BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

STEPHEN ARCHER Claimant	)	
VS.	)	
SUN & SWIM POOLS, INC. Respondent	)	Docket Nos. 1,039,402 and 1,039,492
AND	)	
ACCIDENT FUND INS. CO. OF AMERICA Insurance Carrier	)	

ORDER

STATEMENT OF THE CASE

Respondent and its insurance carrier (respondent) requested review of the February 7, 2012, Award and the February 16, 2012, Nunc Pro Tunc entered by Administrative Law Judge Marcia L. Yates. The Board heard oral argument on June 5, 2012. John R. Stanley, of Overland Park, Kansas, appeared for claimant. Clifford K. Stubbs, of Kansas City, Kansas, appeared for respondent.

The Administrative Law Judge (ALJ) found in both dockets listed above that the $5,100 paid by respondent on August 7, 2008, constituted payment of temporary total disability compensation rather than an advance of permanent partial disability compensation. The ALJ split the compensation equally between claimant's two Kansas workers compensation claims, with each case being apportioned 5 additional weeks of temporary total disability compensation.

In Docket No. 1,039,402, the ALJ found claimant had a 15 percent permanent partial impairment to the left upper extremity at the level of the shoulder. Adding the 5 extra weeks to the amount of temporary total disability benefits paid, the ALJ calculated

the award setting out the number of weeks temporary total disability benefits as 27.[1] There has been no appeal of the award entered in Docket No. 1,039,402.

In Docket No. 1,039,492, the ALJ found claimant had a 17 percent functional impairment to the body as a whole due to the low back injury and a 14 percent functional impairment to the body as a whole due to the cervical spine injury. The ALJ found claimant was entitled to a work disability of 82 percent based on a 100 percent wage loss and a 64 percent task loss. Adding the 5 extra weeks to the amount of temporary total disability benefits paid, the ALJ calculated the award setting out the number of weeks of temporary total disability benefits as 29.

The Board has considered the record and adopted the stipulations listed in the Award. Counsel for the parties have agreed that Exhibit 4 to Terry Cordray's deposition, which was not attached to the deposition transcript, need not be considered by the Board in this appeal as it is only relevant to claimant's Missouri claim.

ISSUES

Respondent has not appealed any issues in regard to Docket No. 1,039,402, which involves claimant's left shoulder injury of August 23, 2007. Claimant agrees that the award in Docket No. 1,039,402 was not appealed and is final.[2]

In Docket No. 1,039,492, respondent requests review of whether the claimant sustained an 82 percent work disability. Respondent concedes claimant was not working and was entitled to at least a 50 percent work disability but argues he was not entitled to a task loss because Dr. Swaim based his task loss opinion on claimant's restrictions in all three of his workers compensation claims and not just the claim in Docket No. 1,039,492.

Respondent further argues the ALJ erred in failing to specify the amount of the credit to which it is entitled. Respondent argues it is entitled to credits in the total amount of $46,232.39, and are set out as follows:

$7,742.91 for compensation collectible by claimant for his August 23, 2007, injury for the 18.3 weeks running after November 13, 2007.

$12,653.10 for temporary total disability benefits related to claimant's August 23, 2007, claim.

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[1] Actually, the number of weeks between May 13, 2010, and October 20, 2010, the period in which respondent paid claimant temporary total disability benefits for his shoulder injury (Docket No. 1,039,402) was 23 rather than 22.

[2] Claimant's Brief at 3 (filed April 9, 2012); Respondent's Brief at 2 (filed March 19, 2012).

$13,709.28 for temporary total disability benefits relative to claimant's November 13, 2007, claim.

$5,100 paid as an advance against permanent partial disability.

$14,770.01 in temporary total disability benefits related to claimant's claim involving his bilateral upper extremities. (Missouri has jurisdiction of this claim.)

