No. 44713-4-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

DALE WEEMS,

Appellant,

v.

STATE BOARD OF INDUSTRIAL INSURANCE APPEALS,

Respondent.

APPELLANT'S REPLY BRIEF

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ORIGINAL

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I. INTRODUCTION

This Reply Brief is intended to address the Briefs by the Department of Labor and Industries (hereinafter "Department") and the Board of Industrial Insurance Appeals (hereinafter "Board"). Their briefs will be addressed together as their issues are similar in nature.[1]

The issues to be addressed as argued by the Department and the Board are as follows: 1) whether Mr. Weems had meaningful access to his second Board hearing through IAJ assistance that allowed him participation in his hearing comparable in nature to a non-disabled pro se claimant; 2) whether Mr. Weems' right to counsel is based on a fundamental liberty interest; 3) whether Mr. Weems is disabled pursuant to the ADA and WLAD and the Board had sufficient notice of Mr. Weems' disability; and, 4) whether Mr. Weems is entitled to attorney fees and costs should he prevail on his appeal before the Washington Court of Appeals.

II. ARGUMENT

A. Mr. Weems did not have meaningful access because the Industrial Appeals Judge did not provide adequate assistance and his participation was not comparable to a non-disabled litigant.

[1] Abbreviations: The Department's brief will be noted as DBr; the Board's brief as BBr; the Appeal Board Record as ABR; Transcripts as TR with date; and, Exhibits as EX.

The arguments by the Department and the Board that Mr. Weems was reasonably accommodated during his hearings by the Industrial Appeals Judges (hereinafter "IAJ") do not pass muster. The Department discusses only the first hearing with IAJ Gilligan in which he asked questions of Mr. Weems' expert witness, Dr. Wagner. DBr 46 – 47. The Board argues that the IAJ's duties include providing all pro se claimants, non-disabled and disabled, with evenhanded and unbiased treatment in order "to fully develop the facts necessary to fairly and adequately resolve the appeal . . ." RCW 51.52.102; WAC 263-12-045(2); BBr at 11 – 12. However, the Board did not offer an explanation as to how the IAJ, particularly at Mr. Weems' second hearing, met his duties pursuant to the statutes, rules and case law.

The Department correctly points out that at Mr. Weems first Board hearing, IAJ Gilligan asked numerous questions of Mr. Weems' expert witness, Dr. Wagner. This was within the IAJ's scope of his duties to ask sufficient questions "to elicit a prima facie case." *In re Evangelina Acevedo*, BIIA Dec., 08,15613 (2009), at 7; BBr at 13. And in fact, on appeal to the Thurston County Superior Court, Mr. Weems prevailed as to presenting a prima facie case regarding his headaches and mental health condition. ABR at 66.

However, the Department failed to demonstrate how and if the IAJ at his second hearing did or was even able to assist Mr. Weems with regard to the Department's witnesses' testimony. The IAJ cannot advocate on behalf of the pro se claimant. WAC 263-12-020(1)(d). The IAJ cannot cross-examine witnesses for pro se parties except to clarify questions or perform those duties within the IAJ's unique purview such as the expert witness' qualifications. *Acevedo*, 08,15613 (2009) at 11.

In Mr. Weems' case, the IAJ did not question the Department's medical expert, Dr. Dietrich. TR 10/11/11 at 19 – 21. He also did not explain that this doctor was not testifying on Mr. Weems' behalf despite the fact that Mr. Weems stated he thought the doctor was doing so. *Id.* The IAJ did ask some questions of the psychiatric witness for the Department at Mr. Weems prompting, but did not and could not ask questions about proximate cause. TR 10/13/11 at 37 – 38.

The Department also failed to demonstrate how at his second hearing, Mr. Weems received fair and impartial treatment from the IAJ as it related to his mental disability. The facts suggest that the IAJ failed in his duties to provide Mr. Weems with fair and impartial treatment.

