THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM THE SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION
T. Scott Beck, Commissioner

W.C.C. 0922546

Richard A. Hartzell, Employee,,.....Respondent,

v.

Palmetto Collision, LLC, Employer,.....Appellant,

and

the S.C. Uninsured Employers Fund.....Respondent.

FINAL BRIEF OF THE APPELLANT

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Table of Authorities

Cases

Statutes

Table of Contents

Statement of the Issues on Appeal

I. Did the Workers' Compensation Commission err in finding and concluding that Palmetto Collision regularly employed four or more employees and; therefore, is subject to the South Carolina Workers' Compensation Act?

II. Did the Workers' Compensation Commission err in finding that the Claimant sustained an injury to his back by accident "on or about February 25, 2009" and in failing to make any conclusion of law with respect to S.C. Code Ann. § 42-1-160?

III. Did the Workers' Compensation Commission err in finding that the Claimant "timely reported the injury" and in failing to make any conclusion of law with respect to S.C. Code Ann. § 42-15-20?

IV. Did the Workers' Compensation Commission err as a matter of law in awarding the Claimant "medical, surgical, hospital and other authorized treatment" in direct contravention of S.C. Code Ann. § 42-15-60?

Statement of the Case

The Appellant, Palmetto Collision, seeks review and reversal of the South Carolina Workers' Compensation Commission's Decision and Order dated March 26, 2012, which affirmed the prior order of Hearing Commissioner Andrea Roche by a vote of two to one. The Appellant respectfully contends that the Commission erred in finding and concluding that "the employer regularly employed four (4) or more employees during the relevant time period and was therefore subject to the Act," as this finding and conclusion is not supported by substantial evidence in the record and the applicable law and is otherwise impermissibly vague. The Commission further erred in finding and concluding that the Claimant timely reported an "injury by accident to his back on or

about February 25, 2009," as this finding and conclusion is also unsupported by substantial evidence in the record or the applicable law and is otherwise impermissibly vague. Finally, the Appellant respectfully contends the Commission erred as a matter of law in concluding that the Claimant is entitled to medical treatment under S.C. Code Ann. § 42-15-60, despite the fact that he utterly failed to meet his express statutory burden of proof by "expert medical evidence stated to a reasonable degree of medical certainty."

Evidence Summary

The Claimant, Richard Hartzell, was 52 years old at the time of the hearing before Workers' Compensation Commissioner Andrea Roche. The Claimant testified that he was working for Palmetto Collision in February 2009 doing paint and body work. The Claimant had worked for Palmetto Collision in the past, but had most recently begun working there in mid-December 2008 (approximately 2 months). (R. p.70). He claims that on or about February 25, 2009, he "started to clean up" by "moving tires and rims and heavy frame equipment, frame posts and chains" and "was fine." However, he claims that "[l]ater" that day he "started having pain." (R. pp.43-44). The Claimant admits that he is "not sure exactly what day it was." (R. p.54).

The Claimant admits that he did not report any accident or injury to anyone at Palmetto Collision the day he alleges he was moving equipment. (R. p.44). However, he alleges that he told Mike Stallings, the owner of Palmetto Collision, the "next day" that he "was pretty sore" and "must have hurt himself." (R. p.45).

The Claimant did not seek medical treatment, but instead, continued working for Palmetto Collision. The Claimant testified that he worked for two weeks (R. p.48), but in his application for unemployment benefits, the Claimant gave the following statement:

> "I quit my job because...there was no work. My last day at work was Friday 3/20/09. I called Mike Stallings on Monday 3/23/09 to see if there was going to be any work for the upcoming week. Mike told me that there was no work in the shop and the storage lot was empty. I told him I would call him back or he could call me back if work became available. I called Mike back on 3/31/09 and he stated there was no work to be done. I talked to some of my co-workers who stated there was no work and that they were just standing around. At that point I just started looking for other work." (R. p. 220).

The Claimant's unemployment claim was initially denied and the Claimant admits that he was in contact with Mike Stallings during the course of his unemployment appeal. (R. p.58). The Claimant testified that he ultimately received unemployment benefits for approximately 26 weeks. (R. p.51). However, he never told Mike Stallings his back was hurting, nor did he ever ask Mike Stallings to assist him with medical treatment. (R. pp.58—59, p.64, p.66).

