THE STATE OF SOUTH CAROLINA
In The Supreme Court

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S.C. SUPREME COURT

APPEAL FROM SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION

Opinion No. 5660 (S.C. Ct. App. filed June 26, 2019)

Otis Nero, Claimant,.....Respondent,

v.

South Carolina Department of Transportation, Employer, and
State Accident Fund, Carrier.....Petitioners.

PETITION FOR WRIT OF CERTIORARI

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CERTIFICATE OF COUNSEL

Pursuant to Rule 242(d) (1), SCACR, Counsel for Petitioner certifies that a Petition for Rehearing was made to the Court of Appeals on July 11, 2019 and denied on August 22, 2019.

QUESTIONS PRESENTED

1. Whether the Court of Appeals erred in reversing the Commission's denial of benefits based on Respondent's failure to provide timely notice in accordance with S.C. Code Ann. §42-15-20 and accompanying case law?

2. Whether the Court of Appeals erred in their application of the substantial evidence standard of review, exceeding their role as an appellate court by substituting their view of the evidence instead of deferring to the Commission as the appropriate fact finders in the case.

STATEMENT OF THE CASE/PROCEDURAL HISTORY

This appeal involves a workers' compensation matter. Respondent alleges a work accident on June 20, 2012, causing injuries to his neck and bilateral shoulders. Petitioners deny that Respondent sustained a compensable injury by accident arising out of and in the course of his employment, and Petitioners deny that Respondent provided his employer with sufficient notice in accordance with S.C. Code Ann. §42-15-20 and accompanying case law.

On June 20, 2012, Respondent was working on a crew pouring slab of cement. (Appendix, p.247, lines 5-17). Respondent was pulling a squeegee board to level cement when he felt a snap between his shoulder and his neck. (Appendix p.250, lines 4-13). Petitioner did not tell his supervisor that he hurt his neck, and he took a break and returned to work. (Appendix p.250, lines 18-24). At the end of the day, Respondent was standing with his supervisor and lead man, laughing and talking, when he passed out. (Appendix p.252, lines 3-14). Respondent got up and told his supervisor he was all right and felt okay, and he didn't know what happened. (Appendix p.252,

lines 20-23). Respondent walked around and his supervisor asked again if he was okay, and Respondent told them he felt like he was alright and drove home. Respondent drove home and when he got out of his truck, he fainted a second time in his yard, so Respondent's wife took him to the emergency room. (Appendix, p.253, lines 14-20).

Respondent presented to Dr. Richie at Carolinas Hospital System and underwent several diagnostic tests to determine the cause of his syncope episodes, including head CT, x-ray of the right foot, chest x-ray, cardiac work up, gastrointestinal work up, and a cervical MRI, which revealed cervical stenosis. (Appendix pp.496-497). As a result of his MRI findings, Respondent was referred for a consultation with a neurosurgeon, Dr. Naso, on June 24, 2012. (Appendix pp.498-499). Dr. Naso's June 24, 2012 report states that Dr. Naso did not feel Respondent's syncope was related to his cervical spine pathology. (Appendix p.499). On June 28, 2012, Respondent completed and signed a "Patient Health History Questionnaire" for Dr. Naso's office, wherein Respondent stated that his complaints were not related to an injury and were not workers' compensation. (Appendix p.505). While in the hospital, Respondent spoke with his supervisors and again did not tell them he was treating as a result of any work injury. (Appendix, p.264, lines 18-23). On August 28, 2012, Dr. Naso performed surgery, consisting of cervical discectomy and fusion. (Appendix, p.501).

Less than one month after his alleged accident, Respondent submitted FMLA paperwork to his employer. On the "Certification of Health Care Provider for Employee's Serious Medical Condition" signed by Respondent and Dr. Richey, in the space designated for the date Respondent's condition commenced, it said "several years – neck and syncope." (Appendix p.537). Respondent's FMLA paperwork did not mention any work related accident, and he did not request workers' compensation benefits at that time.

On January 6, 2014, Respondent filed a Form 50 request for hearing, alleging injuries to his neck and bilateral shoulders, as a result of pulling cement with a road crew using a large squeegee bard, followed by syncope. Petitioners timely filed a Form 51 response, denying that Respondent sustained a compensable injury by accident arising out of and in the course of his employment and denying that Respondent provided Petitioners with timely notice of his alleged accident.

