COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO. 045514-04**

Michelle Grant	Employee
Fashion Bug	Employer
American Casualty Company of Reading PA	Insurer

REVIEWING BOARD DECISION
(Judges Horan, Levine and Harpin)

The case was heard by Administrative Judge Bean.

APPEARANCES
Daniel C. Finbury, Esq., for the employee
John J. Canniff, III, Esq., for the insurer

HORAN, J. The insurer appeals from the fourth hearing decision[1] filed in this case, which awarded the employee permanent and total incapacity benefits from February 14, 2011, to date and continuing. It argues the judge's failure to address its § 1(7A)[2] "combination" injury defense requires us to reverse the decision and vacate the award of benefits. We affirm.

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[1] We refer to the first decision, filed on August 23, 2007, as Dec. I. We refer to the second decision, filed on March 2, 2010, as Dec. II; this decision was appealed. See Grant v. Fashion Bug, 24 Mass. Workers' Comp. Rep. 347 (2010)(reversing decision and recommitting the case for judge to consider the opinion of the impartial medical examiner). We refer to the third decision, filed on January 20, 2011, as Dec. III, and the fourth decision, filed on February 29, 2012 and the subject of this appeal, as Dec. IV. Our decision in Grant, supra, was not appealed.

[2] General Laws c. 152, § 1(7A), provides, in pertinent part:

> If a compensable injury or disease combines with a pre-existing condition, which resulted from an injury or disease not compensable under this chapter, to cause or prolong disability or a need for treatment, the resultant condition shall be compensable only to the extent such compensable injury or disease remains a major but not necessarily predominant cause of disability or need for treatment.

Because of its long and complex history, we recount the material facts, and the law of the case, to date.

Decision I

On November 21, 2005, the employee filed a claim for § 34 benefits from September 26, 2005, to date and continuing,[3] based on her allegation that while working on May 1, 2004, she "dropped a heavy wooden block on her right foot." (Employee's Claim Form 110, November 21, 2005.)[4] In support of her claim, the employee relied upon the November 1, 2005, report and opinion of her treating physician, Dr. Peter J. Ameglio:

> [the employee] presents for evaluation of right great toe pain, which she has had since May 2004. . . . She points to the dorsolateral aspect of the 1st metatarsal phalangeal joint as the area of maximum pain and tenderness.
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> . . .
>
> Patient presents with a[] MRI report, which is reported as soft tissue capsular hypertrophy and erosive changes at the MTP joints. AP and lateral views of the right foot obtained in our office today reveal[] a subchondral cyst and the metatarsal head and the proximal phalanx with joint space narrowing at the lateral or fibula side of the 1st MTP joint.
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> IMPRESSION:
> Right post-traumatic hallux rigidus.

(Dec. I, Ex. 6, p. 1-2.)

On April 10, 2006, a conference on the employee's claim was held; the insurer raised, inter alia, the defenses of § 1(7A)[5] and causal relationship. (April

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[3] Throughout this decision, we take judicial notice of the board file. See Rizzo v. M.B.T.A., 16 Mass. Workers' Comp. Rep. 160, 161 n.3 (2002).

[4] The employee testified the block struck the top of her right foot. (January 29, 2007, Tr. 16.)

[5] The board file does not reveal the basis upon which the insurer initially raised this defense. However, Dr. Ameglio's November 1, 2005, report stated the employee had previously "dropped a dish on the dorsum of her foot and was seen at Lowell General when she had a hematoma drained and this improved her symptoms." (Dec. I, Ex. 6.) At the first hearing, the employee testified that incident occurred in 2003, while she was

10, 2006, Temporary Conference Memorandum Cover Form.) The next day, the judge issued a conference order directing the insurer to pay the employee a closed period of § 34 benefits, ongoing § 35 benefits, and medical benefits. Only the employee appealed the conference order.