Apparently, the Claimant saw a chiropractor, Austin Murray, in April 2009. According to Murray's narrative report dated April 2, 2009, the Claimant reported "a recurrence of complaints related to a previously resolved spine, ribs, pelvic region condition which...was not caused by a work or automobile accident." (R p. 175). Murray, who is not a medical doctor, did not relate the Claimant's symptoms or alleged

need for chiropractic treatment, to any work-related accident or injury, did not state that the Claimant required any medical treatment to lessen his period of disability, and did not give any opinion to a "reasonable degree of medical certainty." The Claimant admits that he did not ask Mike Stallings to send him to Murray or to pay for any of his bills. (R. p.66).

The Claimant later found employment as a painter at Altman Suzuki. (R. p.66). The Claimant testified that after doing work at Altman Suzuki, his lower back was "very sore." (R. p.50). He also sets up tables and sells merchandise on the weekends at the Ladson fairground. (R. p.21). At the time of the hearing, the Claimant was looking for work in the automotive field.

Mike Stallings, testified that he is the sole proprietor of Palmetto Collision and has operated the business for approximately 10 years. (R. p.83). Palmetto Collision has never had workers' compensation insurance. According to Stallings, he has always reported the earnings of his employees to the South Carolina Employment Security Commission and has paid payroll taxes on them, even the family members who have worked for him. (R. p.87).

Palmetto Collision currently has two employees, both of whom are paid on a commission basis. In the fourth quarter of 2008, Palmetto Collision filed a Quarterly Contribution and Wage Report with the South Carolina Employment Security Commission showing wages for three employees: Tommy D. Griffin, Edward A. Davis, and Doug K. Alexander. (R. p.191). Stallings testified that Tommy D. Griffin earned only $650.00 that quarter because he was fired in early October 2008, which Stallings clearly recalls because it was his 30th birthday. (R. pp.96-97). Edward A. Davis also left

Palmetto Collision in the middle of the fourth quarter of 2008 because he moved to California. (R. p.97. The only employee to work the entire fourth quarter of 2008 was Stallings's uncle, Doug Alexander. (R. p.98). Both Stallings and the Claimant testified that the Claimant did not come to work for him until mid-December and was paid in cash for those two weeks.

In the first quarter of 2009, when Hartzell claims he was injured, Employer Quarterly Contribution and Wage Reports filed by Palmetto Collision (R. p. 192) show the names of four employees: the Claimant, James D. Alexander, Harold D. Brock, and Douglas K. Alexander. The Claimant testified that he stopped working for Palmetto Collision in mid-March 2009. The record further shows that James D. Alexander came to work at the end of the first quarter of 2009 and earned only $1,560.00. (R. p.100). Stallings further testified that James D. Alexander typically earned at least $800 per week, indicating that he only worked for about 2 weeks at the end of the first quarter of 2009. (R. pp. 101-102). In the second quarter of 2009, Palmetto Collision reported wages for three employees. (R. p. 193).

Mike Stallings further testified that the Claimant never gave him any reason to believe that he had injured his back at Palmetto Collision or that he needed medical treatment. (R. pp.108-109, p.112). In the year after the Claimant left Palmetto Collision, Stallings spoke to him several times and maintained a friendly relationship with the Claimant. (R. pp.108-109). Stallings testified that he first learned that the Claimant was alleging a back injury when he received a letter from the Workers' Compensation Commission and a Form 50 from the Claimant in May 2010. (R. pp.113-114, p.19).

Arguments

I. The Workers' Compensation Commission erred in finding and concluding that Palmetto Collision regularly employed four or more employees and; therefore, is subject to the South Carolina Workers' Compensation Act.

