COMMONWEALTH OF KENTUCKY
SUPREME COURT
CASE NO. 2014-SC-00236
(2013-CA-001712WC)

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SUPREME COURT

MICHELLE RAHLA — APPELLANT

BRIEF ON BEHALF OF THE MEDICAL CENTER AT BOWLING GREEN

THE MEDICAL CENTER AT BOWLING GREEN; HON. JEANIE OWEN MILLER, ALJ; WORKERS COMPENSATION BOARD; AND KENTUCKY COURT OF APPEALS — APPELLEES

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CERTIFICATE OF SERVICE

I hereby certify that an original and ten copies of this brief on behalf of the Appellee, has been sent, via overnight mail, on the 8th day of September, 2014, to the Clerk of the Supreme Court of Kentucky, Ms. Susan Stokley Clary, Capitol Bldg. 700 Capitol Avenue, Room 235, Frankfort, KY 40601-3488 with a copy served by first class U.S. mail, postage prepaid, on the following: Mr. Phillipe W. Rich, 1001 Trevilian Way, Louisville, Kentucky 40213; Mr. Samuel P. Givens, Jr., Kentucky Court of Appeals, 360 Democrat Drive, Frankfort, Kentucky 40601; Department of Worker's Claims, Workers' Compensation Board, Prevention Park, 657 Chamberlin Avenue, Frankfort, Kentucky; and Ms. Jeanie Owen Miller, ALJ, P.O. Box 2070, Owensboro, Kentucky 42302. The undersigned further certifies that the record on appeal was not withdrawn.

_____
W. Cravens Priest III

STATEMENT CONCERNING ORAL ARGUMENT

While The Medical Center at Bowling Green does not believe this case merits an oral argument, it will welcome the opportunity to participate in oral argument if the Court determines oral argument is appropriate.

COUNTERSTATEMENT OF POINTS AND AUTHORITIES

I. COUNTERSTATEMENT OF THE CASE

Michelle Rahla ("Rahla") alleges to have sustained injury during a physical examination which she was undergoing on February 3, 2012 as an applicant for a position with the The Medical Center at Bowling Green – Commonwealth Health Corporation's ("CHC") sole corporate member subsidiary (the "Medical Center"). Rahla's claim was properly dismissed by the administrative law judge ("ALJ") and the Workers' Compensation Board ("Board") and the Kentucky Court of Appeals properly affirmed dismissal of Rahla's claim because the evidence before the ALJ confirmed that Rahla was not an employee of the Medical Center at the time of the alleged injury under KRS 342.640 and is therefore not covered under Kentucky's Workers' Compensation Act.

A. Rahla's Contingent Job Offer.

Rahla admits that on February 1, 2012 she was given a contingent job offer of employment by the Medical Center to work as a PRN registration clerk. [M. Rahla November 12, 2012 dep. p. 17]. A copy of the February 1, 2012 contingent offer is attached hereto as exhibit 1 and attached to Vickie Weaver's January 23, 2013 deposition as Exhibit 2.

The contingent offer specifically states in pertinent part:

> "It is with pleasure that I confirm the contingent job offer of employment with Commonwealth Health Corporation (CHC) as PRN registration clerk…
>
> The terms and conditions of the offer are outlined below:…
>
> 2. Physical Examination and Substance Abuse Screening
> This offer is contingent upon successful completion of a physical examination that includes a substance abuse screening. This must be completed prior to your starting work."

Rahla testified that she understood that the February 1, 2012 offer of employment was contingent upon her passing the physical exam and drug test:

> "I received a letter of contingency provided that I passed a physical and drug test then I would be employed." [Rahla dep. p. 17].

Vickie Weaver ("Weaver") is the Director of Employee Health Services for CHC and explained in her January 23, 2013 deposition that CHC has an extensive application selection process, under which there are several conditions that applicants have to go through before even being considered for a position with the Medical Center, including physical examinations and substance abuse screenings. Weaver testified that any employment with the Medical Center is contingent upon successful completion of these assessments. [V. Weaver January 23, 2013 dep. pp. 4-5].

Weaver confirmed that Rahla's offer of employment, as set forth in the February 1, 2012, correspondence was expressly contingent upon Rahla's successful completion of a physical exam and drug screens (among other requirements). Weaver further explained that if Rahla had not completed the physical exam or tested positive for an illegal substance, the offer of employment would have been withdrawn. [Weaver dep. pp. 6-7].