Claimant argues the ALJ did not err in finding that he sustained a work disability of 82 percent. However, claimant further contends that even if he would only be entitled to a 50 percent work disability based on a 100 percent wage loss and a 0 percent task loss, he would still be entitled to the $100,000 maximum compensation as set out in K.S.A. 2007 Supp. 44-510f(a)(3).

Claimant further argues that the $5,100 paid by respondent was for temporary total disability benefits owed to claimant and the court correctly gave respondent credit for 5 weeks. Claimant further argues there is no medical evidence or opinion that claimant's prior shoulder injury contributed to his neck and low back disability. Therefore, respondent is not entitled to a credit for compensation paid in the shoulder claim. Further, claimant asserts respondent should not be entitled to a credit for temporary total disability compensation paid on an unrelated injury (bilateral carpal tunnel syndrome) pursuant to another state's workers compensation law.

The issues for the Board's review are:

(1) Is claimant entitled to an 82 percent work disability in Docket No. 1,039,492?

(2) Did the ALJ err in failing to specify the amount of credits to which respondent is entitled in Docket No. 1,039,492?

> (a) Did the $5,100 paid to claimant by respondent represent temporary total disability compensation or an advance against claimant's future award for permanent partial disability?
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> (b) Should the respondent be allowed a credit for temporary total disability benefits and/or permanent partial disability compensation paid on the previous shoulder injury (Docket No. 1,039,402)?
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> (c) Should respondent be allowed a credit for temporary total disability compensation paid on an unrelated injury pursuant to another state's (Missouri) workers compensation law?

FINDINGS OF FACT

Claimant had worked for respondent for about 25 years[3] when he was injured on August 23, 2007.[4] At the time, he was a working foreman and was involved in custom building swimming pools and waterfalls. He was working on the edge of an empty swimming pool when he lost his balance and fell into the pool. Claimant landed on his left side on concrete, injuring his left shoulder and hip. He was treated for his injuries at Concentra and was prescribed medication and sent to physical therapy. Claimant's hip contusion resolved, but his left shoulder problems continued. He was given temporary work restrictions but was not taken off work. He continued to work at light duty.

Claimant was referred by Concentra to an orthopedic surgeon, Dr. Robert Bruce, whom he first saw on October 18, 2007. Dr. Bruce diagnosed claimant with traumatic subacromial bursitis of the left shoulder. On November 29, 2007, Dr. Bruce found him to be at maximum medical improvement (MMI) and released him from treatment with no restrictions. Dr. Bruce, in a letter to respondent's insurance carrier dated December 11, 2007, rated claimant as having a 3 percent permanent partial impairment of the left upper extremity at the level of the shoulder.[5]

On November 23, 2007, before claimant was released from treatment for his shoulder injury, he was involved in a second work-related accident when the van he was driving was rear-ended.[6] He suffered injuries to his neck and cervical spine and mid and low back. Claimant was seen at Concentra the day of the accident complaining of symptoms in his neck and low back. He was treated with physical therapy and had diagnostic testing. Claimant first saw Dr. Atul Patel, his authorized treating physician, on January 28, 2008. He complained to Dr. Patel of pain in his neck and upper back that radiated into his upper extremities. Dr. Patel diagnosed claimant with neck and upper back pain, which he suspected was due to muscle strain and possible whiplash injury. EMG testing done on February 11, 2008, showed no evidence of acute cervical radiculopathy.[7]

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[3] At the preliminary hearing on March 8, 2008, claimant testified he had worked for respondent for 10 years, but all the other evidence in the record indicates he worked for respondent about 25 years before his accidents.

[4] Claimant's claim for compensation regarding the injuries from August 23, 2007, was designated as Docket No. 1,039,402. There were no issues appealed in Docket No. 1,039,402.

[5] The parties have stipulated that the ratings of Drs. Zarr, Bruce and Patel were prepared and are in accord with the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (4th ed.).

[6] This claim, with a date of accident of November 13, 2007, has been designated as Docket No. 1,039,492.

[7] The EMG testing was suggestive of moderate right carpal tunnel syndrome, which is not a condition involved in either of claimant's Kansas claims.