A hearing was held before the Single Commissioner on March 28, 2014. On August 5, 2014, the Single Commissioner issued a decision and order, wherein she found Respondent sustained a compensable injury by accident while pulling a squeegee board leveling concrete, aggravating a pre-existing disease in the Respondent's cervical spine that was asymptomatic prior to the accident. (Appendix, p. 191-192). The Single Commissioner ruled that Respondent had a reasonable excuse for not reporting his work injury due to the facts that (1) his lead man and supervisor were present when he passed out and had knowledge of pertinent facts surrounding the accident sufficient to indicate the possibility of a compensable injury, (2) the Employer was aware that Respondent had not returned to work after June 20, 2012, and (3) Petitioners were notified Respondent had been hospitalized and ultimately underwent neck surgery. (Appendix, pp.195). The Single Commissioner further found that Petitioners were not prejudiced by the late formal reporting of the injury. (Appendix p.200).

Petitioners appealed to the Full Commission Appellate Panel ("Full Commission"), arguing the Single Commissioner erred in finding that Respondent sustained a compensable injury by accident to his neck arising out of and in the course of his employment while pulling a squeegee as alleged in his pleadings, and Respondent did he meet his burden in proving an aggravation of his pre-existing cervical condition as a result of his accident pulling the squeegee board. Petitioners

further argued the Single Commissioner erred in finding that Respondent had reasonable excuse for not providing notice of his alleged work accident pursuant to S.C. Code Ann. §42-15-20, and that Petitioners were not prejudiced by the late formal reporting of the accident.

Following the submission of briefs by both parties, oral arguments were held on February 23, 2015. On May 29, 2015, the Full Commission issued a decision and order, reversing the August 5, 2014 decision of the Single Commissioner. (Appendix, pp.207-227). The Full Commission ruled that although the Respondent's supervisors witnessed the first syncope episode at the job site, Respondent never reported the alleged accident pulling the squeegee board alleged in his pleadings and awarded by the Single Commissioner's finding of compensability. (Appendix, p.155). The Full Commission ruled that Petitioners were prejudiced by Respondent's failure to provide timely notice in accordance with S.C. Code Ann. §42-15-20, and Petitioners were deprived of the opportunity to investigate the causation of the Respondent's injury, including whether his need for surgery was caused by the accident Respondent alleged pulling the squeegee board, or whether his injury was a result of Respondent's first syncope episode at work or his second syncope that took place at home in his driveway. (Appendix, p.157). The Full Commission concluded that based on Respondent's failure to provide notice as required by S.C. Code Ann. §42-15-20 and Respondent's failure to provide a reasonable excuse made to the satisfaction of the Commission for not giving timely notice, and the resulting prejudice suffered by Petitioners, Respondent's request for benefits as a result of his alleged June 20, 2012 accident were denied. (Appendix, p. 226).

Petitioner appealed to the Court of Appeals, and following submission of briefs by both parties, oral arguments were held on November 17, 2016. On March 29, 2017, the Court of Appeals reversed the decision of the Full Commission on the grounds that the substantial evidence

in the record did not support the Full Commission's finding that Respondent failed to put Petitioners on notice of a potential injury. (Appendix, p.7). The Court of Appeals stated that the substantial evidence in the record did not support the Full Commission's finding that Respondent did not provide a "reasonable excuse" for failure to provide timely notice, and Petitioners were not prejudiced by the lack of timely notice. (Appendix, p.10).

On April 13, 2017, Respondents filed a petition for rehearing, arguing that the Court of Appeals overlooked or misapprehended the evidence, law, or arguments involving the substantial evidence standard of review, and the Court of Appeals exceeded its role as an appellate court by substituting its judgment for that of the commission instead of deferring to the Commission as the appropriate fact finders. (Appendix pp. 39-48).