The Appellant specifically raised S.C. Code Ann. § 42-1-360(2) as a defense. According to this section, the Workers' Compensation Act does not apply to "any person who has regularly employed in service less than four employees." Unfortunately, the Commission failed to address this seminal jurisdictional issue with anything but an impermissibly vague finding and cursory legal conclusion, which necessitates reversal of the Commission's March 26, 2012 Decision and Order.[1]

According to the Commission, "under § 42-1-140, Defendant/Employer was a covered employer under the Act." (R. p. 17). The Commission cited no evidence and made no finding of fact in support of this conclusion, other than the conclusory statement that "the employer regularly employed four (4) or more employees during the relevant time period." (R. p. 16). The Appellant respectfully contends that this constitutes plain legal error and requests that Court of Appeals enter its own finding that the Appellant regularly employed fewer than four employees and conclude that the Appellant is not subject to the South Carolina Workers' Compensation Act based upon its own view of the preponderance of the evidence. Shuler v. Tri-County Electric Co-op, Inc., 385 S.C. 470,

[1] The Commission must make specific findings of fact upon which a claimant's right to compensation are based. *See* S.C.Code Ann. § 1-23-350 (1986); Shealy v. Algernon Blair, Inc., 250 S.C. 106, 109, 156 S.E.2d 646, 648 (1967). In fact, "awards without such specific findings do not comply with the requirements of the [workers' compensation] act and are illegal." *Id.* at 110, 156 S .E.2d at 648; *see also* Airco, Inc. v. Hollington, 269 S.C. 152, 160, 236 S.E.2d 804, 808 (1977) (finding that the commission has a statutory duty to make a finding of fact for all "essential factual issues.").

472, 684 S.E.2d 765, 767 (2009) (holding that"[w]hen the issue involves jurisdiction, the appellate court may take its own view of the preponderance of the evidence.").

The Claimant alleges that he was injured in February 2009 and thereafter ceased working for Palmetto Collision because "there was no work." (R. p.56, l.12) and "the parking lot was empty." (R. p.56, l.13). In fact, the Claimant gave a sworn statement to the Employment Security Commission that he quit his job in February 2009 because there was "no work in the shop and the storage lot was empty." (R. p.220). The Appellant respectfully contends that as body shop with an empty parking, it did not regularly employ four or more employees in the first quarter of 2009.

The record contains Palmetto Collision's Quarterly Contribution and Wage Reports, including the reports for the fourth quarter of 2008 and the first quarter and second quarters of 2009. During the fourth quarter of 2008, Palmetto Collision had a total of three employees, one of whom, Tommy Griffin, earned only $650. (R. p.191). According to Mike Stallings, the owner of Palmetto Collision, Griffin was fired in October 2008 and; therefore, Palmetto Collision had only two employees for the majority of the fourth quarter of 2008. (R. p.96, l.21 through p.97, l.16). There is no competent evidence that Palmetto Collision regularly employed four or more employees in the quarter prior to the Claimant's alleged accident.

During the first quarter of 2009, Palmetto Collision reported a total of four employees; however, one of these employees was the Claimant, who admittedly quit in the middle of the first quarter. (R. p.192). At the end of the first quarter (and after the Claimant quit working), Stallings's cousin, James Alexander, came to work for Palmetto Collision earning "$800 dollars a week." (R. p.101, l.22). The wage reports show that

James Alexander earned a total of $1,560.00 in the first quarter of 2009, indicating that he worked for about two weeks. (R. p.192). Therefore, the greater weight of the evidence indicates that Palmetto Collision did not regularly employ four or more employees in the quarter during which the Claimant alleges to have been injured.

In addition, the wage reports for the second quarter of 2009 show that Palmetto Collision had only three employees – including Mike Stallings's cousin and his uncle -- and a total payroll of only $13,259.00. (R. p.193). There is no evidence that Palmetto Collision under-reported its employees or its wages to the Employment Security Commission, especially considering the fact that Stallings reported wages on his own family members. Clearly, the greater weight of the evidence indicates that Palmetto Collision did not regularly employ four or more employees in the quarter after which the Claimant alleges to have been injured.

The Appellant respectfully contends that the preponderance of the evidence supports a finding that Palmetto Collision did not regularly employ four or more employees before, during, or after the Claimant alleges to have been injured. Instead, Palmetto Collision is a small, struggling, family business that is exempted from the South Carolina Workers' Compensation Act by virtue of S.C. Code Ann. § 42-1-360(2). Because the Commission failed to adequately address this seminal issue, the Appellant respectfully requests that the Commission's Decision and Order be reversed and that the Court of Appeals enter its own finding and conclusion on this jurisdictional issue in accordance with the greater weight of the evidence and the applicable law.