B. Alleged Injury during February 3, 2012 Conditional Physical Exam.

On February 3, 2012, Rahla underwent the physical exam required in the contingent offer. Weaver explained that the physical exam was a continuation of the applicant screening process to determine whether Rahla was a fit applicant for the position. Accordingly, in the physical exam, the applicants are tested to determine whether they have the agility to perform the physical demands of the job for which they are applying. The examination form attached as Exhibit 3 to Weaver's deposition confirms that Rahla's physical exam was completed on February 3, 2012 and also confirms that Rahla was required to demonstrate that she had the

agility to perform the physical demands of the PRN registration clerk position for which she was applying. A job description of the PRN registration clerk position confirming the physical requirements of the position is attached to and is part of the examination form. [Exhibit 3 to Weaver dep.].

Rahla testified that during the February 3, 2012 physical exam she was required to lift weights from 10 to 61 pounds and that she felt some pain in her neck while lifting the 61 pounds. Rahla testified, however, that she did not inform the individual administering her exam of the pain. [Rahla dep. pp. 19-20]. The examination form also does not reflect that Rahla had any injury or difficulties during the exam [Exhibit 3 to Weaver dep.]. This alleged neck injury during the February 3, 2012 exam is the basis for the pending claim.

C. Rahla was not employed by the Medical Center on February 3, 2012.

Additional evidence confirms that Rahla was not employed by the Medical Center when she claims to have been injured during the physical exam performed as a condition of her contingent job offer. Weaver testified that:

1. Rahla was not paid for her time spent during the February 3, 2012 physical exam.

2. Rahla did not perform any services for the Medical Center during the exam.

3. The Medical Center did not request that Rahla perform any services during the exam, and

4. The Medical Center did not agree that Rahla perform any services for it during the exam.

Weaver explained that Rahla's physical exam was solely conducted as part of the screening process to determine whether Rahla was a fit applicant for the PRN registration clerk position for which she applied. [Weaver dep. pp. 9-10].

Weaver also confirmed that as of the date of the February 3, 2012 physical exam, other conditions of Rahla's contingent offer of employment had also still not been completed, including the substance abuse screening. As a result, Rahla had not been cleared for employment with the Medical Center on February 3, 2012. [Weaver dep. pp. 9-10]. Rahla also admitted that as of February 3, 2012, she had still not received any confirmation of employment with the Medical Center and that it was only after the February 3, 2012 physical exam that she received any confirmation that she would be hired by the Medical Center. [Rahla dep. p. 22].

D. Rahla's employment began on February 27, 2012.

Weaver confirmed that Rahla first became employed with the Medical Center on February 27, 2012. A screen shot of the Medical Center's Navigator personnel software, confirming Rahla's February 27, 2012 hire date is attached hereto as exhibit 2 and as Exhibit 4 to Weaver's deposition. Rahla began personnel orientation with the Medical Center on February 27, 2012 and Rahla's personnel orientation form signed by Rahla on February 27, 2012 is attached hereto as exhibit 3 and to Weaver's deposition as Exhibit 5 and specifically states:

> "Your official start date is 2-27-2012 and your first pay stub will be available to you on 3-16-2012 which covers time worked 2-26-12 through 3-10-12." [Weaver dep. pp. 11-12].

A copy of Rahla's I-9 Employment Eligibility Verification Form is also attached hereto as exhibit 4 and as Exhibit 6 to Weaver's deposition, confirming that it was signed by Rahla on February 27, 2012 under Section I requiring:

"To be completed and signed by employee at the time employment begins."

Weaver also testified that Rahla did not begin any work for the Medical Center and was not paid for any time at the Medical Center until February 27, 2012. Rahla's first time card sheet attached hereto as exhibit 5 and as Exhibit 7 to Weaver's deposition, confirms that she first

clocked in for work at the Medical Center on February 27, 2012. Rahla's time card sheet confirms that Rahla worked a total of 75.9 hours between February 27, 2012 and March 10, 2012. Rahla's first pay stub is attached hereto as exhibit 6 and as Exhibit 8 to Weaver's deposition. The pay stub is for the period ending March 10, 2012 and confirms that it is payment for the 75.9 hours worked by Rahla between February 27, 2012 and March 10, 2012, further confirming that there was no prior accrual of pay by Rahla before February 27, 2012. It is therefore undisputed that Rahla's first day of work for the Medical Center was February 27, 2012. [Weaver dep. pp. 13-14].

