APPEAL NO. 92077
FILED APRIL 13, 1992

This appeal arises under the Texas Workers' Compensation Act, TEX. REV. CIV. STAT. ANN. arts. 8308-1.01 *et seq.* (Vernon Supp. 1992) (1989 Act). A contested case hearing was held on January 6, 1992, in _____, Texas, with (hearing officer) presiding. The hearing officer determined that, as of June 20, 1991, respondent (claimant below) had not reached maximum medical improvement (MMI) and ordered carrier to continue the provision of medical and income benefits to claimant. In its request for review, to which claimant did not reply, carrier asserts two issues. First, carrier contends that the hearing officer erred in admitting two of claimant's exhibits (medical reports) because no good cause was established for claimant's having failed to exchange them prior to the contested case hearing. Second, carrier contends the hearing officer erred in failing to find that claimant had reached MMI as of June 20, 1991, since the only admissible, competent, and probative evidence conclusively established otherwise.

DECISION

Finding error in the decision of the hearing officer, we reverse and remand.

Claimant's evidence consisted of her testimony and four exhibits. Claimant testified that on March 5, 1991, while working for (employer) as a cashier and stocker at a convenience store, she was injured when a bottle of soda exploded in her face. Claimant had been stocking shelves with six-packs of 16 ounce bottles of soda and while pulling the plastic carrier off a six-pack, one of the bottles exploded. Claimant's chin and forehead were cut by glass and the incident caused her to move her head back rapidly. Claimant visited a doctor several hours later after her shift ended. That doctor sutured her chin, took her off work for an indeterminate period, and prescribed some medications. About one week later, claimant changed treating doctors because she wasn't receiving physical therapy. She next went to Dr. RM who practiced in the same clinic as Dr. G. Claimant both regarded Dr. RM and Dr. G as her "treating doctor." Claimant testified that Dr. RM obtained x-rays and diagnosed her condition as "cervical strain." Dr. RM also referred her to Drs. M and S who apparently were neurosurgery and neurology specialists. She last visited Dr. G in late November or early December 1991 and was advised she needed to go through a "work hardening program" at the facility where her functional assessments were measured. Claimant said she still wore a neck brace, still took prescribed medications, still had pain in her neck and shoulders, headaches and dizziness, and hasn't tried return to work since the date of injury because she isn't physically able to work. Claimant said she hadn't started the work hardening program because she didn't know where she stood with medical benefits since her settlement with carrier was not approved after the first hearing on October 16, 1991. Claimant testified that she completed her prescribed physical therapy course of treatment during the March - August 1991 period.

In addition to her testimony, claimant offered four exhibits identified as Claimant's Exhibits 1-A, 1-B, 1-C and 2. The admission of Exhibits 1-A and 1-B was objected to and is the basis for this appeal. A description of the exhibits follows. Exhibit 1-A is a letter

report, dated August 29, 1991, signed by Dr. G, which stated that claimant's diagnosis consisted of traumatic cervical myositis, posttraumatic headaches, and lacerations of the forehead and chin (healed); that she had completed physical therapy and medications programs for her neck pains and severe headaches; that her cervical spine x-rays and MRI were negative; that she was unable to do a home exercise program ordered in June due to increased neck pain with exercise; that neurological and neurosurgical consultations were obtained; that she has been evaluated for a one-month "work hardening program" ordered on August 27, 1991, and will be seen again after completing that program; and, that "[a]t this time she is still unable to do any significant physical activity."

Exhibit 1-B is a form entitled "Specific and Subsequent Medical Report" (TWCC-64), dated 8-12-91, which was unsigned but contained Dr. G's name. It referenced a visit on "8-5-91," showed a diagnosis of "cervical strain," and stated claimant's medications and treatment plan. It stated that claimant's diagnosis was "guarded at this time - no work," and that claimant's anticipated date of return to work was "undetermined at this time - no work."

Exhibit 1-C is another unsigned TWCC-64, also dated 8-12-91, which referred to claimant's visit on "6-7-91." It contained the same diagnosis, prognosis, and anticipated date of return to work as did Exhibit 1-B. This document had been provided to carrier before the hearing.