II. The Workers' Compensation Commission erred in finding that the Claimant sustained an injury to his back by accident "on or about February 25, 2009" and in failing to make any conclusion of law with respect to S.C. Code Ann. § 42-15-160.

According to the Commission, "on the day after the injury, the Claimant timely reported the injury." (R. p.17, #4). The Commission failed to make any conclusions of law regarding this issues and the March 26, 2012 Decision and Order does not even mention the legal requirements of S.C. Code Ann. § 42-1-160. (R. pp.17-18). The Appellant respectfully contends that the Commission's impermissibly vague finding in this regard and utter failure to properly apply the law to the facts constitutes plain, reversible legal error. *See* S.C. Code Ann. § 1-23-350.[2] Essentially, there can be no "meaningful review" of the Commission's ruling on whether the Claimant sustained an injury by accident arising out of or in the course of his employment pursuant to S.C. Code Ann. § 42-1-160 because the Commission failed to make any such ruling.

Furthermore, the Commission's impermissibly vague finding of fact that the Claimant did sustain "an injury by accident to his back" [sic] is not supported by substantial evidence and should be reversed. While the Commission purportedly relied on the "medical records" to find that the Claimant sustained an injury to his back "on or about February 25, 2009," the only "medical records" in evidence are the reports of a chiropractor, Austin Murray.

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[2] S.C. Code Ann. § 1-23-350 requires that "[a] final decision or order adverse to a party in a contested case shall be in writing or stated in the record. A final decision shall include findings of fact and conclusions of law, separately stated. Findings of fact, if set forth in statutory language, shall be accompanied by a concise and explicit statement of the underlying facts supporting the findings."

The Claimant did not see Dr. Murray until April 2009. According to Dr. Murray's April 2, 2009 narrative report, the Claimant complained of "a recurrence of complaints related to a previously resolved" condition that "was not caused by a work or automobile accident." (R. p.175) (emphasis added). The Claimant signed a statement for Dr. Murray on April 1, 2009 indicating that his condition began on February 30, 2009 and that the cause of his condition was "unknown." (R. p.174). There are no other records—medical, chiropractic, or otherwise -- concerning the cause of the Claimant's alleged back problem and there are no records whatsoever that mention the Claimant moving some heavy machine. Therefore, the Appellant respectfully contends that the "medical records" simply do not support a finding that the Claimant injured "his back on or about February 25, 2009, while moving a heavy frame machine."

While the Claimant may have testified at the July 12, 2011 hearing that he now believes he injured his back lifting a frame machine on February 25, 2009, he was forced to admit on cross-examination that he was "not sure exactly what day it was." (R. p.54, l.25). The Claimant also admitted that he did not have a sudden onset of pain moving anything at work. (R. p.55, ll.20-22). In addition, the Claimant admits that he continued working at Palmetto Collision after the alleged accident and that the reason he quit working for Palmetto Collision in March 2009 was not due to an alleged back injury, but was because work was slow. (R. p.56). The Claimant also admits that he applied for unemployment benefits after he left his job at Palmetto Collision (R. pp.216--229) and began looking for work. Even during the course of his protracted unemployment claim, the Claimant admits that he never asked Mike Stalling for medical treatment, never asked him to pay any medical bills, and never even told him that his back was hurting. (R.

pp.58-59, p.64, p.66). The Appellant respectfully contends the Claimant's testimony is not substantial evidence in support of a finding that he injured his back on or about February 25, 2009 lifting a heavy frame machine.

Furthermore, Mike Stallings, the owner of Palmetto Collision testified that the Claimant never gave him any reason to believe that he had injured his back while working for Palmetto Collision and the Claimant never requested any medical treatment. (R. pp. 108-109, p.111--114). Even in his discussions with the Claimant in the year after he quit working for Palmetto Collision, the Claimant never gave Mike Stallings any reason to believe that he had injured his back or was in need of medical treatment. Mr. Stallings further testified that nothing about the Claimant's job even required him to move a heavy frame machine and that Mr. Stallings would have never asked the Claimant to move a frame machine because the Claimant was known to have weak shoulders due to arthritis. (R. p.110). The Commission failed to discuss to discuss or otherwise discount this testimony in making its conclusory finding and having made no ruling of law on this issue; the Appellant respectfully contends that the Commission's finding that the Claimant injured his back on or about February 25, 2009 and implicit ruling of law on this issue should be reversed.