The ALJ dismissed Rahla's claim on March 21, 2013 because the evidence before her confirmed that Rahla was not an employee of the Medical Center on February 3, 2012. The Workers' Compensation Board and the Kentucky Court of Appeals both affirmed the decision.

II. ARGUMENT

The dismissal of Rahla's claim must be affirmed because the evidence confirms that Rahla is not a covered employee under KRS 342.640 under this Court's ruling in Honaker v. Duro Bag, 851 S.W.2d 481 (Ky. 1993).

A. The evidence confirms that Rahla is not a covered employee under KRS 342.640.

It is fundamental that in order to be covered under Kentucky's Workers' Compensation Act an individual must meet the definition of an "employee" under the Act. KRS 342.640 defines a covered employee in pertinent part as follows:

> The following shall constitute employees subject to the provisions of this Chapter, except as exempted under KRS 342.650:
>
> (1) Every person...in the service of an employer under any contract of hire or apprenticeship, express or implied....

(4) Every person performing service in the course of the trade, business, profession or occupation of an employer at the time of the injury.

Rahla was not an employee of the Medical Center at the time of the alleged injury under KRS 342.640 because the evidence confirms that during the February 3, 2012 physical exam:

1. Rahla was not under a contract of hire with the Medical Center,

2. Rahla was not in the service of the Medical Center, and

3. Rahla was not performing any service in the Medical Center's course of trade, business, profession or occupation. [Weaver dep. pp. 9-10].

B. Honaker v. Duro Bag, 851 S.W.2d 481 (Ky. 1993) confirms Rahla was not under a contract of hire with the Medical Center on February 3, 2012.

This is not a case of first impression, because this Court previously held in Honaker v. Duro Bag Manufacturing Co., 851 S.W.2d 481, 483 (Ky. 1993), that if an applicant's employment is contingent upon successful completion of a pre-employment physical exam, there is no contract of hire, and therefore no employment until after the physical exam is successfully completed. In Honaker, this Court upheld the administrative law judge's and the Board's dismissal of Honaker's workers' compensation claim against Duro Bag because he secretly had his cousin attend a pre-employment physical exam for him after Duro Bag expressly conditioned Honaker's employment upon his successful passage of a pre-employment physical exam. Honaker's cousin successfully completed the physical exam on April 22, 1988. Thereafter, Honaker performed work for Duro Bag for three months until he was injured while working on November 16, 1988.

This Court upheld the dismissal of Honaker's workers' compensation claim because there was no contract of hire between Honaker and Duro Bag as Honaker had not completed the pre-employment physical exam upon which his employment was expressly conditioned. This Court held that the physical exam was a clear and unambiguous condition precedent, which had to be

performed before there was a binding contract of hire, and since the pre-employment physical exam had not been completed by Honaker, the contract of employment had never been consummated. Id. Therefore, Honaker confirms that under Kentucky law, an injury sustained during a conditional pre-employment physical exam cannot be covered under Kentucky's Workers' Compensation Act because no employment relationship exists at the time of the pre-employment physical exam.

This Court also held in Kentucky Farm & Power Equipment Dealers Assoc. Inc. v. Fulkerson Brothers Inc., 631 S.W.2d 633, 635 (Ky. 1982), that an "employee" under KRS 342.640 must be "an employee for hire," because the essence of compensation protection is the restoration of a part of wages which were assumed to have existed at the time of injury. This Court explained that KRS 342.640(4) does not refer to a contract of hire in order to protect workers who are injured while performing work in the course of an employer's business by considering them to be employees despite the lack of a formal contract for hire, unless the worker was a prisoner or the work was performed with no expectation of payment. Id. at 130. Larson, *Workmen's Compensation Law*, 1C §§ 47.00 and 47.01 (1980) also confirms that the term "employee" in workers' compensation laws excludes "workers who neither receive nor expect to receive any kind of pay for their services."

