

GOVERNMENT OF THE DISTRICT OF COLUMBIA

Department of Employment Services



MURIEL BOWSER
MAYOR

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DIRECTOR

COMPENSATION REVIEW BOARD

CRB No. 16-015

**RHONDA PRICE-RICHARDSON,
Claimant–Petitioner,**

v.

**WASHINGTON METROPOLITAN AREA TRANSIT AUTHORITY,
Employer-Respondent.**

Appeal from a January 15, 2016 Compensation Order
by Administrative Law Judge Nata K. Brown
AHD No. 13-431, OWC No. 703466

(Decided July 8, 2016)

Sarah O. Rollman for the Employer
Benjamin Douglas for the Claimant

Before JEFFREY P. RUSSELL, LINDA F. JORY, and, HEATHER C. LESLIE *Administrative Appeals Judges.*

JEFFREY P. RUSSELL, for the Compensation Review Board

DECISION AND REMAND ORDER

FACTS OF RECORD AND PROCEDURAL HISTORY

Rhonda Price-Richardson (Claimant) was employed by the Washington Metropolitan Area Transit Authority (Employer or WMATA) since 2006, working initially as a “parking analyst.” The job involved providing customer service, talking on the telephone, and dealing with parking tickets and other customer relations issues.

In July 2011, Patrick Schmitt became the Director of Employer’s Parking Office, and at that time Claimant was promoted to Parking Operations Specialist. The new position added responsibilities involving opening and closing parking lot gates for customers who had insufficient funds to pay the parking fee or other problems exiting parking lots.

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Claimant stopped working July 9, 2012 and subsequently filed a claim alleging that she had sustained a psychological injury on that date stemming from workplace stress, *also* known as a “mental-mental stress claim”. At a formal hearing conducted before an Administrative Law Judge (ALJ) in the Administrative Hearings Division (AHD) of the Department of Employment Services (DOES), Claimant sought an award of temporary total disability from July 9, 2012 through November 6, 2012, and from November 14, 2012 to the date of the hearing and continuing, payment of causally related medical care, and an award of penalties.

On January 16, 2016, the ALJ issued a Compensation Order (CO). In the CO, the ALJ found that Claimant’s testimony that she was harassed and subjected to a hostile work environment as well as medical reports from numerous treating and examining psychiatrists and psychologists referring to Claimant’s being subjected to “harassment” and “hostility” at work, were sufficient to invoke the presumption that Claimant had sustained a compensable mental-mental stress injury on July 9, 2012.

The ALJ then considered a number of written statements from customers and co-workers concerning Claimant’s interactions with them at the workplace. The ALJ determined that Claimant was an incredible witness, and that there was no workplace harassment or hostility. The ALJ also concluded that, because the medical opinions in evidence all relied upon Claimant’s inaccurate characterization of the workplace, Employer met it’s burden of producing substantial evidence rebutting the presumption. The ALJ thereupon noted that the burden shifted back to Claimant to establish by a preponderance of the evidence that “the disability was caused by a work-related injury”. CO at 9.

In analyzing the claim under this standard, the ALJ concluded that Claimant had failed to adduce “competent factual or medical evidence to support a causal relationship between the workplace events and her alleged injury”, because none of the reports to the various physicians of harassment and hostility “are supported by the evidence”. *Id.*

The ALJ wrote that

The record evidence does not show that Claimant had been harassed by Mr. Schmitt, or that she ever had a verbal altercation with Mr. Schmitt. ... The content of the emails from Mr. Schmitt to Claimant were not harassing; they were professional. The verbal altercation was with a coworker, not with Mr. Schmitt. Further, Claimant was not at the workplace on July 9, 2012, as she called to tell Employer that she was not coming to work that day.

CO at 9 – 10.

The ALJ denied the claim, finding

The testimony of Mr. Schmitt and the letters from the witnesses at the June 26, 2012 meeting support the fact that Claimant’s supervisor was not the origin of her stress. The facts show that Claimant instigated the trouble in [sic] meeting, and not Mr. Schmitt. Further, the opinions of the doctors are based solely on

Claimant's representations, which are not reliable. There is no valid basis for Claimant's assertion that her condition had an origin in her workplace.