On August 22, 2017, the Court of Appeals issued an Order granting Respondents' petition for rehearing. (Appendix p.118) The Court of Appeals filed a substituted opinion, changing the substantial evidence standard of review to a de novo review, stating, "[b]ecause the issue of timely notice is a jurisdictional question, 'the [c]ourt may take its own view of the preponderance of the evidence.' *Shatto v. McLeod Reg'l Med. Ctr.*, 406 S.C. 470, 475, 753 S.E.2nd 416, 419 (2013)(quoting *Wilkinson ex rel. Wilkinson v. Palmetto State Transp. Co.*, 382 S.C. 295, 299, 676 S.E.2nd 700, 702(2009)); *Mintz v. Fiske-Carter Constr. Co.*, 218 S.C. 409, 413, 63 S.E.2nd 50, 52 (1951)." *Id.* at 529." (Appendix p.14).

Petitioners then filed their first petition for writ of certiorari on October 23, 2017. (Appendix pp.54-71). On April 4, 2018, this Court issued an opinion reversing the Court of Appeals and remanding for a decision under the proper substantial evidence standard of review. (Appendix pp.35-36). This Court held that neither the *Shatto* nor *Mintz* cases relied on by the Court of Appeals supported the use of the de novo standard, and "until this case, the Court of

Appeals has consistently applied the substantial evidence standard when reviewing decisions of the commission on the question of timely notice." (Appendix p.36). This Court concluded that the Court of Appeals erred in applying the de novo standard, and under well settled law, the commission's determination of whether a claimant gave timely notice under section 42-15-20 was not a jurisdictional determination and must be reviewed on appeal under the substantial evidence standard. (Appendix p.37).

On June 26, 2019, the Court of Appeals issued another opinion. Despite previously granting the petition for rehearing on the grounds that they violated the substantial evidence standard of review, the Court of Appeals again reversed the Full Commission's denial of the claim on the grounds that the substantial evidence in the record does not support the Commission's findings that Respondent failed to provide Petitioner with adequate notice of his workplace injury or that Petitioner was prejudiced by Respondent's late formal notice. (Appendix p.37). Petitioner filed another petition for rehearing, which was denied on August 22, 2019. (Appendix p.119).

ARGUMENT

I. The Petition for writ of certiorari should be granted because the Court of Appeals erred in reversing the Commission's denial of benefits based on Respondent's failure to provide timely notice in accordance with S.C. Code Ann. §42-15-20 and accompanying case law.

The South Carolina Workers' Compensation Act sets forth the requirements for notice of an accident to an employer in S.C. Code Ann. §42-15-20. That sections states:

> (A) Every injured employee or his representative immediately shall on the occurrence of an accident, or as soon thereafter, give or cause to be given to the employer a notice of the accident and the employee shall not be entitled to physician's fees nor to any compensation which may have accrued under the terms of this title prior to such giving notice, unless it can be shown that the employer, his agent, or representative,

had knowledge of the accident or that the party required to give such notice had been prevented from doing so by reason of physical or mental incapacity or the fraud or deceit of some third person.

(B) Except as provided in subsection (C), no compensation shall be payable unless such notice is given within ninety days after the occurrence of the accident or death, unless reasonable excuse is made to the satisfaction of the commission for not giving timely notice, and the commission is satisfied that the employer has not been unduly prejudiced thereby.

"The burden is upon the claimant to show compliance with the notice provisions of §42-15-20." *Bass v. Isochem*, 365 S.C. 454, 473, 617 S.E.2nd 369, 379 (Ct. App. 2005). In this case, the Court of Appeals acknowledges that Petitioner never gave actual notice of his alleged work accident within the ninety (90) period of time set forth in S.C. Code Ann.§42-15-20(B). (Appendix p.26). Therefore, the question turns on whether the employer had knowledge of the accident, or whether the employer had "adequate notice" of a work-related injury. In *Etheredge v. Monsanto Co.*, the Court of Appeals concluded that "notice is adequate, when there is some knowledge of accompanying facts connecting the injury or illness with the employment and signifying to a reasonably conscientious supervisor that the case might involve a potential workers' compensation claim." 349 S.C. 451, 459, 562 S.E.2nd 679, 683 (Ct. App. 2002). This Court held that knowledge of the fact that an employee becomes ill 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, 328, 162 S.E.2nd 257, 258 (1968).

