THE STATE OF SOUTH CAROLINA
In the Court of Appeals

ORIGINAL

APPEAL FROM THE WORKERS' COMPENSATION COMMISSION

Susan S. Barden, Commissioner
T. Scott Beck, Commissioner
Gene McCaskill, Commissioner

WCC File No. 1510187

Appellate Case No. 2016-002297

Shawn Wier, Employee/Claimant, Respondent,

v.

AGY Holding Corporation, Employer, and Great American Alliance Insurance Company, Carrier, Appellants.

FINAL BRIEF OF RESPONDENT

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COUNTER-STATEMENT OF ISSUES ON APPEAL

I. Whether the Workers' Compensation Commission's findings of fact and conclusions of law must be upheld when they are supported by substantial evidence in the record?

II. Whether the Workers' Compensation Commission properly appointed Dr. Plymale as the authorized treating physician.

STATEMENT OF THE CASE

Shawn Wier (Respondent) suffered compensable injuries to his upper left extremity and left elbow while working in the course and scope of his employment when his elbow struck a piece of machinery. Respondent filed a form 50 on August 31, 2015, requesting a hearing on the merits, asserting injury by accident, requesting additional medical treatment, and requesting other benefits under the South Carolina Workers' Compensation Act (the Act). Subsequently, the parties tried this matter before Commissioner Melody L. James on February 1, 2016. Commissioner James ruled Respondent suffered a compensable injury by accident arising out of and in the course and scope of his employment, she designated Dr. Plymale as authorized treating physician, she ordered payment of temporary total disability compensation from August 19, 2015, to the present and continuing, and she ordered payment of all causally related medical expenses from June 5, 2015, to the present and continuing.

Advanced Glassfiber Yarn (AGY) (the Employer) and Great American Alliance Insurance Company (the Carrier) (collectively Appellants), disputed compensability and liability for medical and indemnity benefits. Therefore, after Commissioner James issued her Order on April 11, 2016, Appellants appealed this matter to the South Carolina Workers' Compensation Commission's Appellate Panel by filing a Form 30. Specifically, Appellants argued Respondent did not meet his burden of proof of compensability, argued Respondent was not entitled to medical treatment, argued Respondent was not entitled to temporary disability benefits, and argued the Commission did not have the right to name Dr. Plymale as the authorized treating physician. Respondent asserted Commissioner James did not err on any of the above, and the Appellate Panel of the Commission agreed. The Panel affirmed Commissioner James's Order with only one amendment, which clarified the Panel's position on Respondent's credibility.

Appellants now appeal the findings of the Appellate Penal to the South Carolina Court of Appeals. They essentially continue to argue the first and fourth arguments they presented to the Appellate Panel: Compensability and the authorized treating physician. The statement presented in Appellants' brief on compensability erroneously argues the same evidentiary standard of review they argued before the Appellate Panel. Presumably, Appellants actually want to argue the Commission's findings of fact are not supported by substantial evidence. Based upon this assumption, Respondent replies as if a substantial evidence argument had been presented, for the standard of review for the Court of Appeals is clearly established and this is all Appellants could reasonably intend. Therefore, on that point, Respondent argues the Commission's Order is supported by substantial evidence, and Respondent argues the Commission was within its rights to designate Dr. Plymale as the authorized treating physician.

SUMMARY OF ARGUMENT

Appellants employed Respondent as a frame services worker (FSR) when he sustained an injury to his upper left extremity and left elbow. That injury was precipitated by Respondent striking his elbow on a piece of manufacturing equipment upon which he was working. Respondent worked light duty until his discharge by Appellants, which was the result of Appellants' unwillingness to continue offering Respondent light duty. Since that time, Respondent has been unable to earn wages and is therefore entitled to temporary total disability benefits. Respondent argues all of the above is supported by substantial evidence.

The Commission awarded this claim because it believed Respondent's testimony, the medical records, and Dr. Plymale's deposition testimony. Based upon those lay and expert opinions, the Commission found Respondent's elbow injury was compensable, awarded temporary total disability benefits, and designated Dr. Plymale as the authorized treating physician.

Substantial evidence supports the Appellate Panel's decision and its conclusions of law are permitted by law, are within the statutory authority of the Commission, are made upon lawful procedure, are not affected by any legal error, and are not arbitrary or capricious.