CO at 10.

The ALJ concluded her analysis by reiterating "Claimant failed to submit credible medical evidence that her disability was caused by a work-related injury. Claimant did not sustain an injury occurring in the course of her employment on July 9, 2012."

Claimant appealed the CO to the Compensation Review Board (CRB) by filing a timely Application for Review and memorandum of points and authorities in support thereof (Claimant's Brief). Claimant argues that the failure to award the claim is not in accordance with the law, generally asserting that whether Claimant's workplace was in fact hostile or she was indeed subjected to harassment are irrelevant, and that all that was required to prove her claim was that workplace events occurred which caused her disabling stress. Claimant also argues that the ALJ erred in finding that Employer had overcome the presumption of compensability because it produced no medical evidence supporting that position, and all the record medical evidence was to the contrary.

Employer filed a timely opposition and memorandum of points and authorities in support thereof (Employer's Brief), arguing that the CO is supported by substantial evidence and should be affirmed.

Because the evidence adduced by Employer that was relied upon by the ALJ was not sufficient to overcome the presumption of compensability, we vacate the denial of the claim. *However*, because the ALJ failed to consider the "aggressor rule" as a bar to compensation, the matter is remanded for further consideration.

ANALYSIS

The medical evidence is undisputed that Claimant has sustained a stress injury. Employer does not dispute that every health care provider expresses that opinion; Employer has offered no contrary medical evidence. The language employed throughout the CO and throughout Employer's Brief refer repeatedly to Claimant having sustained a stress injury.

Employer also concedes in its brief that "WMATA does not dispute Claimant's claim that she has not worked since July 9, 2012 WMATA also does not dispute that medical reports indicate the reason for her absence is stress. However WMATA disputes that Claimant's condition arose out of and in the course of her employment." Employer's Brief at 2.

Further, Employer does not dispute that Claimant adduced sufficient evidence to invoke the presumption that she sustained a compensable injury, and that the burden shifted to Employer to rebut that presumption, which burden the ALJ found Employer met. Employer's Brief at 9.

Claimant argues that the ALJ erred in finding that Employer's evidence was sufficiently specific and comprehensive to rebut the presumption.

The CO accepts that Claimant suffers from a mental stress injury. We reach this conclusion in part from the following language on page 7:

With the above record of evidence, Claimant invokes the presumption that *her condition* is medically causally related to her July 9, 2012 work injury. The burden now shifts to Employer to produce evidence specific and comprehensive enough to sever the presumed connection between the work-related event and *Claimant's current condition*.

In the instant case, Employer does not dispute that Claimant has not worked since July 9, 2012, except for a few days in November 2012; however, Employer denies that *Claimant's condition* arose out of and in the course of employment.

CO at 7 (emphasis added).

Further, Employer states:

WMATA does not dispute Claimant's claim that she has not worked since July 9, 2012, with the exception of a day or two in November 2012. WMATA also does not dispute that medical reports indicate the reason for her absence is stress. However WMATA denies that *Claimant's condition* arose out of and in the course of employment.

Employer's Brief at 2 (emphasis added).

From these passages, it appears to be undisputed that Claimant suffers from a stress condition (which under the Act is an "injury") which has prevented and continues to prevent her from working. Thus, if the stress condition is causally related to Claimant's employment it is a "disability". *See*, D.C. Code §32-1501(8).

Employer adduced no medical evidence. Rather, Employer argues that the causal relationship opinions of all the physicians are not "competent medical evidence" because the events about which Claimant complained to the physicians either (1) "never occurred", (2) did not constitute "actual workplace condition[s] or event[s]", or if they did, (3) they "occurred after the alleged date of injury and thus have no bearing on the cause of her stress."¹ Employer's Brief at 2 – 3.