On August 24, 2006, prior to the first hearing, the employee was examined by Dr. Ralph R. Wolf, the § 11A impartial medical examiner. Dr. Wolf opined the employee suffered from "a contusion of the right foot and arthritis." (Dec. I, Ex. 3.) He noted the employee's 2003 foot injury[6] had resolved, and that eight months after the employee's May, 2004, work-related injury, X-rays revealed that "arthritis was present" in her right foot. Id. He further opined the employee's "degenerative changes . . . are consistent with early arthritis, which [was] not uncommon" for a woman of her age.[7] Id. The judge found Dr. Wolf's opinion to be inadequate, and allowed the parties to submit additional medical evidence. (Dec. I, 58.)

At the hearing, the insurer again raised, inter alia, the defenses of § 1(7A) and causal relationship. (Dec. I, Ex. 2.) In his first decision, the judge did not list or consider the elements of § 1(7A). He simply concluded the employee sustained an industrial accident at work on May 1, 2004, when she dropped a thirty pound block on her right foot. (Dec. I, 59, 62.) Further, he found that on December 12,

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preparing a family meal. (January 29, 2007, Tr. 10.) She also testified the dish struck the tip of her right great toe, but that she recovered from that accident prior to her work-related injury. Id. at 11-13; see footnote 4, supra.

[6] See footnote 5, supra.

[7] Had the judge adopted this part of Dr. Wolf's opinion, it may not have been sufficient to carry the insurer's burden of production under § 1(7A). Errichetto v. Southeast Pipeline Contrs., 11 Mass. Workers' Comp. Rep. 88, 91 (1997); See Blais v. BJ's Wholesale Club, 17 Mass. Workers' Comp. Rep. 187, 192 (2003)(adopted medical evidence that degenerative disc disease was a normal condition for someone the employee's age defeated application of combination injury defense).

2005, the employee underwent a "fusion surgery" on her right foot.[8] (Dec. I, 61.) The judge did not adopt Dr. Wolf's opinion; rather, he adopted the opinions of Drs. Edward Carver, Peter J. Ameglio and Aaron Coleman in support of his award of a closed period of total incapacity benefits and ongoing partial incapacity benefits. (Dec. I, 62.) The doctors' diagnoses, which the judge found were causally related to the employee's May 1, 2004, industrial accident, included the following:

1) Post-traumatic hallux rigidus of the employee's right foot;
2) Right first metatarsophalangeal degenerative joint disease;
3) Sesamoiditis, with painful hardware, and metatarsalgia.

(Dec. I, 62-63.) The insurer did not appeal the first hearing decision. Accordingly, it failed in its attempt to establish that the employee had suffered a "combination" injury on May 1, 2004. See discussion, infra.

Decision II

On May 19, 2008, the insurer filed a complaint to modify or discontinue the employee's partial incapacity compensation. (Form 108, May 19, 2008; Dec. II, 145.) The employee, arguing that her work-related conditions had worsened, Foley's Case, 358 Mass. 230, 232 (1970), claimed total incapacity benefits. (Dec. II, 143.) At the second hearing, the insurer submitted an offer of proof[9] in support of its § 1(7A) defense, citing Dr. Wolf's second § 11A impartial medical

[8] The board file is replete with references to the fact that the employee's surgery in December, 2005, consisted of a fusion of the metatarsal phalangeal (MTP) joint of her right foot.

[9] See 452 Code Mass. Regs. § 1.11(1)(f), which provides:

> In any hearing in which the insurer raises the applicability of the fourth sentence provisions of MGL c. 152, § 1(7A), governing combination injuries, the insurer must state the grounds for raising such defense on the record or in writing, with an appropriate offer of proof.

examination and report.[10] (Ins. Offer of Proof, June 15, 2009.) Specifically, the insurer based its defense on the fact that Dr. Wolf again opined "that the employee has 'mild arthritis.' " Id. Finding Dr. Wolf's opinion to be inadequate, (Dec. II, 149), the judge allowed the parties to submit additional medical evidence. (Dec. II, Ex. 9-20.) The judge also refused to consider Dr. Wolf's deposition testimony. (Dec. II, 152.)