STATEMENT OF FACTS

Respondent suffered his injury in the late evening hours of June 5, 2015, while he was working for the Appellants. (R. p. 59, lines 5–11). His hand slipped off a bobbin he was doffing, which caused his left elbow to strike the creel above it. (*Id.*). He felt a sharp pain as if he had hit his funny-bone. (R. p. 60, lines 17–18). When the pain didn't subside, he reported it to his supervisor and was sent by Appellants to Aiken Regional Medical Center. (R. p. 60, line 19–p. 61, line 11). Upon his arrival to Aiken Regional Medical Center, Respondent reported a direct blow to his left arm from which he was suffering from constant symptoms. (R. p. 207). At that time, Respondent's physicians diagnosed him with a contusion, prescribed Naprosyn for inflammation, prescribed Norco for pain, prescribed a sling, and issued work restrictions limiting his use of his left arm. (R. p. 232).

After reporting to the emergency room on the evening of the accident, Respondent went to the Employer the following morning and took his work excuse to the plant nurse, Ann Tyler. (R. p. 61, lines 19–24). The Employer then completed an accident report and placed Respondent on light duty consistent with his work excuse from Aiken Regional Medical Center. (R. p. 62, lines 5–13). Ms. Tyler then scheduled Respondent for treatment with Dr. Mickey Plymale of the Moore Orthopaedic Clinic. (R. p. 62, lines 14–24).

Dr. Plymale first saw Respondent on June 15, 2015, ten days following the date of accident. (R. p. 201). The history from this visit states, "He reports that he was at work on [June 5, 2015] when he hit his elbow on a piece of equipment." (R. p. 201). Dr. Plymale placed Respondent on

light duty with restrictions of no lifting over ten pounds until a follow-up appointment. (R. p. 202). Moreover, Dr. Plymale placed Respondent in a tennis elbow strap, prescribed Medrol, and recommended physical therapy. (R. pp. 202–03).

Dr. Plymale next saw Respondent on July 6, 2015. He again recommended physical therapy, occupational therapy, and restricted duty, but also ordered Respondent have an MRI. (R. p. 200). Dr. Plymale continued Respondent's work restrictions until an MRI could be performed. (*Id.*). Additionally, Respondent was given an MFP injection in his elbow. (R. p. 202).

Respondent continued to work with light duty restrictions until August 19, 2015, when he was abruptly terminated by his employer, as they were "[u]nable to accommodate restrictions of a probationary employee." (R. p. 17; p. 42, lines 5–15; p. 65, line 11–p. 67, line 24. Supplemental Record on Appeal p.____). On or about the same date, Appellants also notified Respondent they were denying his claim. (R. p. 64). Thus, for over two months, this was a fully documented and accepted claim, and Respondent was continuing to work within his restrictions as requested by his employer. However, Appellants then decided unilaterally to deny the claim and terminate Respondent.

Commissioner James issued a nine-page decision in which she summarized the claims as well as the evidence. (*See* R. pp. 13–17). She described the witness testimony, lay and expert. (*Id.*). Further, Commissioner James indicated she had examined the entire file and specifically referenced the medical records, the MRI, and Respondent's testimony. (See R. p. 17). Based upon this comprehensive review of the record as a whole, Commissioner James found Respondent had met his burden of proof regarding compensability. (*See id.*). Finally, the hearing commissioner found Respondent was entitled to additional medical treatment and was entitled to temporary total disability benefits. (R. p. 20). The Appellate Panel issued a nearly identical Order. (*Compare* R.

pp. 12–20, *with* R. pp. 1–11 (only adding to Finding of Fact No. 9 the sentence "Notwithstanding any inconsistency, after review of all the evidence, we believe Claimant more than we doubt him"; the Panel made no other alterations.)). The Panel's decision to affirm the single commissioner was unanimous. (R. p. 11).