Exhibit 2 is a report of a functional assessment of claimant's physical activities undertaken on August 24, 1991, by a licensed physical therapist. This report was provided to carrier at same time before the hearing. It stated that the her "conditionally valid results are very much lower than these norms since she terminated her activities early for fear of perceived future pain." This report recommended claimant participate in a "pain management program" to learn skills to deal with her pain and stress and attend educational classes to "better understand and take care of her condition" before participating in an individualized work hardening program. This report also noted that, except for the sitting tolerance activity, claimant reported neck and shoulder pain with almost all activities including lower extremity activities such as repetitive foot motion, gait, squatting, kneeling, crawling, stairs, and balance activities. Claimant terminated her standing tolerance activity prematurely due to neck and shoulder pain and refused to perform heel and toe walking activities. Claimant testified she was in pain before this assessment and felt worse afterwards. She said her condition was worse than right after her injury and that she had not improved.

Carrier introduced the x-ray and CAT scan reports prepared in March 1991 for claimant's original doctor and the MRI report of April 11, 1991, prepared for Dr. RM. The results were "normal" and "essentially unremarkable." Carrier also introduced an "Initial Medical Report," dated 6/20/91, signed by Dr. WM which contained a history of claimant's injury and a diagnosis of "cervical sprain." It noted the x-ray and MRI results ("no abnormalities") and stated the clinical assessment findings as "no muscle spasms, no areas of tenderness, no neurological deficits, no vascular compromise, no hypesthesia to pin prick,

no reflex deficits, no restriction of range of motion." This report also stated claimant's prognosis as "[g]ood. May return to work 6/21/91." Carrier also introduced a "Report of Medical Evaluation" (TWCC-69), signed by Dr. WM which repeated the clinical findings from the Initial Medical Report and added "no tension sign." This TWCC-69 certified that claimant had reached MMI on "6-20-91" and assigned a "0%" whole body impairment rating. Claimant testified she disagreed with Dr. WM's conclusions because she still had pain, headaches, and dizziness.

Carrier's only witness, Mr. C, testified that he was a representative of carrier who worked on claimant's claim. Mr. C had called claimant asking if she would agree to be examined by a doctor selected by carrier to obtain an opinion on her current medical condition. Mr. C testified that Dr. WM made his determination as to MMI on June 20, 1991, the date of claimant's visit. Claimant testified that she agreed to see Dr. WM since "I have nothing to hide, so why not," and that Dr. WM had examined her "thoroughly" and took her medical history, but didn't tell her anything. She had taken her x-rays with her. Mr. C provided claimant with the Initial Medical Report from Dr. WM right after receiving it on July 10, 1991. Dr. WM completed the Initial Medical Report after examining carrier on June 20, 1991. However, he later completed the TWCC-69 form after Mr. C asked him to do so. Carrier received the TWCC-69 form on August 14, 1991.

Mr. C did not attend the benefit review conference (BRC) held on August 22, 1991. The benefit review officer's report, of which official notice was taken, was signed on September 3, 1991, and recommended that Dr. WM's certification of MMI be sent to claimant's treating doctor for his consideration. Mr. C then sent both reports of Dr. WM (Initial Medical Report and TWCC-69), to claimant's treating physician, Dr. RM, attached to Mr. C's letter dated 9/09/91. Mr. C's letter asked Dr. RM to state whether in his opinion, and based upon the objective clinical findings, he agreed with Dr. WM that claimant was presently able to return to work. Mr. C's letter went on to ask Dr. RM to indicate what future course of treatment would be necessary and when he thought claimant would reach MMI if he disagreed with Dr. WM. According to Mr. C, carrier never received any response from Dr. RM. Claimant testified that she too had been provided a copy of the TWCC-69 and had shown it to Dr. RM although she couldn't remember when she did so.

Mr. C also testified that he attended the first contested case hearing in this matter and there provided claimant's counsel with a copy of his September 9th letter to Dr. RM. No evidence was adduced regarding the first contested case hearing nor was any official notice taken concerning it. However, the "Statement of Case" contained in the hearing officer's Decision and Order was expressly agreed to by carrier in its Request for Review. According to that "Statement of Case," a hearing was convened on October 16, 1991, at which claimant was represented by [attorney]; the parties negotiated a settlement prior to putting on their evidence; and the Benefit Dispute Settlement Agreement was subsequently "rejected" by the Texas Workers' Compensation Commission (Commission).