This Court has held that the purpose of the notice provision is twofold: "first, it affords protection of the employer in order that he may investigate the facts and question the witnesses while their memories are unfaded, and second, it affords the employer the opportunity to furnish medical care of the employee in order to minimize the disability and consequent liability." *Mintz v. Fiske-Carter Constr.*, 218 S.C. 409, 414, 63 S.E.2nd 50, 52 (1951).

The facts of this case demonstrate that Respondent failed to provide Petitioners with adequate notice of his alleged work accident. Respondent testified that he never told his employer about his incident pulling the squeegee over the cement on the day of the alleged accident. (Appendix p.260, lines 13-18). Respondent testified that after he passed out at the job site at the end of the day, he told his employer that he was fine and drove home. (Appendix p.253, lines 5-15). Respondent testified it was not until he fell a second time at home in his yard that he went to the hospital. (Appendix p.253, lines 14-20). Respondent testified that when his employer called him at the hospital, he never told them he was having surgery as a result of being injured on the job. (Appendix p.264, lines 18-23).

When Respondent presented to Dr. Naso on June 28, 2012, he completed a handwritten "Patient Medical Questionnaire" wherein he wrote that his complaints were not related to an injury and was not related to workers' compensation. (Appendix p.505). When Respondent was seen by Dr. Richie on June 24, 2012, Dr. Richey's report stated "the cause of the syncope I think has something to do with his spinal stenosis and a reflex mechanism. *We really cannot prove it*, but from a monitoring standpoint, we found no problems." (emphasis added; Appendix p.500). When Respondent was seen for a neurosurgical consultation by Dr. Naso on June 24, 2012, Dr. Naso's record stated, "I do not think his syncope is related to cervical spine pathology." (Appendix p.499). When Respondent submitted FMLA paperwork to this employer dated Jul 9, 2012, the date his condition commenced indicated "several years – neck and syncope." (Appendix pp.536-539).

Despite all the facts set forth above, the Court of Appeals found the undisputed evidence in the record demonstrated that Petitioners had adequate notice within the statutory requirement. The Court of Appeals fails to address the fact that Respondent passed out a second time in his driveway, which is equally likely to be the cause of his injuries as the fall witnessed by the

employer at the end of the day. Petitioners were not afforded the opportunity to timely investigate which of the multiple incidents that took place of the date of the alleged accident were the cause of Respondent's need for surgical treatment, since notice was not provided until long after the time period for notice passed.

In order for the Court of Appeals to reverse the Full Commission's decision based on the fact that the Respondent's supervisors witnessed him fall at the end of the day, it would require them to find that the syncope episode at the worksite, and not the alleged squeegee incident or the subsequent syncope episode in his own driveway, was the mechanism of injury that aggravated his pre-existing cervical condition, even though it was the pulling of the squeegee that was pled by Respondent and awarded by the Single Commissioner. Such a finding would be speculative, and this Court has been clear that, "an award cannot be based on surmise, conjecture, or speculation." *Tiller v. National Health Care Center of Sumter,* 334 S.C. 333, 339, 513 S.E.2d 843, 845 (1999).

The only notice Petitioners had in this case was that they witnessed Respondent passing out at the end of the day, before then telling them he was fine and driving home. As this Court held in *Sanders*, "the fact that an employee becomes ill at work "does not necessarily, of itself, serve the employer with notice that such illness constituted or resulted in a compensable injury." *Sanders* at 251 S.C. at 328, 162 S.E.2nd at 259 (1968). In another case dealing with the issue of notice, this Court reversed a decision of the Court of Appeals, stating, "[w]hile reasonable minds could have reached a different conclusion based on the record, we must not engage in fact-finding that would disregard the Commission's factual finding on these issues." *Hartzell v. Palmetto Collision*, 415 S.C. 617, 623, 785 S.E.2nd 194, 197 (2016).

Further, Petitioner submits that the Court of Appeals' decision in this case would impose a heightened requirement of investigation on an employer that would result in an almost impossible and impractical application of the law to future workers compensation claims. If an injured worker fails to tell his employer about an alleged accident, tells his doctor his injuries are not related to any work injury, and submits formal paperwork to his employer requesting FMLA and denying his condition was related to a recent work injury and instead has existed for years, it is illogical to find that the injured worker has satisfied his burden, or that an employer should disregard the injured workers' statements and still investigate a potential accident they know nothing about.