STANDARD OF REVIEW

The Administrative Procedures Act (the APA) establishes the standard of review for decisions by the South Carolina Workers' Compensation Commission. *Lark v. Bi-Lo, Inc.*, 276 S.C. 130, 132, 276 S.E.2d 304, 305 (1981). Pursuant to the APA, the Court may reverse or modify such a decision if the findings and conclusions of the Commission are affected by error of law, clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record or arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion. S.C. Code Ann. § 1-23-380(6) (Supp. 2016). Under the substantial evidence standard, a decision of the South Carolina Workers' Compensation Commission must be affirmed if the factual findings are supported by substantial evidence in the record. *See Minor v. Philips Prods.*, 329 S.C. 321, 323, 494 S.E.2d 819, 820 (1997); *Jennings v. Chambers Development Co.*, 335 S.C. 249, 259, 516 S.E.2d 453, 458 (Ct. App. 1999).

Substantial evidence is not a mere scintilla of evidence, nor the evidence viewed blindly from one side of the case, but is evidence which, considering the record as a whole, would allow reasonable minds to reach the conclusion reached by the administrative agency in order to justify its action. *Miller v. State Roofing Co.*, 312 S.C. 452, 454, 441 S.E.2d 323, 324–25 (1994). Moreover, the possibility of drawing two inconsistent conclusions from the evidence does not prevent the agency's findings from being supported by substantial evidence. *Clade v. Champion Laboratories*, 330 S.C. 8, 11, 513 S.E.2d 856, 857 (1998). Where there is a conflict in the

evidence, either by different witnesses or in the testimony of the same witness, the findings of fact of the Commission are conclusive. *Tiller v. National Health Care Ctr.*, 334 S.C. 333, 338, 513 S.E.2d 843, 845 (1999).

Determinations of the credibility of evidence are exclusively within the authority of the Commission. The Commission is the ultimate finder of fact in a workers' compensation case and makes the final determination of witness credibility and the weight to be given the evidence. *Brunson v. American Koyo Bearings*, 395 S.C. 450, 455, 718 S.E.2d 755, 758 (Ct. App. 2011). The final determination of witness credibility and the weight to be accorded evidence is reserved to the Full Commission, and an appellate court lacks authority to weigh evidence found by the Commission. *Stone v. Taylor Brothers, Inc.*, 360 S.C. 271, 274, 600 S.E.2d 551, 552 (Ct. App. 2004). A reviewing court may not substitute its judgment for that of the Commission as to the weight of the evidence on questions of fact. *Sharpe v. Case Produce Co.*, 336 S.C. 154, 160, 519 S.E.2d 102, 105 (1999); *Ross v. American Red Cross*, 298 S.C. 490, 491, 381 S.E.2d 728, 730 (1989).

This Court may not substitute its judgment for that of the Commission as to the weight of the evidence on questions of fact but may reverse if the decision is affected by an error of law. *Youmans v. Coastal Petroleum Co.*, 333 S.C. 195, 198, 508 S.E.2d 43, 45 (Ct. App. 1998). Thus, this Court's review is limited to deciding whether the Commission's decision is unsupported by substantial evidence or is controlled by some error of law. *Rogers v. Kunja Knitting Mills, Inc.*, 312 S.C. 377, 381, 440 S.E.2d 401, 403–404 (Ct. App. 1994).

ARGUMENTS

For the most part, this is a substantial evidence appeal. The Appellants disagree with the Commission's Appellate Panel's factual findings, but, as the Court is aware, the Court is bound

by the Commission's findings unless they are clearly erroneous, made on an unlawful procedure, controlled by a legal error, or arbitrary. S.C. Code Ann. § 1-23-380(5) (Supp. 2016).

The Appellants say that Respondent failed to carry his burden of proof in establishing a compensable claim, and argue that he was not credible, but substantial evidence supports the Commission's decision. The Single Commissioner heard Respondent's testimony, reviewed the deposition transcript and medical evidence, and found no pertinent inconsistencies. (R. pp. 12–20). Instead, the Single Commissioner found that Respondent's testimony of the accident was credible, and she found that two providers objectively observed the injury, an MRI documents the injury, and Dr. Plymale's expert medical testimony confirms all other evidence. (*Id.*). The Commission relied on the Single Commissioner's assessment of Respondent's credibility and relied upon the evidence in the record. (R. pp. 1–11). This reliance is within the Commission's discretion.