Carrier objected to claimant's Exhibits 1-A and 1-B because they had not been

provided prior to the hearing. Carrier, in voicing the objection, noted that the exhibits contained "fax" transmission data showing they were transmitted on September 3, 1991, from (law firm), the law firm claimant's attorney was believed to be associated with, to the Commission in Austin, Texas. However, the exhibits contained no indication they had been sent to carrier. Carrier argued to the hearing officer that the exhibits had obviously been in the possession of claimant's counsel on September 3, 1991, but were not provided to carrier at the first hearing on October 16th or at any later time. Thus, argued carrier, there was no "good cause" for claimant's failure to timely exchange the exhibits. When the hearing officer asked claimant how she responded to the objection and if she knew whether "this information was submitted," she stated that she had asked her doctor if he had sent "those papers" to her attorney or to claimant, and he said he had but "they" said they hadn't received them; that the doctor told her he had "sent something" but "they said . . . we haven't received it;" that the Commission obviously received the documents because the Commission sent copies to the claimant; that her doctor wouldn't give them directly to claimant at the time because she was represented but did tell her he had given them to her attorney. Claimant further testified that at the first hearing on October 16th, she told her attorney that her doctor had sent "those papers" but her attorney told her the doctor had not sent him anything. Claimant subsequently "let him [attorney] go because he wasn't working in the best interest of me." Claimant said she wrote her attorney releasing him and asking for all of her medical records but he "wouldn't even do that." The hearing officer then stated he "will admit the document, I think for good cause, that show him having failed to exchange it. . . ."

Article 8308-6.34(d) (1989 Act) provides that within a time to be prescribed by Commission rule the parties shall exchange all medical reports and medical records and Article 8308-6.34(e) provides that a party who fails to disclose documents in existence and in the possession, custody, or control of that party at that time when disclosure is required may not introduce such evidence at any subsequent proceeding before the Commission unless good cause is shown for not having disclosed the documents. Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 141.1 (TWCC Rules) requires that not later than 14 days before the benefit review conference, all pertinent information including information relating to the employee's medical condition will be sent to the Commission and exchanged between the parties. The two TWCC-64 reports (claimant's Exhibits 1-B and 1-C) were both dated "8-12-91" and the BRC was held on August 22, 1991. The record doesn't reflect what medical reports, if any, were exchanged prior to the BRC. TWCC Rule 142.13(c), pertaining to the parties' exchange of documentary evidence, provides that no later than 15 days after the BRC the parties shall exchange with one another all medical reports, all medical records, and any witness statements; and, that thereafter the parties shall exchange additional documentary evidence as it becomes available. Rule 142.13(c)(3) permits the parties to bring documentary evidence not previously exchanged to the hearing where the hearing officer shall make a determination as to whether good cause exists for not having previously exchanged such documents. The post-BRC 15 day deadline for exchanging existing documents was September 6, 1991. Claimant's Exhibits 1-A, 1-B and 1-C were apparently transmitted to the Commission by "fax" transfer on September 3, 1991, but not to carrier.

While at some time prior to the hearing on January 6, 1991, Exhibit 1-C and Exhibit 2 were provided to carrier, Exhibit 1-A dated August 29th and Exhibit 1-B dated August 12th were not provided to carrier until the hearing.

In Texas Workers' Compensation Commission Appeal No. 91009, decided September 4, 1991, Panel No. 1 stated that "[t]he appropriate test for the existence of good cause is that of ordinary prudence; that is, that degree of diligence as an ordinarily prudent person would have exercised under the same or similar circumstances. . . ." in that decision we found that while the showing of good cause for failure to timely exchange a medical report "appears minimal at best, we do not find it so lacking as to conclude the hearing officer abused his discretion in accepting the evidence. . . ." The questioned document in that case was a medical report not exchanged before the hearing. The claimant showed that he had difficulty contacting the doctor who resided in California, and, when it was determined the doctor wouldn't be available to testify, the claimant requested a report which claimant received on the day of the hearing. In contrast, the two contested reports *instanter* were dated August 12th and 29th; were sent to the Commission on September 3rd; and were not exchanged at the BRC, or within 15 days after the BRC or at the first hearing on October 16th, even though claimant was represented by an attorney throughout that period. Claimant testified that her doctor wouldn't give her the medical reports when she asked for them because she was represented by an attorney, and, that after releasing her attorney she unsuccessfully sought to obtain her records from him. However, claimant clearly came into actual possession of the exhibits, which she obtained from the Commission, since she produced them at that hearing. Although the record doesn't reflect when claimant acquired the exhibits, her attorney had them from at least the time he sent them to the Commission on September 3, 1991. After carefully considering only the record developed at the hearing as we must, (Article 8308-6.42(a) (1989 Act), we find it utterly devoid of a showing of the existence of "good cause" and further find that the hearing officer abused his discretion in admitting the exhibits over carrier's objections. *Compare* Texas Workers' Compensation Commission Appeal No. 91058, decided December 5, 1991.