Claimant saw Dr. Patel next on February 18, 2008, at which time Dr. Patel found him to be at MMI and released him to return to work with restrictions of no climbing, bending, stooping or overhead lifting. Dr. Patel provided an impairment rating in accordance with Missouri law but did not provide an impairment expressed as a percentage pursuant to the Kansas Workers Compensation Act.

Dr. James Zarr, a physician who specializes in physical medicine and rehabilitation, met with claimant on June 27, 2008, at the request of respondent. Claimant gave Dr. Zarr a history of his accident of August 23, 2007, as well as his medical treatment. Claimant also gave a history of his November 13, 2007, accident and medical treatment.

After examining claimant, Dr. Zarr diagnosed him with persistent neck, upper back, low back, left hip and right shoulder pain, as well as with right carpal tunnel syndrome. Dr. Zarr opined that claimant had reached MMI in regard to his neck, midback, low back, right hip and left shoulder. He had no further treatment to recommend and did not provide claimant with any restrictions. Dr. Zarr found that claimant had a 7 percent whole body permanent disability rating for his neck, midback, low back, hip and left shoulder. The rating did not include claimant's right carpal tunnel syndrome.

Dr. Truett Swaim, a board certified orthopedic surgeon and independent medical examiner, examined claimant on November 22, 2010, at the request of claimant's attorney. Dr. Swaim reviewed claimant's medical records since the August 2007 accident and was provided a history by claimant. He performed a physical examination of claimant's left shoulder, neck, cervical and lumbar spine, and upper extremities.

As to the August 23, 2007, injury, Dr. Swaim stated the fall caused claimant to develop left shoulder impingement syndrome, a partial rotator cuff tear, biceps tendon tear, and a cartilage defect in the glenoid surface. The fall also caused claimant to sustain a hip contusion, but Dr. Swaim did not find anything that would lead him to believe claimant had a significant impairment or disability related to the hip condition. Using the AMA *Guides*,[8] Dr. Swaim rated claimant as having a 28 percent permanent partial impairment of the left upper extremity. The prevailing factor causing claimant to develop this permanent partial impairment was his occupational injury of August 23, 2007.

As to the November 13, 2007, injury, Dr. Swaim stated the accident caused claimant to develop chronic neck pain and chronic back pain with right leg radicular symptoms. Claimant told Dr. Swaim that he had a prior motor vehicle accident in 1980, after which he developed some neck pain. He was treated with medication and the neck problem resolved, and there was no ongoing treatment between 1982 and the injury of 2007. Claimant said he had no previous problems with his lumbosacral spine.

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[8] American Medical Association, *Guides to the Evaluation of Permanent Impairment* (4th ed.). All references are based upon the fourth edition of the *Guides* unless otherwise noted.

Using the AMA *Guides*, Dr. Swaim rated claimant as having a 17 percent permanent partial impairment of the whole body due to his lumbosacral condition using the range of motion model. Dr. Swaim also rated claimant as having a 14 percent permanent partial impairment to the whole person due to his cervical condition. The prevailing factor causing claimant to develop these two permanent partial impairments was claimant's occupational injury of November 13, 2007.

Dr. Swaim recommended that claimant have work restrictions consisting of limiting occupational stresses to a light work level, which would give him the ability to exert up to 20 pounds occasionally or 10 pounds frequently, and a negligible amount of force constantly. Claimant should avoid repetitive bending, stooping, twisting, squatting, climbing, kneeling, or crawling. He should avoid prolonged sitting, standing or walking. He should avoid repetitive prolonged, or forceful use of the right upper extremity above shoulder height or extended away from the body. He should not perform repetitive, prolonged or forceful use of the left upper extremity above shoulder height or extended away from the body. He should avoid repetitive forceful use of the hands and use of vibrating or jarring equipment or tools.