The Appellants also claim Respondent is not entitled to temporary total disability benefits by alleging he voluntarily resigned from his position. However, the testimonial and documentary evidence in the record clearly shows Respondent continued to work on light duty until he was suddenly terminated after his claim was denied. (R. p. 17; p. 42, lines 5–15; p. 65, line 11–p. 67, line 24. Supplemental Record on Appeal p.____). Conversely, Appellants offer no evidence to support their claim that Respondent was not terminated. Regardless, Respondent remains under work restrictions, and his inability to earn wages is directly related to his medical condition resulting from his accident. The Commission chose to rely on the evidence presented by Respondent and that decision was reasonable.

Finally, Appellants argue that the Commission erred in designating Dr. Plymale as the authorized treating physician in this claim. However, Appellants themselves chose Dr. Plymale

as the authorized treating physician when they first admitted the claim. It was only after terminating Respondent and denying the claim that they objected to Dr. Plymale's status as the previously-authorized treating physician in this case.

I. THE WORKERS' COMPENSATION COMMISSION'S FINDINGS OF FACT AND CONCLUSIONS OF LAW MUST BE UPHELD, FOR THEY ARE SUPPORTED BY SUBSTANTIAL EVIDENCE IN THE RECORD.

a. The Commission correctly found Respondent sustained a compensable injury by accident arising out of and in the course and scope of his employment.

As noted above, the record is replete with evidence that supports the Commission's finding that Respondent sustained a compensable injury by accident and carried the requisite burden of proof. For an injury to "arise out of" employment for workers' compensation purposes, the injury must be proximately caused by the employment; the injury arises out of employment when there is a causal connection between the conditions under which the work is required to be performed and the resulting injury. *Ardis v. Combined Ins. Co.*, 380 S.C. 313, 321, 669 S.E.2d 628, 632 (Ct. App. 2008). When testimony of medical experts is relied upon to establish a causal connection between an accident and subsequent disability or death, opinion of experts must be at least that disability or death most probably resulted from the accidental injury. *Grice v. Dickerson, Inc.*, 241 S.C. 225, 230, 127 S.E.2d 722, 725 (1962).

In the instant case, the Commission specifically found that "Claimant has met his burden of proof that he incurred an injury by accident to his left elbow that arose out of and was within the course and scope of his employment." (R. p. 7). The Commission further explained that this finding "is based on the record as a whole, including the corroborating medical records of Aiken Regional Medical Center, Dr. Plymale, and the MRI findings as well as Claimant's testimony." (R. pp. 7–8). All of the accident reports, testimony, and statements made to medical providers

contain virtually the same description of injury, notwithstanding Appellants' repeated reliance upon the fact that a Form 50 states the creel was moving when Respondent was injured.

Furthermore, the medical evidence in the record clearly supports the Commission's finding that Respondent's injury was proximately caused by his workplace accident and that the claim was compensable. First, Dr. Plymale completed a questionnaire on December 2, 2015, whereby he indicated that Respondent's elbow problems were most probably caused by the work incident on June 5, 2015. (R. p. 237). On its face, this documentary medical evidence clearly establishes the requisite medical causation.

Second, Dr. Plymale's deposition was taken in January of 2016 by the Appellants. Appellants assert that a few cherry-picked pages of the transcript refute any evidence of proximate causation.[1] However, a complete reading of the deposition shows Dr. Plymale affirmed his medical opinion on proximate causation given in December of 2015 on multiple occasions. (*See* R. pp. 176–77). Dr. Plymale testified that he initially diagnosed Respondent with lateral epicondylitis, which was consistent with Respondent's report of striking his left elbow. (R. p. 168, lines 10–16). As mentioned in his deposition, Dr. Plymale requested an MRI of the left elbow in July of 2015 because it "kind of confirms that he had an injury there – because it would show up on an MRI." (R. p. 169, lines 4–9). However, because Defendants subsequently denied the claim, Respondent was unable to get the MRI through Dr. Plymale's practice. (R. p. 169, lines 10–15).