Finally, the Court of Appeals held that Petitioners were not prejudiced by Respondent's failure to provide notice in accordance with the statute. As discussed above, there were disputed facts and competing medical opinions regarding whether Respondent's aggravated cervical stenosis or his syncope episodes were causally related to the accident he alleged operating the squeegee board, and Petitioners were deprived of the right to timely investigate the causation of Respondent's injuries, the extent of Respondent's pre-existing conditions, and whether Respondent sustained his burden in proving a compensable aggravation of a pre-existing condition pursuant to S.C. Code Ann. §42-15-35.

For the reasons set forth above, Petitioner respectfully requests this Court grant the petition for writ of certiorari and allow further briefing on the issues.

II. The petition for writ of certiorari should be granted because the Court of Appeals erred in their application of the substantial evidence standard of review and exceeded their role as an appellate court by substituting their view of the evidence instead of correctly deferring to the commission as the appropriate factfinder in the case.

The South Carolina Administrative Procedures Act (APA) governs the standard of judicial review in workers' compensation cases. *Lark v. Bi-Lo, Inc.*, 276 S.C. 130, 135, 276 S.E.2d 304, 306 (1981). Under the APA, an appellate court's review is limited to deciding whether the Full Commission's decision is unsupported by substantial evidence or is controlled by an error of law. *Hargrove v. Titan Textile Co.,* 360 S.C. 276, 289, 599 S.E.2d 604, 610-11 (Ct. App. 2004). "The Appellate Panel is the ultimate finder of fact in workers' compensation cases, and if its findings are supported by substantial evidence, it is not within our province to reverse those findings." *Mungo v. Rental Unfi. Of Florence, Inc.* 383 S.C. 270, 279, 678 S.E.2nd 825, 829-30 (Ct. App. 2009).

The APA requires that "[a] final decision . . . 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." S.C. Code Ann. § 1-23-350 (2005). Moreover, the Full Commission's findings of fact must be sufficiently detailed to enable the appellate court to determine whether the evidence supports the findings and whether the law was properly applied to those findings. *Frame v. Resort Servs. Inc.,* 357 S.C. 520, 531, 593 S.E.2d 491, 497 (Ct. App. 2004).

In this case, the Full Commission complied with the requirements of the APA. The Full Commission made the following relevant findings of fact:

1. We find that the Claimant alleges he sustained he sustained an injury by accident to his back (cervical spine), affecting both shoulders and arms in the form of radiculopathy, on June 20, 2012 while pulling a large squeegee board over concrete with a road crew. (Appendix p.222, Finding of Fact #3)
2. We find that Claimant admits he did not report the alleged incident pulling the squeegee to his supervisors, and he continued to work the remainder of his shift. (Appendix p.222, Finding of Fact #4)