¹ Employer's Brief also states "Finally, WMATA contends that Claimant failed to provide notice to WMATA as required under D.C. Code §32-1513 and that WMATA did not have actual knowledge of her disability and its relationship to her work thereby excusing her failure to provide proper notice." Employer's Brief, at 3. The brief makes no further mention of the argument, points to nothing in the record relevant thereto, and thus is deemed waived for the purposes of *this* appeal and will not be addressed further. We do not hold that the defense has been waived for consideration on remand.

In finding that the presumption had been overcome, the CO never explains how the lengthy recital of evidence adduced by Employer accomplished that purpose, and given that the record lacks any contradictory medical opinion, the CO's reasoning is neither obvious nor self-evident.

It is true that the CO makes clear that the ALJ found Claimant to lack credibility, and cites a number of record-based reasons for this conclusion beyond Claimant's demeanor, including her denial that any of the multiple documented customer complaints occurred or that she acted aggressively at the staff meeting. But we fail to see how, given the lack of dispute over the fact that Claimant suffered or suffers from a disabling stress condition, the ALJ could find that Claimant's lack of credibility, by itself, overcomes the presumption, particularly in light of the absence of any alternative theory of causation.

Regarding Employer's first argument, Employer does not identify which of the events reported to the physicians "never occurred", so we are unable to assess this argument.

Regarding the second argument we do not know and Employer does not explain what is meant when it asserts that such events "do not constitute 'an actual workplace condition or event'". Every event discussed in the CO inarguably was work-related, and Employer adduced no evidence of any non-work-related "conditions or events" that could explain the genesis of the undisputed stress injury.

Regarding the third argument, that the events Claimant complained of occurred after the alleged date of injury, Employer's Brief identifies the following events or "conditions" all of which predated July 9, 2012², and if they occurred, were work-related, even if some other events referred to post-dated the date of injury

1. During the time Claimant worked for Mr. Schmitt, he received numerous complaints from customers about Claimant's rude or unhelpful attitude;

2. These several complaints involved a September 2, 2011 incident involving the manner in which Claimant was alleged to have mistreated the daughter of a customer, Ms. Bailey, involving a \$25 overcharge for parking; a May 1, 2012 incident in which Claimant was cited by a WMATA police officer for excessive speed, tailgating, and threateningly causing her vehicle to lurch in the officer's direction and nearly struck him; a June 19, 2012 incident involving a customer, Mr. Brown, who complained that Claimant treated him rudely, unfairly and unprofessionally by refusing to allow him to exit a parking lot when he had insufficient money on his Farecard and had forgotten his Smartcard;

² We agree with Employer's argument that, on the question of causation, a determination concerning compensability is limited to events leading up to and including the date of injury.

3. On June 26, 2012, at a staff meeting, a co-worker responded to the supervisor's request for expression of any general concerns about the work place by stating that Claimant routinely failed to arrive on time for work, causing others on earlier shifts to have to work until she arrived, and that Claimant would disappear from her desk without explanation for extended periods of time, causing co-workers to perform her share of the telephone answering duties; and that in response Claimant reacted with actions including physically gesturing as if she intended to strike the co-worker;

4. Mr. Schmitt informed Claimant of the customer complaints verbally and via email;

5. Claimant responded to the criticism with anger, and failed to report for work on July 9, 2012, alleging at the formal hearing that her absence (which lasted until November 14, 2012) was due to stress and anxiety from her work situation.

Employer's Brief at 3 – 5.

The first mental health care Claimant sought following her failure to come to work on July 9, 2012³ was from Dr. Ramesh Patel, who completed a WMATA Family Medical Leave Act certification form, stating that Claimant should remain off-work until July 23, 2012 and that upon her return she should temporarily work less than a full schedule.

Employer argues that the ALJ's determination that these events cannot be viewed as "hostility" or "harassment" of Claimant. We disagree and find that such a conclusion by the ALJ is supported by substantial evidence. We accept that substantial evidence supports the ALJ's explicit and implied determination that Employer's responses to Claimant's work activities were reasonable, justified and consistent with Employer's need to run a customer-friendly transit system and it should not allow behavior that is disruptive or threatening to go unchecked. We have no trouble accepting that a supervisor's notifying an employee of written customer complaints is a natural and probable consequence of an employee's behavior as the ALJ found Claimant to have exhibited.