First, the IAJ scheduled a binding examination with a neurologist to address Mr. Weems' conditions as they related to his industrial injury. TR 12/6/10 at 2. As the Board pointed out in its argument, this is one area

in which the IAJ can accommodate all pro se parties. BBr at 12 (WAC 263-12-045(2). However, the IAJ did not ask the correct questions of the examiner nor did he likely assign the correct examiner for Mr. Weems' conditions, as indicated by the first decision of the Thurston County Superior Court. ABR at 67; TR 6/13/11 at 3. The first Thurston County Superior Court decision clearly stated what conditions were prima facially related to Mr. Weems' industrial injury. ABR at 66, 67. On June 13, 2011, the IAJ revealed his error to the parties, but he did not attempt to provide the correct questions to the examiner nor did he assign a new doctor for the binding examination. TR 6/13/11 at 2. Instead the IAJ participated in a protracted back and forth discussion in which both of the Weems, but particularly Mr. Weems, became agitated. TR 6/13/11 at 4 – 12.

Second, because the IAJ did not assign a psychiatrist (as suggested by the Superior Court) for the binding examination, the Department moved for a CR35 examination by their own psychiatrist. TR 8/29/11 at 4. While discussing this issue, Mr. Weems became highly frustrated and left the room. The IAJ asked Ms. Weems to stay. Ms. Weems was left to discuss the Department's CR35 request. When she attempted to inquire about the CR35 process and argue about the Department's motion, the IAJ responded as follows:

JUDGE LUCIA: Would you mind staying for just a bit?

MS. WEEMS: I'll stay, but I don't understand why we're coming here wasting these officers' time and this reporter's time, and her time and your time. You do this to us over and over again. All you do is enrage Dale, and I have to go home and live with him –

JUDGE LUCIA: Okay –

MS. WEEMS: -- every time you do this. And I don't understand why –

JUDGE LUCIA: All right –

MS. WEEMS: -- you're putting me through this.

JUDGE LUCIA: **All right, please stop talking**. When would the exam be scheduled?

[…continued discussion regarding scheduling examination…]

MS. WEEMS: I object because when we get –

JUDGE LUCIA: **Please stop talking**.

MS. WEEMS: When we get seen by them, we want to get their opinion.

JUDGE LUCIA: **Please stop talking**. Two p.m., where?

TR 8/29/11 pp. 4 – 5 (emphasis added).

The IAJ did not attempt to wait for Mr. Weems to calm down nor did he adequately respond to Ms. Weems' concerns about the CR35 motion.

The IAJ's failure prohibited the appropriate accommodation as it related to Mr. Weems' mental disability. While it is all well and good to allow a lay person to assist, as the Board pointed out in its brief, if the IAJ does not allow the lay person to assist then the IAJ has not sufficiently made the accommodation available.

Even if the IAJ had allowed lay representation in a reasonable manner, Ms. Weems' lay assistance did not serve as a suitable accommodation for three reasons. She did not believe she could effectively assist Mr. Weems as she was "attorney illiterate." TR 10/11/11 at 19. The IAJ told her she was exacerbating Mr. Weems' mental condition, and thus, needed to decrease her involvement in Mr. Weems' hearing. TR 6/13/11 at 10. She was unable to articulate to Mr. Weems the consequences of the hearing process, such as when she attempted to tell him that the Department's expert medical witness was not testifying on his behalf, but he continued to believe so. TR 10/11/11 at 20.

Both the Board and the Department argue that a person with a disability may only receive treatment from a public entity that makes access "comparable" with a non-disabled person under the WLAD. The Board argues that it must only provide services to persons with disabilities equal to that of non-disabled persons BBr at 24 – 25. The provision of

the same services to Mr. Weems as those provided to any unrepresented claimant by definition fails to reasonably accommodate Mr. Weems.

The Board and Department both argue that appointment of counsel for a pro se disabled person would be treatment in excess of that provided to a pro se non-disabled person in that the attorney is "different in kind from services it provides to all other litigants who appear before [the Board]". BBr at 23 – 25, DBr at 36 – 37. The "difference" would be that an attorney might advocate for the disabled person, not merely enable a mentally disabled person to "participate" in the process as might an auxiliary aid. *Id.* However, the Department fails to understand that *every* accommodation for a person with a disability must be based on an individualized determination of need and that a usual practice may very well pose a barrier to access with respect to that particular disability. *Martin v. PGA Tour, Inc.*, 522 U.S. 661, 688, 121 S. Ct. 1879 (2001)(ADA requires an "individualized inquiry . . . to determine whether a specific modification for a particular person's disability would be reasonable under the circumstance . . .") Moreover, as the Court said in *Martin*, the fact that a particular accommodation may be "outcome affecting" cannot justify its denial. *Id.*