Dr. Swaim said the restrictions in terms of lifting are related specifically to claimant's neck, shoulder and back. In terms of the bending, stooping, twisting, squatting, kneeling, and crawling would be because of the back injuries. Climbing restrictions would be due to the back and shoulder injuries. The basis for avoiding prolonged sitting, standing and walking would be the back injuries. Dr. Swaim's restrictions that claimant avoid repetitive prolonged, forceful use of both upper extremities above shoulder height or extended away from the body would be for claimant's neck injury and left shoulder injury. The restriction against vibrating and jarring equipments would be because of its affect on claimant's neck, back and the hands.

Dr. Swaim reviewed the task list prepared by Terry Cordray. Of the 11 tasks on the list, he opined that claimant would be unable to perform 7 for a 64 percent task loss. Dr. Swaim believed that claimant's inability to perform the tasks were related to the occupational injuries he sustained and the resulting permanent/partial disabilities from those injuries related to his occupation working for respondent. [9]

Terry Cordray, a vocational rehabilitation counselor, met with claimant on February 22, 2011, at the request of claimant's attorney. Mr. Cordray spoke with claimant again, by telephone, on March 8, 2011, to obtain more information. Mr. Cordray prepared a list of 11 tasks that claimant had performed in the 15 years before his injuries.[10]

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[9] Dr. Swaim believes claimant is totally, permanently disabled, but claimant is not making a claim for a permanent total disability in either of his Kansas cases.

[10] Mr. Cordray believes claimant is totally disabled.

Respondent is claiming credits for the temporary total disability benefits and/or permanent partial disability compensation it paid in all claimant's current workers compensation claims, including the claim in Missouri.

In Docket No. 1,039,402, the shoulder injury of August 23, 2007, claimant was taken off work by Dr. Lowry Jones. Claimant was found to be at MMI for his left shoulder on October 19, 2010.[11] The stipulation of the parties concerning payment of temporary total disability benefits in claimant's three workers compensation claims[12] shows that claimant was paid temporary total disability benefits from May 13, 2010, through October 20, 2010, a period of 23 weeks, in the total amount of $12,653.10. Benefits were paid at Missouri compensation rates. Temporary total disability benefits for 23 weeks at claimant's compensation rate in Kansas of $510 per week would be $11,730.

In Docket No. 1,039,492, with an accident date of November 13, 2007, claimant did not return to work after the date of the accident. He was released as being at MMI by Dr. Patel on February 18, 2008. The claim payment report stipulated into evidence shows claimant was paid temporary total disability benefits from November 17, 2007, through February 19, 2008, a period of 13.57 weeks.[13] Claimant was again taken off work on March 4, 2010, by Dr. Lowry Jones. Claimant was referred to Dr. Lan Fotopoulos, who found claimant was at MMI for his low back radiculopathy on May 5, 2010.[14] Temporary total disability benefits were again paid to claimant in Docket No. 1,039,492 from March 4, 2010, through May 12, 2010, a period of 10 weeks. In all, respondent paid claimant $13,709.28 in temporary total disability benefits in Docket No. 1,039,492. Had the 23.57 weeks of benefits been paid at claimant's compensation rate in Kansas, the total would be $12,020.70.

The stipulated claim payment record in regard to claimant's bilateral carpal tunnel syndrome shows respondent paid $19,870.01 in temporary total disability benefits. This includes the $5,100 which resulted from Judge Foerschler's order of May 9, 2008, wherein

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[11] This information was gleaned from respondent's counsel's letter of November 24, 2010, to claimant's counsel, at p. 2. The letter does not indicate when claimant was taken off work, but claimant had been receiving temporary total payments from March 4, 2010, through May 12, 2010, in the car accident claim, Docket No. 1,039,492.

[12] This includes claimant's claim for bilateral carpal tunnel syndrome, which is being adjudicated in Missouri.

[13] These benefits were paid at the Missouri compensation rate. Respondent counsel's letter to claimant's attorney of November 24, 2010, which was made a part of the record by stipulation, indicates claimant's temporary total disability benefits were started on November 14, 2007, but the payment record attached shows the benefits started on November 17, 2007.

