also noted he had complaints of neck injury and neck pain with radiation into his back. (APA 13) He had pain on range of motion as well as continued tenderness and neck pain. (APA 13) The nurse indicated that the he was complaining of neck pain down the middle of his spine into his left hand which felt numb. The Claimant was seen on November 16, 2011 (APA 3) at University Medical Group they ordered further medical treatment to include physical therapy, " I have recommended to him he undergo a course of supervised PT for his low back with our manual spine therapist at Proaxis to focus on core strengthening, back strengthening, pelvic stabilization exercise. I provided the patient with information on back care and we discussed activity modification including no bending, lifting." We also discussed anti-inflammatory measures including NSAID and the use of ice alternating with heat. If the patient fails to respond to a course of PT or symptoms worsen he understands he is to notify me. (APA 3)

It is submitted that since the Claimant was unable to undergo the treatment recommended by the physician due to denial of benefits by the Workers' Compensation Carrier that the Commission was correct in finding that he entitled to further care and treatment.

ARGUMENT IV

IV. WHETHER THE SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION HAS SUBJECT MATTER JURISDICTION OVER THIS CASE.

Respondent, Gary Jeter, Jr., filed a workers' compensation claim against All My Sons Moving and Storage, Inc.. It is submitted that the South Carolina Workers' Compensation Commission does have subject matter jurisdiction over this claim. The South Carolina Workers' Compensation Act was enacted in 1936 primarily to provide protection to injured workers. Further, the South Carolina Workers' Compensation Commission was established to decide work related claims. "The Workers' Compensation Act is a remedial statute it's primary objective being to create and preserve rights of employees who may sustain personal injuries during the course of their employment." McLaine v. Carolina Power and Light Co. 1959, 172 F. Supp. 273

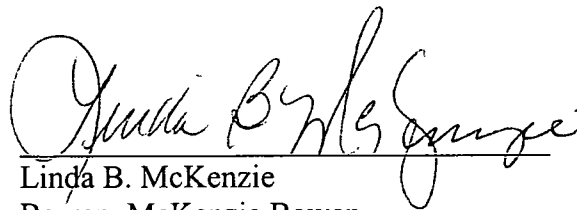
The Respondent an injured worker filed a claim with the South Carolina Workers' Compensation Commission alleging that his employer, All My Sons Moving and Storage, Inc. was liable for the injuries he sustained as a result of the incident on September 23, 2011. Since All My Sons Moving and Storage, Inc. is an employer operating within the state of South Carolina and has four or more employees they are subject to the South Carolina Workers' Compensation Act. Therefore, it is submitted that the Commission does have subject matter jurisdiction in that they were established to have jurisdiction over workers' compensation claims arising out of and in the course of employment. The issue of whether All My Sons Moving and Storage, Inc. was insured and if so, by which carrier, is a matter within the determination of the South Carolina Workers' Compensation Commission. The Commission issued an Order wherein they found that at the time of this accident All My Sons Moving and Storage, Inc. was insured by Hartford Insurance Company of the Midwest. The substance of that finding is subject to a

separate Order by the South Carolina Workers' Compensation Commission and is a matter pending before the Appellate Court under separate appeal.

CONCLUSION

The Respondent contends that the South Carolina Workers' Compensation Commission does have subject matter jurisdictions of this case. Further, that a hearing was held before the Single Commissioner on February 24, 2012 at which time all parties were present and evidence on the claim was submitted. Thereafter, by Order dated August 21, 2012 the Workers' Compensation Commission Single Commissioner issued an Order which was timely appealed to the Appellate Panel of the South Carolina Workers' Compensation Commission. By Order dated March 12, 2013 the Appellate Panel issued an Order affirming the Hearing Commission's Order in its entirety. It is submitted that the Order of the South Carolina Workers' Compensation Commission Appellate Panel was supported by substantial evidence and not affected by error of law and therefore should be affirmed in its entirety.

RESPECTFULLY SUBMITTED,



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Of whom Hartford Insurance Company of the Midwest is the Appellant

CERTIFICATE OF SERVICE

The undersigned certifies that she is an employee of Bowen, McKenzie, Bowen, and that the attached *Respondent's Initial Brief* and *Designation of Matter to be included on the Record on Appeal* were served upon Myada O. El-Sawi, Esquire, attorney for Hartford Insurance Company of the Midwest and Pete Dworjanyn, Esquire, attorney for ULLICO, this **26th day of July 2013**, in accordance with Regulations 67-210, 67-213, 67-214, 67-215 and such other law as may be applicable by U.S. mail, addressed to:

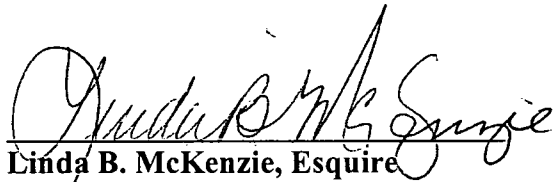
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