In this case, the Board and the Department posture that the presence of an attorney as an accommodation for Mr. Weems may affect

the outcome of the proceedings as it provides the potential for him to be assisted by an advocate. BBr at 37 – 38. It is precisely the proffered concern about an "outcome affecting" benefit as justification for denial of the professional golfer's requested accommodation (a golf cart v. required walking) the *Martin* Court found violated the ADA. *Martin*, 522 U,S. at 688. The Department and Board's unwillingness to modify the hearing process to provide a difference in kind accommodation as needed alone demonstrates their failure to accommodate. The concern that the accommodation may operate to benefit Mr. Weems more than an unrepresented non-disabled person might benefit is not a legitimate basis on which to deny the accommodation. *Id.*

Relying on *Fell v. Spokane Transit Authority*, 128 Wn.2d 618, 911 P.2d 1319 (1996), the Department and Board also argue that appointment of counsel for a pro se disabled person would be an administrative and financial burden. DBr at 36 – 38, BBr at 24 – 25. The *Fell* court explained that the Human Rights Commission (hereinafter "HRC") developed policy regulations implementing RCW 49.60, including protection for persons with "sensory, mental, or physical disability" from discriminatory practices. RCW 49.60.215; *Fell*, 128 Wn.2d at 627. This policy regulation to prohibit discrimination against persons with

disabilities in public accommodations is WAC 162-26-060, which states in relevant part:

> (1) Same service preferred. The purposes of the law against discrimination are best achieved when disabled persons are treated the same as if they were not disabled. The legislature expresses this policy in RCW 49.60.215 with the words "regardless of." Persons should, if possible, be treated without regard to their disability or use of a dog guide or service animal. This is called "same service" in this chapter.
>
> (2) Reasonable accommodation. The law protects against discrimination because of the "presence" of a disability. It does not prohibit treating disabled persons *more favorably than nondisabled persons in circumstances where same service will defeat the purposes of the law against discrimination…*
>
> (3) Overall objective. People with disabilities must be afforded the full enjoyment of places of public accommodation to the greatest extent practical.

Emphasis added. *Washington State Communication Access Project v. Regal Cinemas, Inc.,* 173 Wn. App. 174, 194, 293 P.3d 413 (2013) citing WAC 162-26-040(2), *review denied* 308 P.3d 643 (2013) (The WLAD "does not prohibit treating disabled persons more favorably than nondisabled persons in circumstances *where the same service will defeat the purposes of the law against discrimination.*" Emphasis the Court's); see also generally, *Fell*, 128 Wn.2d at 627 – 628.

Under WAC 162-26-060, the Court recognized three levels of public accommodation, that is, same service, "reasonable accommodation," and least acceptable, "arranged service." *Fell*, 128

Wn.2d at 627 – 628. The *Fell* Court concentrated on the test of comparable services in order to prevent unlimited "service entitlements." *Fell*, 128 Wn.2d at 636. In so doing, they concluded that a party must meet a prima facie violation under RCW 49.60.215 as follows:

> (1) they have a disability recognized under the statute; (2) the defendant's business or establishment is a place of public accommodation; (3) they were discriminated against by receiving treatment that was not comparable to the level of the designated services provided to individuals without disabilities by or at the place of accommodation; and, (4) the disability was a substantial factor causing the discrimination.

Fell, 128 Wn.2d at 637.

But "'comparable' does not mean identical." *Negron v. Snoqualmie Valley Hospital*, 86 Wn. App. 579, 585, 936 P.2d 55 (1997). The facts of *Negron* are helpful to Mr. Weems' case. In *Negron*, Ms. Negron, who was deaf, suffered from medical conditions that caused her to be "mentally confused." Her husband was unable to interpret due to his primary language of Spanish. The hospital attempted to contact an interpreter, but did not qualify it as an emergency. During her hospital stay, the hospital provided only sporadic interpreter services, notably not receiving an interpreter during two doctor visits. *Negron*, 86 Wn. App. at 582 – 583.