In his second hearing decision the judge once again did not list or discuss the insurer's § 1(7A) defense, but did find the employee's condition had worsened. He adopted the opinions of Dr. Carver and Dr. Ameglio. (Dec. II, 154-156.) Dr. Carver opined, and the judge found, that as a result of her industrial accident the employee suffered from:

> damage of the joint cartilage (confirmed by MRI) which caused moderate pain and inability to ambulate . . . [and] sesamoiditis and secondary symptoms . . . caus[ing] 'multiple secondary functional changes'. . . [including] pain in the adjacent second and third metatarsal-phalangeal joints with resultant tendon symptoms in the dorsal and medial ankle joint due to an alteration in the normal function of the tendons, which are exacerbated by the lack of propulsion of her foot . . . .

(Dec. II, 153-154; Ex. 12.) Dr. Ameglio opined, and the judge found, that the employee suffered from sesamoiditis as a result of her industrial accident. (Dec. II, 155; Ex. 15.) The judge also adopted Dr. Ameglio's opinion that "[d]ropping an object on the metatarsal-phalangeal joint is a common cause of arthritis in the joint." Id. The judge awarded the employee ongoing § 34 benefits from July 29, 2008. (Dec. II, 146, 159.)

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[10] Given that the opinion of Dr. Wolf was essentially no different from the one which the judge did not adopt at the first hearing, this offer of proof should have been rejected. See Peterson v. Hopson, 306 Mass. 597, 599 (1940)("A question of law not seasonably and properly saved, cannot be revived by the simple expedient of bringing it forward again, demanding a second ruling, and claiming an exception or appeal from that second ruling").

The insurer appealed the second hearing decision, arguing only that the judge erred when he refused to consider Dr. Wolf's deposition testimony.[11] We agreed, and recommitted the case for the judge to do so. Grant, supra.

Decision III

Following recommittal the judge filed the third hearing decision. The judge noted his consideration of Dr. Wolf's testimony but repeated his adoption of the medical opinions of Dr. Carver and Dr. Ameglio to support his "medical findings." (Dec. III, 522-523.) These findings incorporated new diagnoses as components of the employee's compensable injury which, in time, would lead to others. (Dec. IV, 48.) The judge affirmed his award of ongoing § 34 benefits to the employee. (Dec. III, 523.) Once again, his decision did not address the insurer's § 1(7A) defense. The insurer did not appeal the third hearing decision.

Decision IV

The employee then claimed permanent and total incapacity benefits from February 14, 2011, to date and continuing. Prior to the hearing on this claim, the employee was examined by a different impartial medical examiner, Dr. Frank A. Graf. (Dec. IV, 46.) Dr. Graf's report was admitted into evidence at the hearing. (Dec. IV, Ex. 3.) Dr. Graf was not deposed, and neither party objected to the judge's determination that the doctor's report was adequate and that the medical issues were not complex. See G. L. c. 152, § 11A(2). Accordingly, Dr. Graf's impartial medical report was the only medical evidence.

Dr. Graf's report contained a detailed summary of the history of the employee's treatment following her May 1, 2004, accepted industrial injury. Based on its contents, the insurer once again raised § 1(7A) in defense of the claim. (Offer of Proof, January 10, 2011.) The insurer relied on three statements in Dr. Graf's report in support of its "combination" injury defense: 1) the doctor mentioned the employee had dropped a platter on her right great toe; 2) prior to

[11] On appeal, the insurer did not argue that the judge erred by failing to address its § 1(7A) defense.

her workplace injury she had "a bilateral asymptomatic degenerative change at both great toes"; and 3) that her "workplace injuries . . . are the cause of an acceleration of her previously asymptomatic right foot condition both by reason of new injury and acceleration of the prior condition." (Id; Dec. IV, Ex. 3.)

Specifically, Dr. Graf's "[a]ssessment" was as follows:

> Statement of Medical Diagnoses: Aggravation and acceleration of previously asymptomatic metatarsal phalangeal degenerative osteoarthritis right great toe through two work-related injuries described above;[12] chronic sesamoiditis right foot; chronic regional pain syndrome right forefoot and ankle; chronic gait pattern disorder with equinus deformity right foot/ankle; status post gastrocnemius recession with no improvement in ankle plantar flexion deformity; solid arthrodesis metatarsal phalangeal joint with ongoing chronic gait pattern change and chronic forefoot pain.
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> . . .
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> There is a causal connection between the present medical condition and the patient's history of injury.
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> . . .
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> [The employee] is medically disabled and the disability is total and permanent.