Rahla admits that at the time of her alleged injury on February 3, 2012, she had not received any confirmation of employment from the Medical Center. [Rahla dep. p. 22]. Rahla only had an offer of employment with the Medical Center at the time of the alleged injury, which she understood was expressly contingent upon, among other things, successful completion of the physical exam and a substance abuse screening, neither of which had been completed by February 3, 2012. As Weaver testified, if Rahla had not successfully completed the physical

exam or if Rahla had not passed the substance abuse screening, her offer of employment would have been withdrawn. [Weaver dep. pp. 6-7].

The evidence and testimony from Rahla and Weaver also confirms that Rahla was not paid for attending the February 3, 2012 physical exam, and Rahla therefore had no expectation to receive any kind of pay from the Medical Center at the time of the injury. Once Rahla was ultimately hired by the Medical Center on February 27, 2012, she was only paid for hours that she thereafter worked as an employee of the Medical Center from February 27, 2012 forward. Accordingly, Rahla's injury is not covered by the Workers' Compensation Act because as set forth above, like Honaker, Rahla's employment was clearly and unambiguously conditioned upon successful completion of the physical exam and substance abuse screening, and at the time of the alleged injury neither the physical exam nor the substance abuse screening had been completed. Therefore, as this Court held in Honaker, there was no contract of hire between Rahla and the Medical Center at the time of the alleged injury. As a result, Rahla does not meet the definition of an employee covered under KRS 342.640 and the dismissal of Rahla's claim must be affirmed.

C. Dodson v. Workers' Compensation Div., 558 S.W.2d 635 (W. Va. 2001) is not applicable.

Rahla ignores Kentucky's controlling precedent in Honaker v. Duro Bag Manufacturing Co., 851 S.W.2d 481 (Ky. 1993) and Kentucky Farm & Power Equipment Dealers Assoc. Inc. v. Fulkerson Brothers, Inc., 631 S.W.2d 633 (Ky. 1980) and instead, relies upon a West Virginia case, Dodson v. Workers' Compensation Div., 558 S.E.2d 635 (W. Va. 2001) [attached hereto as exhibit 7.]. Dodson however, is inapplicable and not controlling in this case. Although the court held in Dodson that the claimant's injury sustained during a physical exam was work related, the court based its decision upon testimony from both the claimant and the employer, confirming

that the claimant had been hired verbally before the physical exam. Id. at 644. Furthermore, the court in Dodson expressly held:

> "WE EMPHASIZE THAT our conclusion reached today is narrowly drawn and driven by the facts of this case. Participation in a pre-employment test does not, standing alone, create an employment contract for workers' compensation purposes." Id. at 645 (emphasis are original).

The facts in Rahla's claim are clearly different than in Dodson, because as set forth above: Rahla had not been hired, verbally or otherwise, at the time of her physical exam; Rahla had not completed any of the conditions of her offer at the time of the injury as she had not completed the physical exam or drug test, and the Medical Center had not consented to receive her services at the time of the injury. [Weaver dep. pp. 9-10].

Rahla also erroneously claims that if injuries sustained by employees shortly after being fired are compensable, so should injuries sustained in pre-employment physical exams. Rahla, however, does not cite any precedent for such a position and injuries sustained by an employee leaving the premises of an employer-employee relationship are clearly distinguishable from injuries sustained in a pre-employment physical exam before any employer-employee relationship exists. Rahla's claims were therefore properly dismissed.

D. Hubbard v. Henry is not applicable since Rahla was not working in a "trial period" at the time of the alleged injury.

Rahla also erroneously cites Hubbard v. Henry, 231 S.W.3d 124 (Ky. 2007), as controlling authority. Hubbard however, is not applicable. In Hubbard, the claimant, a timber cutter, agreed to work for Hubbard, a logging company, on a trial basis for a couple of days and to only receive pay if Hubbard was satisfied with his work. The claimant was injured by a falling tree during one of the trial days. Thereafter, Hubbard paid the claimant, but did not say it was payment for work.

The court determined that the claimant was a covered employee under KRS 342.640(4) because he was cutting trees at the time of the injury for Hubbard, thereby performing services in the course of Hubbard's logging business. Id. at 130. Rahla, however, was not performing any work or service which benefited or was in the course of the Medical Center's business when she was allegedly injured on February 3, 2012. She was not registering patients or otherwise performing any tasks for the Medical Center. She was simply undergoing a physical exam as a condition of her offer during the application process. [Weaver dep. pp. 9-10].