The Negrons filed a discrimination lawsuit citing that the hospital defendant failed to provide a reasonable accommodation in providing deaf services. The hospital argued that it had fulfilled its duty to provide an accommodation through its contract with the Center for the Deaf. The Negron court found that this was an insufficient accommodation when interpreter services were not available for emergency treatment and physician visits did not provide adequate access. The court explained that "[t]reatment received in a hospital generally includes not only medical intervention, but also the opportunity to explain symptoms, ask questions, and understand the treatment being performed including options, if any." *Negron*, 86 Wn. App. at 586.

In considering comparable services, the Negron court summarized that "reasonable accommodation to a deaf person is one that allows a comparable opportunity, reasonable under the circumstances." *Negron*, 86 Wn. App. at 586. Thus, the court held that "the hospital failed to provide a means of communication" and "a trier of fact could conclude that Overlake did not treat the Negrons comparably to non-disabled persons." *Negron*, 86 Wn. App. at 586 – 587.

The Department contends that the Board's duty is only to provide "an opportunity to be heard." DBr at 36 (citing RCW 51.52.050). Unless the IAJ allows a "comparable opportunity" for "an opportunity to be

heard" then the IAJ has not properly developed the record. In providing a reasonable accommodation the IAJ must provide accessible services under the WLAD, which are "usable or understandable by a person with a disability." *Wash. State Communication Access Project v. Regal Cinemas, Inc.*, 173 Wn. App. at 194 citing WAC 162-26-040(2).

In Mr. Weems' case, the IAJ made a mistake with the binding examination, and instead of correcting the mistake, decided not to proceed further with a fair and equitable remedy. The IAJ did not allow Mr. Weems' wife to argue or inquire about the Department's CR35 motion. The IAJ failed to explain to Mr. Weems that the Department's medical expert was not testifying on his behalf. Thus, as in *Negron*, the Board did not make available sufficient services comparable to those provided a non-disabled claimant. Due to Mr. Weems' mental disability, he was unable to understand the Board process. A non-disabled person would likely have been able to understand that a Department expert witness is testifying against their interest.

The Department and the Board argue that accommodating Mr. Weems' mental disability through appointment of counsel to ensure his reasonable access to the Board process would be in excess of services provided to a non-disabled party. (BBr at 24; DBr at 36) But this argument has been adequately addressed by the ADA and rejected by the

United States Supreme Court in *Martin, supra* and our state case law. In 2013, Division 1 addressed the issue of additional services as required accommodation for deaf persons in the *Regal Cinemas* case and ruled:

> By its very definition, an auxiliary aid or service is an **additional** and different service that establishments must offer the disabled. For example, a courthouse that was accessible only by steps could not avoid ADA liability by arguing that everyone—including the wheelchair bound—has equal access to the steps. And an office building could not avoid having to put Braille numbering on the buttons in its elevator by arguing that everyone—including the blind—has equal access to the written text.

Regal Cinemas, Inc., 173 Wn. App. at 192 quoting *Arizona ex. rel. Goddard v. Harkins Amusement Enterprises*, 603 F.3d 666, 672 (9th Cir. 2010) (emphasis the Court's)

Thus, despite the fact that an attorney may be an advocate on behalf of the person with a disability, the representation is no more beneficial than allowing an intelligent and capable blind person to be assisted by a reader or a deaf person to be assisted by an interpreter. See WAC 162-26-060. It just so happens in this case, involving a mentally disabled claimant, the services of a skilled representative are essential to assure his fair access to the Board process. An attorney for Mr. Weems would have likely enabled the IAJ to receive more relevant information about Mr. Weems' injury; presumably would not have allowed the IAJ to make a mistake on the medical questions to be asked of a binding

examiner; would have enabled an assessment of the value of a CR35 examination; would have clarified for Mr. Weems that the Department's expert witness was not testifying on his behalf; and, would have enabled the hearing process to carry on even if Mr. Weems were to walk out of the hearing room. In effect, appointed counsel would provide for an efficient and better controlled hearing process, benefitting the Board as well as Mr. Weems.

B. The Board's failure to provide a reasonable accommodation and access to the hearing process is a violation of Mr. Weems fundamental liberty interest.