The hearing officer's ruling was, of course, pivotal to the outcome since the exhibits arguably could be said to controvert Dr. WM's reports. In Texas Workers' Compensation Commission Appeal No. 91064, decided December 12, 1991, a case involving an untimely exchange of medical evidence, Panel No. 1 similarly found the record devoid of a showing of the existence of "good cause." The Panel noted in that decision that "[t]o obtain reversal of a judgment based upon error of the trial court in admission or exclusion of evidence, the complaining party must first show that the trial court's determination was in fact error, and second, that the error was reasonably calculated to cause and probably did cause rendition of an improper judgment. Hernandez v. Hernandez, 611 S.W.2d 732 (Tex. App.-San Antonio 1981, no writ)." In that case, the panel found other sufficient evidence to support the hearing officer's conclusion and thus the erroneous admission of the medical report did not constitute reversible error. *See also* Texas Workers' Compensation Commission Appeal No. 91117, decided February 3, 1992. In this case, had claimant's Exhibits 1-A and 1-B been excluded, the only remaining evidence to controvert Dr. WM's certification of MMI,

effective June 20, 1991, consisted of claimant's testimony and her Exhibits 1-C and 2. Exhibit 1-C, like 1-B, was not signed by Dr. G who ostensibly prepared it and referred to claimant's visit on "6-7-91," a date preceding Dr. WM's certification of MMI. Exhibit 2, as we stated, was a report of functional assessment prepared by a licensed physical therapist. We find that the admission of claimant's Exhibits 1-A and 1-B was error and that such error was reasonably calculated and probably did lead to the hearing officer's improper determination that the evidence established that claimant had not reached MMI effective June 20, 1991.

The hearing officer made the following findings and calculations pertinent to this appeal.

FINDINGS OF FACT

6.By letter dated 29 August 1991 the claimant's treating physicians indicated that the claimant still is unable to do any significant physical activity, and recommended a work hardening program.

7.The claimant's treating physicians have not certified her to have reached maximum medical improvement.

8.The claimant continues to experience pain and dizziness as the result of her injury.

9.The claimant was examined by [Dr. WM] on 20 June 1991.

10.The examination by [Dr. WM] was not directed or approved by the Commission for the purpose of resolving a disputed (sic) regarding MMI, impairment, or disability.

11.[Dr. WM] certified the claimant to have reached MMI with zero impairment effective 20 June 1991, and indicated that the claimant could return to work on 21 June 1991.

12.Neither [Dr. WM] nor the carrier submitted the assessment referenced in Finding No. 11 to the claimant, the Commission, or the treating doctor within seven days of the examination.

13.Although the assessment referenced in Finding No. 11 was mailed to the treating physician on 9 September 1991, the carrier has received no response.

CONCLUSIONS OF LAW

3.[Dr. WM] was neither the claimant's treating doctor under Article 8308-4.62, nor was he a designated doctor selected to offer opinion regarding a

dispute of MMI pursuant to Article 8308-4.25(b). As such, his findings are not entitled to presumptive weight.

4.The Report of Medical Evaluation by which [Dr. WM] certified the claimant to have reached MMI with no impairment is not in compliance with Commission Rule 130.1 or 130.3 because (i) the assessment was not rendered with the content prescribed by the Commission; and (ii) because the assessment was not submitted to the Commission, the claimant and the treating doctor in a timely manner.

5.The greater weight and preponderance of the evidence established that the claimant was not able to obtain and retain employment at her pre-injury wages effective 20 June 1991, and therefore, she remains disabled under the Texas Workers' Compensation Act.