[14] This information was garnered from Dr. Swaim's medical report of November 22, 2010. None of the medical records from Dr. Lowry or Dr. Fotopoulos are in the record.

he held: "For the time being temporary total disability is ordered commenced . . . ."[15] The order was entered in Docket Nos. 1,039,402; 1,039,491[16] and 1,039,492. Judge Foerschler did not specify to which docketed claim the temporary total disability should be paid. In Judge Yates' Award, she found that the 10 weeks of temporary total disability benefits that were paid as a result of this order should be divided equally between the two remaining Kansas claims, with 5 weeks of temporary total disability benefits being added to claimant's claim in Docket No. 1,039,402 and 5 weeks being added to claimant's claim in Docket No. 1,039,492.

PRINCIPLES OF LAW

K.S.A. 2007 Supp. 44-501(a) states in part: "In proceedings under the workers compensation act, the burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends." K.S.A. 2007 Supp. 44-508(g) defines burden of proof as follows: "'Burden of proof' means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record."

K.S.A. 44-510e(a) states in part:

> Permanent partial general disability exists when the employee is disabled in a manner which is partial in character and permanent in quality and which is not covered by the schedule in K.S.A. 44-510d and amendments thereto. The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury. In any event, the extent of permanent partial general disability shall not be less than the percentage of functional impairment. Functional impairment means the extent, expressed as a percentage, of the loss of a portion of the total physiological capabilities of the human body as established by competent medical evidence and based on the fourth edition of the American Medical Association Guides to the Evaluation of Permanent Impairment, if the impairment is contained therein. An employee shall not be entitled to receive permanent partial general disability compensation in excess of the percentage of functional impairment as long as the employee is engaging in any work for wages equal to 90% or more of the average gross weekly wage that the employee was earning at the time of the injury.

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[15] ALJ Preliminary Decision (May 9, 2008) at 2.

[16] This claim was subsequently dismissed in Kansas.

K.S.A. 44-510a provides:

> (a) If an employee has received compensation or if compensation is collectible under the laws of this state or any other state or under any federal law which provides compensation for personal injury by accident arising out of and in the course of employment as provided in the workers compensation act, and suffers a later injury, compensation payable for any permanent total or partial disability for such later injury shall be reduced, as provided in subsection (b) of this section, by the percentage of contribution that the prior disability contributes to the overall disability following the later injury. The reduction shall be made only if the resulting permanent total or partial disability was contributed to by a prior disability and if compensation was actually paid or is collectible for such prior disability. Any reduction shall be limited to those weeks for which compensation was paid or is collectible for such prior disability and which are subsequent to the date of the later injury. The reduction shall terminate on the date the compensation for the prior disability terminates or, if such compensation was settled by lump-sum award, would have terminated if paid weekly under such award and compensation for any week due after this date shall be paid at the unreduced rate. Such reduction shall not apply to temporary total disability, nor shall it apply to compensation for medical treatment.

K.S.A. 44-525(b) states in part:

> No award shall be or provide for payment of compensation in a lump sum, except as to such portion of the compensation as shall be found to be due and unpaid at the time of the award, . . . and credit shall be given to the employer in such award for any amount or amounts paid by the employer to the employee as compensation prior to the date of the award.

ANALYSIS

Respondent acknowledges that claimant is earning no wages and, therefore, has a 100 percent wage loss. But respondent contends claimant is not entitled to a task loss due to a failure of proof. Dr. Swaim is the only physician who rendered an opinion as to the percentage of tasks claimant has lost the ability to perform out of all the tasks claimant performed during the 15 years preceding the accident. Unfortunately, Dr. Swaim was not asked to give his task loss opinion taking into consideration only the impairment and permanent work restrictions he recommended as a result of the injury on November 13, 2007, to claimant's neck and back. Nevertheless, Dr. Swaim testified that although some of the restrictions he considered were for injuries claimant suffered in his two other accidents and which are the subject of separate claims, those restrictions were also applicable to the neck and back injuries that are the subject of this claim. In other words, all of the restrictions that Dr. Swaim considered in arriving at his opinion on task loss were restrictions that were at least in part applicable to the injuries claimant suffered in the