The Department seeks to use *In re Grove* as its reasoning that Mr. Weems does not have a fundamental liberty interest at stake; and, therefore, should not be appointed counsel. DBr at 39; *In re Grove*, 127 Wn.2d 221, 897 P.2d 1252 (1995). This argument is based on a workers' compensation claimant who sought appointed counsel at the appellate court level based on his indigency. *Grove*, 127 Wn.2d at 237. The court held that the workers' compensation claimant did not have a fundamental liberty interest because the interest at stake was purely economic. *Grove*, 127 Wn.2d at 238.

This case is distinguishable from *Grove*. This case rests squarely on a statutory right to non-discrimination in the Board of Industrial

Insurance Appeals hearing process. The statutory right to non-discrimination under Title II of the ADA and the WLAD in *this* context expressly incorporates and seeks to enforce Mr. Weems' fundamental right to due process and equal access to the Board's hearing process. *Tennessee v. Lane*, 541 U.S. 509, 522, 124 S. Ct. 1978, 1988 158 L. Ed.2d 820 (2004) (In addition to prohibiting irrational disability discrimination, Title II "seeks to enforce a variety of other constitutional guarantees . . . [including] the right to access the courts… that are protected by the Due Process Clause of the Fourteenth Amendment")

Unlike the claimant in *Grove*, Mr. Weems' interest is not to have his case remanded due to the results of his hearing on the merits, but to have an opportunity <u>to be heard</u> at his hearing in the first instance. An attorney will provide him the necessary means for achieving equal and meaningful access to the hearing process.

C. <u>Under the ADA and WLAD definitions, Mr. Weems is disabled and the Board was on sufficient notice that he was disabled.</u>

Contrary to the Department's contention of lack of notice of Mr. Weems disability and/or request for accommodation (DBr at 40), the Board had more than sufficient notice of both. The Weems' first asked for an attorney on June 3, 2008. TR 6/3/08 at 28-29. Further, the Department

was well aware of the requested accommodation as of the first Superior Court appeal. Judge McPhee appointed counsel to represent Mr. Weems under GR 33 and subsequently remanded the case back to the Board. AR 66 (expressly finding that "Mr. Weems suffers from a mental health condition that affects his ability to fully and effectively represent himself and prosecute his labor and industries case." Finding of Fact No. 6). Moreover, the Department's argument rests on employment discrimination cases in stating that notice must be given. Under the WLAD, only under an employment case must a worker "put the employer on notice of the existence of an impairment . . ." RCW 49.60.040(d)(i) and (ii).

The Department also purports that Mr. Weems is not disabled because he is not "mentally incompetent." DBr at 30. However, incompetency is not required for one to suffer from a mental disability. Under the WLAD, disability is defined as:

> (7)(a) "Disability" means the presence of a sensory, mental, or physical impairment that:
>
> (i) Is medically cognizable or diagnosable; or
>
> (ii) Exists as a record or history; or
>
> (iii) Is perceived to exist whether or not it exists in fact.

RCW 49.60.040(7)(a)

Under the ADA, 42 U.S.C. § 12102 (1)(A) – (C), disability is defined as:

> The term “disability” means, with respect to an individual—
>
> (A) a physical or mental impairment that substantially limits one or more major life activities of such individual;
>
> (B) a record of such an impairment; or
>
> (C) being regarded as having such an impairment (as described in paragraph (3)).
>
> A major life activity is defined by 42 U.S.C. § 12102(2)(A) as:
>
> (A) In general
>
> For purposes of paragraph (1), major life activities include, but are not limited to, caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, *reading, concentrating, thinking, communicating*, and working.
>
> Emphasis added.

Mr. Weems is disabled pursuant to these statutory definitions, and the facts of this case demonstrate that. Mr. Weems received GR 33 court-appointed attorneys at both of his Thurston County Superior Court appeals of the Board decisions. ABR at 66. GR 33 defines disability as:

> (2) "Person with a disability" means a person with a sensory, mental or physical disability as defined by the Americans with Disabilities Act of 1990 (42 U.S.C. §§12101-12213), the Washington Law Against Discrimination (RCW 49.60 et seq.), or other similar local, state, or federal laws.

Thus, the definition under GR 33(2) encompasses both definitions of the WLAD and the ADA.