3. We find that the knowledge employer had that anything was wrong with Claimant on June 20, 2012, was when he suddenly passed out at the shed while talking, laughing, and joking with his supervisors and other employees after the conclusion of their work shift. (Appendix p.223, Finding of Fact #5)
4. We find that Claimant admitted to having other previous dizzy spells on the job. (Appendix p.223, Finding of Fact #6, citing Hr. Tr. found at Appendix p.262)
5. We find that none of the medical records of Dr. Richey or Dr. Naso make any mention of an incident pulling a squeegee board, and instead the records consistently reference a mechanism of injury as Claimant passing out while talking to his boss. (Appendix p.223, Finding of Fact #7)
6. We find that on June 28, 2012, Claimant's hand-written answers on a "Patient Health Questionnaire" stated that his problems were not related to his job and this was not a workers' compensation injury. (Appendix p.223, Finding of Fact #8)
7. We find that there is conflicting medical evidence regarding whether Claimant's alleged incident pulling the squeegee board caused the subsequent syncope episode. Specifically, Claimant's family doctor, Dr. Richey, testified that he had a "hypothesis" that "the cause of the syncope episode had to do with his spinal canal stenosis and a reflex mechanism." On the other hand, Dr. Naso, the neurosurgeon who performed his surgery, stated, "I do not think his syncope is related to his spinal pathology." (Appendix p.223, Finding of Fact #9)
8. We find that the only actual or informal notice the employer had of an injury was that Claimant, who previously suffered from dizzy spells on the job, passed out in front of his supervisors at the shed at the conclusion of the workday. (Appendix p.223, Finding of Fact #10)
9. We find that Claimant assured the employer he was fine to return home, and he suffered a second syncope episode in his driveway, and he was taken to the hospital by his wife. (Appendix p.223, Finding of Fact #11)
10. We find that Claimant spoke with both Mr. Durant and Mr. Bostick while he was in the hospital, and although he informed them he was having neck surgery, Claimant never reported any work-related accident. (Appendix p.224, Finding of Fact #12)
11. We find that Claimant submitted FMLA paperwork to his employer, describing his condition as "several years – neck and syncope," but again Claimant made no mention of a work accident to his employer at that time. (appendix p.224, Finding of Fact #13)
12. We find that pursuant to S.C. Code Ann. §42-15-20, Claimant failed to provide Defendants the required ninety (90) day notice of his accident so as to be entitled to benefits under the act. (Appendix p.224, Finding of Fact #14)
13. We find that pursuant to S.C. Code Ann. §42-15-20, Claimant failed to provide a reasonable excuse made to the satisfaction of the commission for failure to provide timely notice as required by the statute. Although Claimant's supervisors witnessed Claimant's syncope episode, Claimant never reported the alleged accident pulling the

squeegee board, which was the basis of his claim. Claimant was given several opportunities to report his work accident and even submitted FMLA paperwork to the Human Resources department indicating that his problems lasted for several years instead of requesting workers compensation. (Appendix p.224, Finding of Fact #15)

14. We find that pursuant to S.C. Code Ann. §42-15-60, Defendants suffered a prejudice as a result of Claimant's failure to provide timely notice. Defendants were unable to fully investigate whether Claimant's alleged squeegee accident because syncope episode, or whether the alleged squeegee accident or the syncope fall cause the aggravation of his cervical condition. As a result of the prejudice against Defendants caused by Claimant's failure to provide timely notice, Claimant's request for benefits is denied. (Appendix p.224, Finding of Fact #16)

The Full Commission's findings are sufficiently detailed to enable the Court of Appeals to determine whether the evidence supported their findings and whether the law was properly applied to those findings. Instead, the Court of Appeals reversed the factual conclusions of the Commission and substituted its own judgment that Petitioners had adequate notice.

As this Court has previously stated in *Fox v. Newberry Co. Memorial Hospital*, "[i]n the review of a finding of the Worker's Compensation Commission, the reviewing court may not make findings of fact as to basic issues of liability for compensation, where, to do so, would impose upon the court the function of determining such facts from conflicting evidence. 319 S.C. 278, 461 S.E.2nd 393 (1995). This Court has also stated, "[w]hile reasonable minds could have reached a different conclusion based on the record, we must not engage in fact-finding that would disregard the Commission's factual finding on these issues." *Hartzell v. Palmetto Collision*, 415 S.C. 617, 623, 785 S.E.2nd 194, 197.

Petitioners submit that the Court of Appeals' reversal of the Full Commission's decision went far beyond a determination of whether there was evidence to support the conclusions of the Commission, and instead served the function of fact-finding that disregarded the Commission's findings on conflicting evidence in the record. As such, Petitioner's respectfully request this Court grant the petition for writ of certiorari and allow further briefing on the issues.

CONCLUSION

For the reasons set forth above, Petitioners argue that the Court of Appeals erred in finding Petitioners had adequate notice of Respondent's alleged work accident, and its decision conflicts with prior Supreme Court holdings involving the role of the Commission as fact finders in workers compensation claims. As such, Petitioners respectfully requests that this Court grant the petition for writ of certiorari and allow further briefing on the issues.

Respecfully submitted,

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September 19, 2019

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v.

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State Accident Fund, Carrier.....Petitioners.

PROOF OF SERVICE

Petitioner, by and through their undersigned counsel, certify that on the date indicated below, he served counsel of record with a copy of the **Petition for Writ of Certiorari** and **Appendix** by mailing copies of the same by United States Mail with first class postage prepaid the following addresses:

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