(Dec. IV, Ex. 3, p. 7.) The judge adopted Dr. Graf's opinions, credited the testimony of the employee and her vocational expert that she was unable to work, and awarded the § 34A benefits claimed. (Dec. IV, 50.)

The insurer appeals, arguing the judge erred by failing to address its § 1(7A) defense.[13] More specifically, relying on MacDonald's Case, 73 Mass. App. Ct. 657 (2009), and Dr. Graf's opinion, the insurer argues that 1) it satisfied

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[12] Dr. Graf apparently thought the employee's 2003 injury was also work-related; it was not. See footnote 5, supra. Because the doctor was not deposed, this matter was not clarified.

[13] Under ordinary circumstances, we would recommit the case for further findings of fact. See, e.g., Soucy v. Beacon Hospice, 25 Mass. Workers' Comp. Rep. 311 (2011); Skaff v. Division of Medical Assistance/Comm. of Mass., 24 Mass. Workers' Comp. Rep. 289 (2010); Hart v. G.V.W. Inc., 23 Mass. Workers' Comp. Rep. 421 (2009);

its burden of production under § 1(7A); 2) the employee had the burden of proving her industrial accident was "a major" cause of her ongoing disability; 3) she failed to introduce any such evidence; and 4) the judge's decision must be reversed and his award of permanent and total incapacity benefits to the employee must be vacated. We disagree.

We need only address the first prong of the insurer's argument, to wit: whether it satisfied, at the fourth hearing, its burden of production under § 1(7A). While it is true the employee retains the burden of proving all elements necessary to establish her right to compensation, including ongoing causal relationship, it is also true that burden applies only to those elements "not conceded by the insurer. . . ." Ginley's Case, 244 Mass. 346, 348 (1923). Pursuant to the law of the case doctrine, we find the insurer conceded that the employee's industrial injury, ab initio, was not a "combination" injury under the statute. We also conclude the insurer failed to meet its burden of production under § 1(7A) by relying on the opinions contained in Dr. Graf's report.

The Law of the Case: § 1(7A)

Because the insurer raised § 1(7A) at the first hearing, and did not appeal the first hearing decision,[14] it accepted the judge's findings that the employee's 1) post-traumatic hallux rigidus of the employee's right foot; 2) right first metatarsophalangeal degenerative joint disease; and 3) sesamoiditis, with painful hardware and metatarsalgia, were legally causally related to her May 1, 2004,

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Stecchi v. Tewksbury State Hosp., 23 Mass. Workers' Comp. Rep. 347 (2009); Baldini v. Department of Mental Retardation/DMR3, 23 Mass. Workers' Comp. Rep. 159 (2009). However, in light of the history of this case, the judge's failure to address the issue, as required generally by G. L. c. 152, § 11, is harmless.

[14] These two facts distinguish this case from those in Spencer-Cotter v. North Shore Medical Ctr., 25 Mass. Workers' Comp. Rep. 315, 318 (2011). In that case, the insurer raised § 1(7A) in defense of the employee's § 34A claim, after voluntarily paying § 34 benefits. There being no prior adjudication respecting whether the employee suffered a "combination" injury, it presented an open question.

industrial injury and *not* the "resultant" conditions of a "combination" injury.[15] See n.2, supra. In other words, the insurer's failure to appeal from the first hearing decision established the aforementioned findings as the law of the case.[16] See, e.g., A.W. Chesterton Co. v. Massachusetts Insurers Insolvency Fund, 445 Mass. 502, 506 (2005); Conley v. Deerfield Academy, 26 Mass. Workers' Comp. Rep. ___ (September 11, 2012); Murphy v. American Steel & Aluminum Corp., 25 Mass. Workers' Comp. Rep. 71, 73 n.7, 77 (2011), aff'd sub nom. Murphy's Case, 81 Mass. App. Ct. 1117 (2012)(Memorandum and Order Pursuant to Rule 1:28). An unappealed hearing decision, like a board approved agreement to compensation,

> is a *final determination of all issues involved in the establishment of the right to compensation* . . . [while] the board has jurisdiction to modify the award of compensation *as changes take place in the condition of the injured employee* . . . the basic questions of liability under the law are not open for further consideration or different determination.