During the deposition, Dr. Plymale was shown the MRI obtained by Respondent in September of 2015 at the VA Hospital in Augusta, Georgia. After his review, Dr. Plymale testified that the MRI confirmed his prior diagnosis of lateral epicondylitis. (R. p. 170, lines 8–15). He

[1] The manner in which Appellants present quoted testimony from Dr. Plymale is particularly misleading; their presentation of the quotes creates a narrative that was not given by Dr. Plymale. In fact, the quotes provided by Appellants span direct examination, cross examination, and re-direct examination. Respondent respectfully asks this Court to consider R. pp. 164–76 in its entirety, for Appellants' presentation of quoted language is deceptive.

then reaffirmed his opinion regarding causation initially given in December of 2015. (R. p. 170, lines 16–24). Regarding related treatment for Respondent's left elbow, Dr. Plymale did not believe it was a surgical condition; however, he did recommend injections, bracing, physical therapy, and medications. (R. p. 171, lines 1–15). Thus, the expert medical testimony in the record provides substantial evidence of proximate cause.

While Appellants take the position that Respondent could not have been injured in the manner he alleges because of the positioning of a creel and bobbin, the Commission held otherwise. Respondent testified, "I was doffing a frame, and I went to pick up a bobbin that was stuck. I did not know if was stuck. My hand slipped off the bobbin, and my elbow hit the creel above it." (R. p. 98, lines 3–6). These statements are virtually identical to those given to the medical providers and to those given at the hearing. For this reason, the Commission's finding that Respondent suffered an injury by accident is supported by substantial evidence.

Appellants further allege that the medical evidence in the record shows no injury occurred even if it was assumed that the accident occurred. Again, there is no basis for this allegation due to the numerous medical reports that confirm the same.

Appellants further allege Respondent's testimony is not credible and his injury is not compensable because he took his kids to the pool. While Respondent admitted to going to the pool with his family, he did not reveal that he lifted his young children in the pool. This issue was addressed with Dr. Plymale in his deposition, including a review of surveillance photographs taken of Respondent playing in the pool. Dr. Plymale testified that going to a pool and teaching his kids to swim was not something he would advise Respondent to avoid. (R. p. 172, line 23–p. 173, line 4). When specifically asked by Appellants' counsel whether the activity seen in the photographs, including lifting his small children in the water, would be something he would restrict Respondent

from doing, Dr. Plymale stated "not necessarily." (R. p. 26, lines 3–6). On re-cross examination, Dr. Plymale yet again affirmed that after reviewing the MRI and surveillance materials, he still stood by his causation statement from December of 2015. (R. p. 26, line 21–p. 27, line 3). Therefore, there is substantial evidence in the record to support the Commission's finding that Respondent suffered an injury.

b. The Commission correctly found respondent was terminated by his employer and is entitled to temporary total disability benefits.

Appellants also make an incredible argument that Respondent is not entitled to temporary total compensation because he voluntarily removed himself from the workplace. This is patently false. Respondent worked every day following his injury until he was terminated on August 19, 2015. Appellants' own records show he was discharged because they were, "[u]nable to accommodate medical restrictions of a probationary employee." (R. p. 17; p. 42, lines 5–15; p. 65, line 11–p. 67, line 24. Supplemental Record on Appeal p.____). Respondent testified he would still be working if his employer would have allowed him to work. (R. p. 67, lines 18–22). Clearly, Respondent did not voluntarily remove himself from the workplace and had ongoing work restrictions confirmed by the authorized treating physician. Accordingly, the Commission correctly held that Respondent is entitled to temporary total compensation.

As explained above, substantial evidence supports the Commission's Order. The record is replete with evidence that Respondent suffered a compensable injury by accident and that Claimant was terminated by his employer due to their unwillingness to comply with his physician-prescribed work restrictions. This Court should, therefore, affirm the Order of the Commission's Appellate Panel pursuant to section 1-23-380(5) of the South Carolina Code.