III. The Workers' Compensation Commission erred in finding that the Claimant "timely reported the injury"and in failing to make any conclusion of law with respect to S.C. Code Ann. § 42-15-20.

According to the Commission, "the medical records and testimony" support a finding that the Claimant injured his back "on or about February 25, 2009, while moving a heavy

frame machine" and "timely reported the injury" to Mike Stallings. The Commission failed to make any conclusions of law regarding these issues and the March 26, 2012 Decision and Order does not even mention the legal requirements of S.C. Code Ann. § 42-15-20. The Appellant respectfully contends that the Commission's impermissibly vague finding in this regard and utter failure to properly apply the law to the facts constitutes plain, reversible legal error. *See* S.C. Code Ann. § 1-23-350.[3] Essentially, there can be no "meaningful review" of the Commission's rulings on these important legal issues because the Commission failed to make any such rulings.

Furthermore, the Commission's impermissibly vague finding of fact on the notice issue is not supported by substantial evidence and should be reversed. Mike Stallings, the sole owner of Palmetto Collision, testified that his first notice of the alleged accident was a Form 50 dated May 10, 2010 – fourteen months after the Claimant last worked for him. (R. p.114, ll.11-15). However, S.C. Code Ann. § 42-15-20 requires that the Claimant give the employer notice of a job-related accident within ninety days after its occurrence. Hanks v. Blair Mills, Inc., 286 S.C. 378, 335 S.E.2d 91 (Ct. App. 1985); see also McCraw v. Mary Black Hosp., 350 S.C. 229, 237, 565 S.E.2d 286, 290 (2002). The burden is upon the Claimant to show compliance with the notice provisions of section 42-15-20. *See* Lowe v. Am-Can Transport Servs., Inc., 283 S.C. 534, 324 S.E.2d 87 (Ct. App. 1984). Unless the Claimant meets this burden of proof by a preponderance of the

[3] S.C. Code Ann. § 1-23-350 requires that "[a] final decision or order adverse to a party in a contested case shall be in writing or stated in the record. A final decision shall include findings of fact and conclusions of law, separately stated. Findings of fact, if set forth in statutory language, shall be accompanied by a concise and explicit statement of the underlying facts supporting the findings."

evidence, the alleged injury is not compensable. Muir v. C.R. Bard, Inc., 336 S.C. 266, 519 S.E.2d 583 (Ct. App. 1999). The Appellant respectfully contends that the Claimant failed to meet his burden of proof under S.C. Code Ann. § 42-15-20 and any finding to the contrary is not supported by substantial evidence.

While the Claimant testified that that he told Mike Stallings, the owner of Palmetto Collision, the "next day" that he "was pretty sore" and "must have hurt himself." (R. p.45, l.1), this alone is insufficient evidence upon which a conclusion in his favor could have been made under S.C. Code Ann.§ 42-15-20. The South Carolina Supreme Court has explained that "the employer's knowledge of the fact that an employee becomes ill while at work does not necessarily, of itself, serve the employer with notice that such illness constituted or resulted in a compensable injury." Sanders v. Richardson, 251 S.C. 325, 162 S.E.2d 257 (1968). Here, there is no evidence or testimony that the Claimant ever told Mike Stallings that his alleged back pain was in any way related to any alleged accident at work. Furthermore, any allegation to the contrary is seriously undermined by the fact that the Claimant continued working for two more weeks before he quit to go to work elsewhere and the fact that the Claimant admittedly never asked for any medical treatment or made any complaint of back pain for the next fourteen months to Mike Stallings, a man whom he considered a friend for 30 years.

Unfortunately, the Commission failed to adequately address the basis for their cursory finding that notice was given and, perhaps more importantly, failed to make any conclusion of law with respect to the requirements of S.C. Code Ann. § 42-15-20. Therefore, the Appellant respectfully requests that the Commission's March 26, 2012 Decision and Order be reversed.

IV. The Workers' Compensation Commission erred as a matter of law in awarding the Claimant "medical surgical, hospital and other authorized treatment" in direct contravention of S.C. Code Ann. § 42-15-60.