A record and history of Mr. Weems' mental disability that affected at least one major life activity exists. Even though he is not incompetent, as a result of his mental disability he has difficulty reading, concentrating, thinking and communicating. TR 10/13/11 at 37 – 38. Mr. Weems receives Social Security Disability. TR D. Weems 9/10/08 at 35. In order to be found disabled under the Social Security Act, an individual must demonstrate an:

> inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than 12 months;

42 U.S.C. § 423(d)(1)(A)

But other information of Mr. Weems' mental disability was readily available to the Board. Ms. Weems reported that Mr. Weems difficulty with his "mental capacity." TR 6/3/08 at 28; DBr at 5. While the Department attempts to minimize this comment as one in which she was explaining Mr. Weems' abilities as compared to the AAG (attorney skill versus pro se), the IAJ actually responded to the issue of Mr. Weems' mental health condition, not to his pro se status. DBR at 5.

Both Mr. Weems and Ms. Weems repeatedly referenced Mr. Weems' inability to read, think clearly, concentrate and tendency to anger quickly. Mr. Weems' actions included leaving the hearing room or needing a break on at least five occasions during his second hearing. TR 4/7/11 at 9; TR 6/13/11 at 14, 16; TR 8/29/11 at 4; TR 10/13/11 at 34. His incapacity includes his inability to understand and participate in the Board hearing process as demonstrated by his misunderstanding that his case had been won at his first superior court appeal (TR 4/7/11 at 7; TR 6/13/11 at 7), and his tendency to argue with the IAJ. TR 6/13/11 at 8 – 10. He thought the Department's witness was testifying on his behalf (which the IAJ never disabused him of). TR 10/11/11 at 20 – 21. State troopers were present for some of the in-person hearings. TR 10/27/10 at 2; TR 4/7/11 at 1. Their presence was presumably to prevent any violence in the hearing room caused by Mr. Weems' tendency to anger quickly. There are many examples, which do not lend themselves to the conclusion proffered by the Department that he was just frustrated as any non-disabled pro se claimant might be in the Board hearing process. DBr at 25 – 26.

Mr. Weems' mental disability and his inability to represent himself at a Board hearing was confirmed by Thurston County Superior Court. Judge McPhee. See ABR at 66. The Board had more than sufficient

notice that Mr. Weems suffered from a mental disability, and that this disability would impair his ability to represent himself at his second hearing.

Finally, while the Department points to its CR 35 psychiatric examiner, Dr. Schneider, whose opinion was that Mr. Weems functioned well, it must be remembered that he was hired by the Department and testified on behalf of the Department. DBr at 30 – 31. His opinion was based on a one time evaluation. He did not treat Mr. Weems. Thus, his opinion lends little credibility with regard to Mr. Weems' mental health condition.

D. Attorney fees and costs may be granted pursuant to RCW 51.52.130.

Mr. Weems is entitled to attorney fees and costs under RCW 51.52.130(1), which states:

> (1) If on appeal to the superior or appellate court from the decision and order of the board, said decision and order is reversed or modified and additional relief is granted to worker or beneficiary . . ., a reasonable fee for the services of the worker's or beneficiary's attorney shall be fixed by the court.

See also *Tobin v. Department of Labor and Industries*, 169 Wn.2d 396, 405 – 406.

Therefore, Mr. Weems, by and through his counsel, amends his attorney fee request, and requests attorney fees and costs under RCW 51.52.130(1) should the board's decision and order be modified or reversed and he receives accommodations for a new hearing.

III. CONCLUSION

For the reasons set forth above and the appellant's opening brief, Mr. Weems respectfully requests that the superior court's Order Granting Reconsideration and Vacating Order be reversed and that Mr. Weems receive the relief of a new board hearing with appointment of counsel at the board's expense pursuant to the superior court's Findings of Fact, Conclusion of Law and Order entered on November 20, 2012.

Respectfully submitted on this 10 day of October, 2013.

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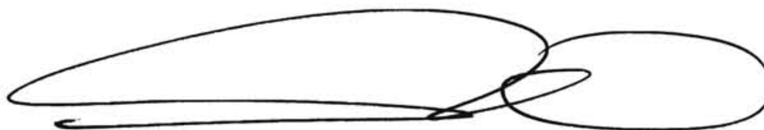

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I certify that I initiated a copy of this Appellant's Reply Brief to be served on all parties or their counsel of record on the date below as follow:

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