Kareske's Case, 250 Mass. 220, 224 (1924)(emphases added); See Peterson, supra at 599 ("Where there has been no change of circumstances, court or judge is not bound to reconsider . . . an issue, or a question of fact or law, once decided"); see also Docos v. T.J. McCartney, 25 Mass. Workers' Comp. Rep. 39, 41-42 (2011)(judge erred in adopting medical opinions based on a history of injury contrary to that which he found in a prior unappealed hearing decision), citing

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[15] Our examination of the first three hearing decisions reveals that the judge did not adopt medical evidence that could, even arguably, permit him to conclude that the employee suffered a "combination" type injury. See Kelly v. Boston Univ., 26 Mass. Workers' Comp. Rep. 27, 29 n.3 (2012)(and cases cited).

[16] An employee's failure to appeal from an adverse hearing decision would have the same effect. See Hough v. Athol Table LLC, 25 Mass. Workers' Comp. Rep. 301, 304-305 (2011), aff'd sub nom. Hough's Case, 82 Mass. App. Ct. 1121 (2012)(Memorandum and Order Pursuant to Rule 1:28); Boyden v. Epoch Senior Living, Inc., 25 Mass. Workers' Comp. Rep. 153, 156-157 (2011), aff'd sub nom. Boyden's Case, 81 Mass. App. Ct. 1117 (2012)(Memorandum and Order Pursuant to Rule 1:28), rev. den. 462 Mass. 1102 (2012).

Brackett v. Civil Service Comm'n, 447 Mass. 233, 240 n.14 (2006); Adams v. Town of Wareham, 21 Mass. Workers' Comp. Rep. 207, 209 (2007)(in an accepted case, error to permit insurer to challenge the causal relationship of the employee's present disability based on a medical opinion rejecting liability for the initial causal relationship between the industrial injury and the employee's disability). And two of the "basic questions of liability," Kareske, supra, are the issues of the *initial causal relationship* between the employee's industrial accident and her injury, and the nature of the injury suffered.

We also note the insurer did not appeal the third hearing decision, in which the judge affirmed the findings in his second decision. Therefore, the insurer also accepted, as the law of the case, that the employee's injuries included those found compensable by the judge under the "regular burden of proof . . . of causation" standard[17] utilized in those decisions. See discussion, supra at Decision III. With all of this in mind, we address the requirements of the insurer's § 1(7A) burden of production at the fourth hearing.

The Insurer's Burden of Production under § 1(7A)

The insurer argues the opinions contained in Dr. Graf's report satisfy its burden of production under § 1(7A). See MacDonald, supra at 659. We disagree, because this case is distinguishable from MacDonald. There, the insurer was defending an employee's claim owing to an alleged back injury by denying liability for the initial causal relationship between his industrial accident and his disability. MacDonald, supra at 658. The court held the insurer could not maintain its § 1(7A) defense without evidence that any of the employee's prior conditions had combined with his work injury. Id. at 661. Here, the issues of 1) the initial causal relationship between the employee's work and her disability, and 2) the nature of the employee's work-related medical conditions, were settled

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[17] See MacDonald, supra at 662.

by three prior hearing decisions. It bears repeating that although the insurer had attempted to establish that the employee had suffered from a § 1(7A) "combination" injury, it failed to do so in decisions I, II and III as discussed, supra.

Dr. Graf's opinion, insofar as it may be viewed as satisfying the insurer's § 1(7A) burden of production under normal circumstances such as those presented in MacDonald, fails to carry the insurer's burden in Decision IV because of the litigation that preceded it. The problem with Dr. Graf's opinion in this case is analogous to the problem with the report of Dr. Robert Levine in Adams, supra.