6.The greater weight and preponderance of the evidence established that the claimant had not, effective 20 June 1991, reached a point after which further material recovery from or lasting improvement to her injury could no longer reasonably be anticipated. Therefore, the claimant had not reached Maximum Medical Improvement under the Texas Workers' Compensation Act.

In its Request for Review, carrier does not take issue with the hearing officer's conclusion of law that the evidence established that claimant remained disabled under the 1989 Act. Carrier does challenge the conclusion that the evidence established that claimant had not reached MMI as of June 20, 1991. As to this challenge, carrier argues that neither claimant's testimony nor her Exhibit 2, the functional assessment, controverted Dr. WM's certification of MMI since the 1989 Act requires that the attainment of MMI be based on reasonable medical probability. Article 8308-1.03(32) defines MMI as the earlier of "(A) the point after which further material recovery from or lasting improvement to an injury can no longer reasonably be anticipated, based on reasonably medical probability; or (B) the expiration of 104 weeks from the date income benefits begin to accrue." Carrier points out that claimant was not qualified as a medical expert and that her Exhibit 2, the functional assessment, was prepared by a licensed physical therapist. Carrier argues, correctly we believe, that neither claimant's testimony nor the functional assessment exhibit were probative on the issue of MMI as "based upon a reasonably medical probability." Claimant's remaining uncontested Exhibit (1-C) was a TWCC-64 which referenced claimant's visit to Dr. G on "6-7-91," a date preceding her examination by Dr. WM on June 20, 1991. Even if claimant's Exhibits 1-A and 1-B had been properly admitted, it is arguable as to whether they controvert Dr. WM's certification of MMI. Exhibit 1-B, an unsigned TWCC-64 referencing claimant's visit to Dr. G on "8-5-91," reports no change in claimant's physical condition, a "guarded" prognosis, and an indeterminate date when claimant can return to work. While this report supports the determination that claimant continued to have a "disability" under the 1989 Act, it does not indicate whether "further material recovery from

or lasting improvement to" claimant's injury can any longer be reasonably anticipated. While claimant's Exhibit 1-A, the August 29, 1991, letter of Dr. G, basically reports that claimant has yet to complete a one-month "work hardening program," it, too, doesn't indicate whether claimant has attained MMI.

The hearing officer concluded that Dr. WM's TWCC-69 did not comply with Rules 130.1 or 130.3 in that it wasn't "rendered with the content prescribed" and wasn't timely submitted. The hearing officer does not indicate what data is missing. We have closely examined this exhibit and find that it contains all the information specified in TWCC Rule 130.1(c) except for the information on the onset and course of claimant's medical condition and the findings of previous examinations, treatments, and responses to treatments not previously reported to carrier and the Commission by the doctor making the report. According to the evidence, Dr. WM only saw claimant once to examine her at the request of carrier. Thus Dr. WM had no prior examinations to report. Further, Dr. WF had first prepared an Initial Medical Report which contained the history of claimant's injury, Dr. WM's clinical assessment findings, and his review of radiographic tests. This report was submitted to the Commission, to claimant, and to carrier together with the subsequent TWCC-69 and the combination of these reports substantially complied with the TWCC Rule 130.1 requirements.

TWCC Rule 130.3 does provide that a doctor, other than a treating doctor, who certifies that an employee has reached MMI shall complete a medical evaluation report under Rule 130.1 and send a copy to the treating doctor no later than seven days after the examination. The treating doctor, in turn, is required to send the Commission within seven days a statement indicating agreement with the certifying doctor's certification and impairment rating, or, a Rule 130.1 report if the treating doctor disagrees. In this case the chronology indicates that Dr. WF examined claimant on June 20, 1991, and determined on that date that she had reached MMI, had "0%" impairment, and could return to work on "6/21/91." However, Dr. WF prepared first an Initial Medical Report on "6/20/91" which was received by carrier on July 10, 1991. Dr. WM next prepared the TWCC-69 certifying MMI. The record doesn't indicate when the latter form was signed; however it was received by carrier on August 14, 1991, and by the Commission on August 15, 1991. In his BRC report, dated September 3, 1991, the benefit review officer stated that Dr. WM's certification of MMI "needs to be sent to the treating doctor for agreement or disagreement, and I feel that the treating doctor is in a better position to determine the claimant's disability at this time." Carrier then sent Dr. WM's reports to the treating doctor in the letter of September 9th which solicited a statement of agreement or disagreement with Dr. WM. Claimant had also, at some time, provided her treating doctor with Dr. WM's certification. No response from either of the treating doctors, Dr. RM and Dr. G, was ever received by carrier. The hearing officer doesn't indicate whether or not he disregarded Dr. WF's certification of MMI in view of his Conclusion of Law No. 4. In its Request for Review, carrier urges that the hearing officer's concerns about the timeliness of the submission of Dr. WM's report to the treating doctor was a "procedural point" which was not a disputed issue before the hearing officer. We note that while Article 8308-10.07(c)(3) provides for administrative penalties for health