November 13, 2007, accident. As such, his task loss opinion that claimant lost the ability to perform 7 out of the 11 tasks on the task list prepared by Mr. Cordray is applicable to this claim. The ALJ adopted this 64 percent task loss opinion and averaged it with claimant's 100 percent wage loss, as required by K.S.A. 44-510e, and determined claimant's permanent partial general body work disability to be 82 percent. The Board concurs and affirms this finding by the ALJ. In addition, it is worth noting that even if claimant's task loss is eliminated, the resulting 50 percent work disability would still result in claimant's disability award exceeding the $100,000 statutory maximum.

Likewise, the Board agrees with the ALJ that respondent is not entitled to any credit or offsets in this docketed claim for sums paid for other work-related injuries in other claims. Although some of the weekly permanent partial disability compensation awarded in Docket No. 1,039,402 may overlap with compensation awarded in this claim, K.S.A. 44-510a is not applicable to this claim because respondent has not shown the percentage of contribution that the prior disability contributes to claimant's overall disability. In fact, no such contribution exists.

The Board finds that the $5,100 paid pursuant to an order by the ALJ, one-half of which was attributed to this claim, was for temporary total disability and not permanent partial disability. Nevertheless, respondent will receive credit for amounts previously paid in this docketed claim and any overpayment of temporary total disability compensation awarded in this claim will be applied to the permanent partial disability compensation awarded herein. Respondent is not entitled to any offset or credit for payments made in the Missouri claim. That claim, like the claim in Docket No. 1,039,402, is for a separate accident and injury and involves a different body part than what is the injury and disability in this docketed claim. And it does not matter if those weeks of compensation overlap.[17] When K.S.A. 44-525(b) refers to a credit for amounts paid by the employer, it limits that credit to payments made in "such award," meaning this award, not for payments made in some other award.

The ALJ found claimant to be entitled to 29 weeks of temporary total disability compensation at the rate of $510 per week for a total of $14,790, followed by such amount of permanent partial disability compensation as would reach the $100,000 maximum. Respondent was ordered to pay this amount "in one lump sum less amounts previously paid."[18] Respondent contends that it overpaid the amount of temporary total disability compensation awarded. If the total amount of temporary total disability compensation respondent paid in this docketed claim exceeds the $14,790 awarded, then respondent is entitled to deduct the additional sums from the amount of permanent partial disability

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[17] See *Ratcliff v. Par Electrical Contractors, Inc.*, Docket No. 1,050,846, 2012 WL 1142961 (Kan. WCAB March 22, 2012).

[18] ALJ Award (Feb. 7, 2012) at 9; Nunc Pro Tunc (Feb. 16, 2012).

compensation awarded. In other words, respondent may only deduct from the total $100,000 awarded the amount of temporary total disability compensation it actually paid claimant for temporary total disability in this docketed claim.

The Board notes that the ALJ did not award claimant's counsel a fee for his services. K.S.A. 44-536(b) requires that the Director review such fee agreements and approve such contract and fees in accordance with that statute. It is noted that claimant's attorney attached a copy of the fee agreement to claimant's brief to the Board. Should claimant's counsel desire a fee be approved in this matter, he must submit his contract with claimant to the Director or ALJ for approval.

CONCLUSION

(1) Claimant is entitled to a permanent partial disability award based upon a work disability of 82 percent.

(2) The ALJ did not err in her calculation of the award as modified by the Order Nunc Pro Tunc. Credit was properly given to respondent for amounts previously paid in this docketed claim.

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the February 7, 2012, Award and the February 16, 2012, Nunc Pro Tunc order of Administrative Law Judge Marcia L. Yates are affirmed.

IT IS SO ORDERED.

Dated this _____ day of June, 2012.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

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Marcia L. Yates, Administrative Law Judge