In Adams, the self-insurer accepted the employee's back injury and paid § 34 benefits until statutory exhaustion; it was then was ordered to pay her ongoing § 34A benefits. Adams, supra, at 208. Several years later, the self-insurer filed a complaint to discontinue or modify the employee's § 34A benefits; following a hearing, the employee's benefits were discontinued. Id. On appeal, the employee challenged the judge's adoption of the opinion of Dr. Robert Levine as a proper basis upon which to conclude that there was no longer a causal relationship between her injury and her disability. Dr. Levine's opinion to that effect was based on his conviction that there *never was* a causal relationship between the employee's initial injury at work and her disability. Id. at 209. Relying on Kareske, supra, we held that the issue of original causal relationship had long been settled in the employee's favor. Id. We reversed the hearing decision and reinstated the employee's § 34A benefits, reasoning that "Dr. Levine's causal relationship opinion did not meet [the self-insurer's] burden of production, because it did not address any change in the employee's condition." Id.

To the extent that Dr. Graf's opinion could be[18] interpreted to support a finding that the employee suffered a "combination" injury on May 1, 2004, that

[18] We say "could be" because the doctor's statement that the employee's "workplace injuries . . . are the cause of an acceleration of her *previously asymptomatic right foot*

issue was long ago resolved. See discussion, supra. His report is comprised of a history of the employee's medical course, and an affirmative opinion that the employee's multiple medical problems, including those resulting from surgery, remain work-related. But the doctor did *not* express, in present terms, that either, 1) there had been a change[19] in the employee's condition,[20] such that it is no longer causally related to her May 1, 2004, injury, or 2) that a medical condition which pre-existed May 1, 2004 combined with the employee's compensable injury *after* the close of the evidence at the third hearing, "to cause or prolong" the employee's disability or need for treatment. G. L. c. 152, § 1(7A).

To permit the insurer to utilize Dr. Graf's opinion to relitigate an issue that it had lost, and failed to appeal, would violate the rules of law as set forth in Kareske, supra, Adams, supra, and Docos, supra, and unjustifiably excuse its failure to appeal from the prior decisions where its § 1(7A) defense had failed. Given this case's long and complex history, in order to properly raise § 1(7A) anew at the fourth hearing, it was incumbent upon the insurer to produce a medical opinion premised on the law of the case. It failed to do so.

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condition both by reason of new injury and acceleration of the prior condition," (Dec. IV, Ex. 3), is, at best, an ambiguous opinion on the nature of the alleged "combination" injury. (Emphasis added.) Dr. Graf's "assessment" included the additional diagnoses of "chronic sesamoiditis right foot; chronic regional pain syndrome right forefoot and ankle; chronic gait pattern disorder with equinus deformity right foot/ankle; status post gastrocnemius recession with no improvement in ankle plantar flexion deformity; solid arthrodesis metatarsal phalangeal joint with ongoing chronic gait pattern change and chronic forefoot pain." (Dec. IV, Ex. 3, p. 7.) We again note Dr. Graf was not deposed.

[19] Of course, the insurer may always challenge ongoing causal relationship with the introduction of a medical opinion which, if adopted, would entirely disassociate, based upon a change in the employee's condition, her disability or need for treatment from her 2004 industrial accident. While the insurer did raise causal relationship in defense of the claim, Dr. Graf's opinion was sufficient to carry the employee's burden of proof under the applicable "as is" standard. (Dec. IV; Ex. 3); see MacDonald, supra at 662.

[20] In fact, Dr. Graf's opinion expanded the number of medical conditions causally related to the employee's work injury, and found her disability to be permanent and total. (Dec. IV; Ex. 3, p. 7.)

The decision is affirmed. Pursuant to G. L. c. 152, § 13A(6), the insurer shall pay employee's counsel an attorney's fee in the amount of $1,563.91.

So ordered.

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Mark D. Horan
Administrative Law Judge

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Frederick E. Levine
Administrative Law Judge

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William C. Harpin
Administrative Law Judge

Filed: **March 1, 2013**