Rahla was also not working within a trial period for the Medical Center at the time of the alleged injury, as the claimant was for Hubbard. Further, the "trial work" in Hubbard arose out of a verbal agreement, whereas Rahla had a letter expressly stating that the offer of employment was "contingent upon successful completion of a physical examination that includes a substance abuse screening." Rahla was also never paid for any of her time spent on the date of her injury, like the claimant was in Hubbard. In fact, Rahla never worked for the Medical Center until 20 days after the injury on February 27, 2012 and was only paid for her time from February 27, 2012 forward. [Weaver dep. pp. 13-14]. Therefore, this is clearly not a "try-out case" like Hubbard and Hubbard is not applicable to Rahla's claim.

E. A Pre-Employment Physical Exam is not a "try-out."

In an attempt to apply Hubbard to Rahla's claim, Rahla erroneously claims that a pre-employment physical exam is "a "try-out" like the timber cutter's 'try-out' in Hubbard." Rahla, however, again ignores the holding in Honaker v. Duro Bag, 851 S.W.2d 483 (Ky. 1993) and cites no authority supporting her position. Other courts have also distinguished "try-out cases" like Hubbard from cases like Rahla's, in which injuries were sustained in conditional offer physical exams.

In Gebhard v. Dixie Carbonic, 625 N.W.2d 207 (Neb. 2001) [exhibit 8], Gebhard was given a conditional offer of employment with Dixie Carbonic for a position as a line worker. Like Rahla, Gebhard's offer was contingent upon successful completion of a drug test and physical exam. During the physical exam Gebhard was required to lift weighted boxes, like Rahla, and injured her back when she lifted a 60 pound box. Gebhard filed a workers' compensation claim for her back injury sustained during the physical exam. Nebraska's Workers' Compensation Act's definition of an employee covered under the Act is virtually identical to Kentucky's and states in pertinent part:

> The term "employee" shall be construed, and in relevant part to mean:
> (2) Every person in the service of an employer who is engaged in any trade, occupation, business, or profession...under any contract of hire, express or implied, oral or written.

The court held that Gebhard was not covered under Nebraska's Workers' Compensation Act, because Gebhard only had a mere conditional offer of employment at the time of the injury and therefore, no employer-employee relationship existed between Gebhard and Dixie Carbonic at the time of the injury. As a result, the court affirmed the dismissal of Gebhard's workers' compensation claim. Id. at 213.

The court in Gebhard explained that, as in Kentucky, the claimant in a workers' compensation claim has the burden of proving that she was a covered employee under Nebraska's Workers' Compensation Act, which like Kentucky, requires proof of an employer-employee relationship through a contract between the parties. Id. at 211. The court recognized that Gebhard conceded that passing the physical exam was a condition precedent to her employment, as Rahla did, and determined that the evidence therefore confirmed that Gebhard was given only a conditional offer of employment at the time of the alleged injury. Id. at 212. As a result, the court concluded that no employment relationship existed between Gebhard and

Dixie Carbonic at the time of the injury and held that Gebhard was not a covered employee as defined under Nebraska's Workers' Compensation Act Id. at 213.

In Younger v. City of Denver, 810 P.2d 647 (Colorado 1991), [exhibit 9], Younger applied for an entry level police officer position with Denver. Younger was required to pass a physical agility test and other assessments as conditions of employment. Younger injured her knee during the physical agility test and filed a workers' compensation claim. The court affirmed the dismissal of Younger's workers' compensation claim.

The Court recognized that Younger's injury during the pre-employment physical agility test did not arise out of or in the course of any employment with Denver and that Younger was therefore, merely an applicant for employment at the time of the injury, not an actual employee. Id. at 651. The court held that Younger's participation in the agility test did not create a contract of employment between Younger and Denver. The court stated that although liberal construction is to be afforded to workers' compensation laws, a contract of hire is subject to the same rules as other contracts and determined that Younger had failed to meet her burden of proving any mutual agreement for employment between the parties at the time of the injury during the physical exam. Id. at 635. As a result, the court determined that an employer-employee relationship did not exist at the time of the injury and affirmed the denial of Younger's workers' compensation claim. Id. at 653.