The Commission found that the Claimant is entitled to medical treatment; however, no evidence is cited in support of this vague and conclusory finding. The Appellant respectfully contends that there is no competent evidence upon which such a finding could be properly based and that only surmise, conjecture, and speculation support the claim for medical benefits. Perhaps more importantly, the Commission erred as a matter of law by completely relieving the Claimant of his burden of proof under S.C. Code Ann. § 42-15-60. (R. pp.17-18, #3). As such, the Appellant requests that the Commission's finding and conclusion regarding the Claimant's entitlement to medical benefits be reversed.

According to the Commission, S.C. Code Ann. § 42-15-60 "is not intended to disadvantage or burden a Claimant" who seeks an award of medical benefits. This conclusion is plainly contrary to the applicable law, including the unequivocal terms of S.C. Code Ann. § 42-15-60. It was heretofore well-settled that the Claimant bears the burden of proving his entitlement to benefits under the Workers' Compensation Act and that an award in his favor may not rest on mere surmise, conjecture, or speculation. Jennings v. Chambers Development, 516 S.E.2d 453 (Ct. App. 1999). In addition, S.C. Code Ann. § 42-15-60 specifically requires a heightened burden of proof for claims for medical treatment beyond ten weeks from the date of the alleged injury. According to its plain an unequivocal terms, the Commission may only award medical benefits beyond ten weeks from the date of an injury when such treatment

"will tend to lessen the period of disability as evidence by expert medical evidence stated to a reasonable degree of medical certainty."

The record contains no medical evidence that the Claimant requires additional medical treatment to "lessen the period of disability" related to an alleged low back strain in February 2009 and the record contains no opinion from any medical expert "stated to a reasonable degree of medical certainty." Because the Claimant did not and cannot meet his burden of proof by "expert medical evidence stated to a reasonable degree of medical certainty," the Commission relieved him of his burden entirely, ostensibly because it "would be expensive and difficult to obtain."

However, the Legislature, within its sole discretion, has chosen to place this burden of proof squarely upon the Claimant, despite any alleged expense or difficulty. "Once the legislature has made [a] choice, there is no room for the courts to impose a different judgment based upon their own notions of public policy." South Carolina Farm Bureau Mut. Ins. Co. v. Mumford, 299 S.C. 14, 19, 382 S.E.2d 11, 14 (Ct. App. 1989). Therefore, the Appellant respectfully contends that the Commission erred as a matter of law in ignoring the plain and unambiguous requirements of S.C. Code Ann. § 42-15-60 and in entering an impermissibly vague finding in the Claimant's favor that is unsupported by substantial evidence. The Appellant requests that the award of medical benefits be reversed in accordance with S.C. Code Ann. § 42-15-60.

Conclusion

Based upon these arguments, the Appellant respectfully requests that the Court of Appeals reverse the March 26, 2012 Decision and Order of the South Carolina Workers' Compensation Commission. The Appellant further requests that the Court of Appeals enter its own findings and conclusions that Palmetto Collision is not subject to the South Carolina Workers' Compensation Act pursuant to S.C. Code Ann. § 42-1-360(2).

Respectfully submitted,

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March 19, 2013
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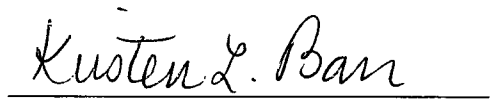
the S.C. Uninsured Employers Fund.....Respondent.

CERTIFICATE OF COUNSEL

The undersigned certified that this Final Brief complies with Rule 211(b), SCACR and Supreme Court Order 2007-08-16-02, dated August 13, 2007, requiring redaction of personal identifiers.

March 19, 2013



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the S.C. Worker's Compensation Uninsured Employer's Fund,.....Respondent.

PROOF OF SERVICE

The undersigned hereby certifies that the above-named Respondents, Richard A. Hartzell and the S.C. Workers's Compensation Uninsured Employer's Fund, were each served with three (3) bound copies of the enclosed Final Brief of the Appellant this 19th day of March 2013 by depositing a copy of the same in the United States Mail, first class postage prepaid, addressed to the parties of record, as follows:

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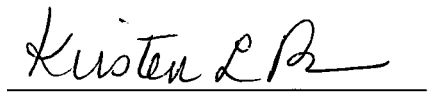

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