care providers who intentionally or wilfully fail or refuse to timely file required reports, we do not believe that the substance of Dr. WM's certification of MMI was derogated by its not having met the time requirement for its provision to the treating doctor.

The hearing officer found that Dr. WF was not a "designated doctor" and concluded that "his findings were not entitled to presumptive weight." Carrier takes the position that the hearing officer's finding that Dr. WM's examination had not been directed by the Commission and his comment in his "Statement of Evidence" that "[n]either party offered evidence to suggest that effort was made . . . to secure the opinion of an independent designated doctor under the [1989 Act]" were procedural points and not disputed issues below. Article 8308-4.16(a) provides that the Commission "may require" the employee to submit to medical examinations to resolve any question about, *inter alia*, the attainment of MMI. Article 8308-4.16(b) provides that the Commission may require the employee to submit to a medical examination at the request of the insurance carrier but shall do so only after the carrier has attempted and failed to obtain the employee's permission and concurrence. Carrier contends that it did comply with this provision and obtained claimant's permission and concurrence. Thus, argues carrier, while Dr. WF was not a designated doctor whose report would be entitled to presumptive weight, it was a "proper examination" resulting in a "probative report."

Article 8308-4.25(b) (1989 Act) provides that "[i]f a dispute exists as to whether the employee has reached [MMI], the Commission shall direct the employee to be examined by a designated doctor . . . [who] shall report to the Commission. The report of the designated doctor shall have presumptive weight, and the Commission shall base its determination as to whether the employee has received [MMI] on that report unless the great weight of the medical evidence is to the contrary." TWCC Rule 130.6(a) provides that "[i]f the Commission receives a notice from the employee or the insurance carrier that disputes either [MMI] or an assigned impairment rating, the Commission shall notify the employee and the insurance carrier that a designated doctor will be directed to examine the employee. While the rule does not define what is meant by the term "notice," we believe the word is sufficiently broad to include the two written medical reports of claimant's treating doctors, objected to by carrier, which were transmitted to the Commission's Central Office in Austin, Texas, by "fax" on September 3, 1991. Concerning the duty of the Commission to designate a doctor upon notice of a dispute over claimant's attainment of MMI, carrier posits in its Request for Review that the BRC report "shows that the Commission was aware and had been given notice of a dispute involving [MMI]." Carrier goes on to contend that "[s]ince the Commission failed to invoke the designated doctor procedure once a dispute was noted [but instead directed that Dr. WM's certification of MMI be sent to the treating doctor], "the lack of an opinion from a designated doctor is irrelevant to this dispute . . ." We disagree. As we have previously noted, the report of a certifying doctor must be sent to the treating doctor and the latter must either state agreement or prepare a report pursuant to TWCC Rule 130.1. However, this procedure parallels and would normally be expected to precede the designated doctor requirements of Article 8308-4.25 and Rule 130.6. Certainly such procedures are not mutually exclusive nor mere optional alternatives. Accordingly, it is necessary that we remand this matter for the development of additional evidence concerning

whether claimant's treating doctor received Dr. WM's certification of MMI and, if so, whether the treating doctor agreed or disagreed with it. Once that information is obtained, it may or may not then be necessary for the Commission to direct that claimant be examined by a designated doctor.

The decision of the hearing officer is reversed and the case is remanded for development of appropriate evidence, if any, and reconsideration not inconsistent with this opinion.

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Philip F. O'Neill
Appeals Judge

CONCUR:

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Stark O. Sanders, Jr.
Chief Appeals Judge

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Susan M. Kelley
Appeals Judge