The Restatement (Third) of Employment Law §101 (copy attached as exhibit 10) also confirms that in order for an employer-employee relationship to exist, the employer must consent to receive the employee's services. The "try-out period" analysis in Hubbard is therefore clearly not applicable to cases, like Rahla's involving injuries sustained during conditional pre-employment physical exams. Rahla and the applicants in a pre-employment physical exam do

not perform any work for the prospective employer during the exam and the prospective employers have not consented to receive any services from the applicants.

Like the defendants in Gebhard and Younger, the Medical Center had not consented to receive any services from Rahla at the time of the alleged injury on February 3, 2012 and Rahla had not performed any services for the Medical Center during the exam. Weaver confirmed that: there was no guarantee that Rahla would be employed by the Medical Center at the time of the alleged injury, Rahla's contingent offer could have been withdrawn if Rahla did not complete the exam or did not pass the drug test, Rahla's drug test had not been completed at the time of the injury, and Rahla was not employed by the Medical Center until twenty days after the exam on February 27, 2012. [Weaver dep. pp. 6-7. 10]. Therefore, it is undisputed under the evidence and Honaker v. Duro Bag that Rahla was only an applicant for a position with the Medical Center on February 3, 2012, not an employee of the Medical Center. Therefore, Rahla's claim was properly dismissed.

An examination of the law in other states reveals that the courts have overwhelmingly held that injuries sustained during pre-employment activities designed to determine whether an individual is suitable for employment are not compensable under workers' compensation laws. *See* Scroggins v. Glen Roberts Excavation, 210 AR App. 84 (2010); Moberg v. Workers' Compensation Appeal Board, 995 A.2d 385 (PA 2010); Bugryn v. State, 904 A.2d 269 (CT App. 2006); Gebhard v. Dixie Carbonic, 625 N.W.2d 207 (NE 2001); Dotson v. Conrad, 1998 WL 87911 (OH App. 1998); Leslie v. School Services and Leasing, Inc., 947 S.W.2d 97 (MO App. 1997); North v. Floyd County Board of Education, 442 S.E.2d 809 (GA App. 1994); Younger v. City and County of Denver, 810 P.2d 647 (CO 1991); Boyd v. City of Montgomery, 515 So.2d 6 (AL App. 1987); Sellers v. City of Abbeville, 458 So.2d 592 (LA App. 1985); Rastaetter v.

Charles S. Wilson Memorial Hospital, 436 N.Y.S.2d 47 (S.Ct. N.Y. 1981); Fluor Engineers & Contractors, Inc. v. Kessler, 561 P.2d 72 (OK 1977); State ex rel. Kusie v. Weber, 10 N.W.2d 741 (N.D. 1943); Knupp v. Potashnick Truck Service, Inc. 135 S.W.2d 1084 (MO App. 1940); Coco v. Wilbur, 140 A. 790 (N.J. 1928); Brewer v. Dept. of Labor and Industries, 254 P. 831 (WA 1927); Lederson v. Cassidy Dorfman, 187 N.Y.S. 50 (N.Y. App. 1921); and California Hwy. Commission of Dept. of Engineering of State of California v. Industrial Accident Commission of State of California, 181 P. 112 (CA App. 1919).

III. CONCLUSION

Rahla does not meet the definition of an "employee" under KRS 342.640 for the alleged February 3, 2012 injury. Honaker v. Duro Bag Manufacturing Co., 851 S.W.2d 481 (KY. 1993) and the evidence confirms that Rahla was not under any contract of hire with the Medical Center on February 3, 2012. The evidence also confirms that Rahla was not performing any service in the Medical Center's trade, business, profession or occupation on February 3, 2012. Rahla was simply applying for a position with the Medical Center when she claims to have been injured on February 3, 2012 and had no guarantee or expectation that she would be employed by the Medical Center at that time. As a result, Rahla has failed to meet her burden of proof and the dismissal of Rahla's claim must be further affirmed.

Respectfully submitted,

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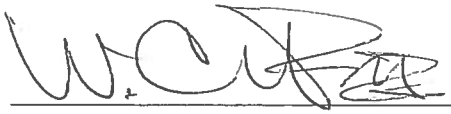

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