II. THE COMMISSION PROPERLY DESIGNATED DR. PLYMALE AS THE AUTHORIZED TREATING PHYSICIAN

The Workers' Compensation Commission has the authority to name an authorized treating physician and appropriately used that authority to name Dr. Plymale as the authorized treating physician in this matter. S.C. Code Ann. § 42-15-60 (A) (2015) provides the Commission may set the authorized treating physician despite a defendant's wishes if good cause is shown. Under section 42-15-60, the Commission is "awarded great discretion" and "the Commission may override the employer's choice of medical provider. *Gattis v. Murrells Inlet VFW No. 10420*, 353 S.C. 100, 114, 576 S.E.2d 191, 198 (Ct. App. 2003). The Court of Appeals has offered an example of cause sufficient to warrant a Commission override of the employer's preference and explained that in "a situation where the employee feels he still needs treatment and the employer fails to provide it . . . the Appellate Panel act[s] within its discretion" by ordering an employer provide treatment with a provider the employer has not selected. *Martin v. Rapid Plumbing*, 369 S.C. 278, 292, 631 S.E.2d 547, 555 (Ct. App. 2006). Moreover, the Appellate Court's standard of review on this discretionary action that is allowed under the Commission's statutory authority is limited by section 1-23-380 (5)(b). Pursuant to *Vulcan Materials Co. v. Greenville County Bd. of Zoning Appeals*, 342 S.C. 480, 496, 536 S.E.2d 892, 900 (Ct. App. 2000) "The construction of a statute by the agency charged with its administration should be accorded great deference and will not be overruled without a compelling reason."

In the instant case, Appellants initially provided medical treatment with Dr. Plymale for Respondent's injury. However, they then denied the claim and refused to provide any further treatment. After Respondent's claim was found compensable by the Single Commissioner, Appellants then objected to Dr. Plymale's designation as the authorized treating physician and appealed this issue. Respondent's brief, however, objects to the appointment of Southeastern

Spine Institute. Southeastern Spine has never been involved in this matter. Respondent has never treated with Southeastern Spine Institute for his work-related injury and there is no Order from the Commission directing the same. Presumably, this is an error. Respondent has, however, treated with Dr. Plymale, an orthopaedist at Moore Orthopaedic Group in Columbia, SC. In order to appropriately respond to a brief with such error, Respondent assumes Appellants are objecting to the designation of Dr. Plymale and the Moore Othopaedic Group. Therefore, Appellants object to the Commission designating Dr. Plymale as the authorized treating physician, but they selected Dr. Plymale in the first place to provide treatment for Respondent's injury.

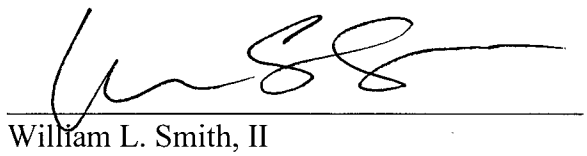
Appellant's contend section 42-15-60 and *McKinney v. Kimberly Clark Corp*, 376 S.C. 636, 658 S.E.2d 112 (Ct. App. 2008) state a denied case is not sufficient to grant the Commission authority to direct medical treatment and that defendants have the right to choose the physician, respectively. However, both contentions are flawed. There is no mention in section 42-15-60 of differing authority depending on an employer's acceptance or denial of a claim. Moreover, no case law supports that position. Instead, the appellate courts of South Carolina make clear the Commission has great discretion to appoint a physician. *E.g. Gattis,* at 114, 576 S.E.2d at 198; *Martin*, at 292, 631 S.E.2d at 555; *Clark v. Aiken County Government*, 366 S.C. 102, 113, 620 S.E.2d 99, 105 (Ct. App. 2005). *McKinney*, on the other hand, simply reaffirms that, barring circumstances prescribed in section 42-15-60, the employer and not the employee has the authority to designate the authorized treating physician. 376 S.C. at 369, 658 S.E.2d at 114. That case, however, is inapplicable in this matter, for Appellants appear to be disputing the Commission's authority to name an authorized treating physician. As between the rights of an employer and an employee, *McKinney* controls, but does nothing more than reiterate statutory law; as between the rights of the employer and the Commission, *McKinney* has no relevance. (*Id.*). Furthermore,

Appellants have only been directed to continue the care they initially began providing with Dr. Plymale. It can hardly be argued that Appellants have lost the right to direct medical treatment or select a treating physician when their own previously-selected physician is appointed to provide continuing care in a compensable case. Therefore, the Court of Appeals should affirm the Commission's Order designating Dr. Plymale as the authorized treating physician, for its decision is supported by substantial evidence and is within the Commission's statutory authority.

CONCLUSION

Respondent respectfully requests the Order of the South Carolina Workers' Compensation Commission's Appellate Panel be affirmed, for the Commission's findings are supported by substantial evidence, exemplify an accurate application of the law, and are within the bounds of its statutory authority.

Respectfully Submitted,



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CERTIFICATE OF COUNSEL

The undersigned certified that this Final Brief complies with Rule 211(b), SCACR.

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