However, despite the fact that the diagnoses of all the treating and examining physicians and mental health professionals accept Claimant's characterization of her workplace experiences as being "hostile", or "harassing", and despite the fact that the ALJ rejected these descriptions as being factually inaccurate, we agree with Claimant that whether the characterizations are accurate or not is no longer relevant. *Ramey v. DOES*, 997 A.2d 694 (D.C. 2010) and *McCamey v. DOES*, 947 A.2d 1191 (D.C. 2008).

We further recognize that, under *McNeal v. DOES*, 917 A.2d 652 (D.C. 2007), even a finding that a claimant is intentionally misrepresenting the severity a workplace incident, and there being

³ Claimant's absence from work on that date is what renders July 9, 2012 the alleged date of injury, rendering erroneous the ALJ's argument that being absent from work on that date militates against a finding of a work connection to the condition.

no medical evidence that what occurred had the potential to cause a documented physical injury (and even where the ALJ's findings on that issue are supported by substantial evidence), the presumption of compensability is still invoked, and the absence of such medical evidence does not rebut the presumption.

These principles are premised upon the "take your employee as you find him or her" concept, and generally stand for the proposition that it doesn't matter what the claimed injurious event is; if the event is followed by a documented injury, the injury and disability are presumed to have been caused by entirely innocuous or seemingly benign events.

In the *Ramey/McCamey* paradigm, as Claimant aptly points out, "To require some 'objective harassment' showing is a relic of the *Dailey* 'objective' standard, akin to requesting proof that a worker who hurt her back while lifting an object that could fairly be characterized as 'heavy'". Part of the rationale for rejecting this "objective" approach is the court's finding no legitimate basis for making a distinction between psychological injuries and physical injuries when it comes to causation. Claimant's Brief at 9.

However, one area of this paradigm that has not been addressed is whether a defense that would obviate an employer's liability for a claim in a pure physical injury case also applies in a mental-mental stress claim.

We do know that one defense that the court has indicated that it would countenance is a showing that the claimed injury did not occur from a medical perspective, hence the requirement that there be "competent medical evidence" of a stress injury and a work relationship. *See, Ramey*, at 699 - 700.

Employer argues that the findings and conclusions of the medical professionals in this case cannot be deemed "competent", because they accepted without question Claimant's characterization of her work environment as being hostile and harassing.

However, as Claimant points out (Claimant's Brief at 6, where Claimant inadvertently refers to an extended quote as coming from *McCamey*, when it in fact is from *McNeal*) this is analogous to the situation that was presented in *McNeal*, and the court deemed the fact that the opinions on causation were just as effective in invoking the presumption, and that a medical opinion based upon the actual events is not necessarily required.

Thus, we agree with Claimant that the ALJ's reliance on the lack of contrary medical opinion evidence is insufficient to overcome the presumption, if one only views the matter from an "arising out of" perspective. However, the presumption of compensability can be overcome by other means if the record warrants it.

The CRB usually does not raise an issue that was not raised by the parties in the appeal. But where a compensation order evinces a misunderstanding of the law, whether by misstatement or

omission, we are not permitted to affirm. *See, D.C. Department of Mental Health v. DOES*, 15 A.3rd 692 (D.C. 2011); *Giles v. St. Phillips Episcopal Church*, CRB No. 15-184 (April 14, 2016). Such is the case before us.

Although we have agreed with Claimant that the basis enunciated in the CO is not sufficient to overcome the presumption, there are other factual findings in this case that cannot be ignored in the overall consideration of the claim.

Present in this record, absent in *Ramey* and *McCamey*, are clearly supported findings by the ALJ that all of the reported “stressors” which pre-dated July 9, 2012 were the result of Employer or a co-employee *reacting* to conduct on the part of Claimant (such as belittling or mistreating Employer’s customers, delaying the exit of a customer from a gated parking facility, or disruptive and belligerent behavior bordering on violence at a staff meeting).

It has long been the law of this jurisdiction that a claimant is not eligible for an award of benefits if an injury is the result of aggression, belligerent or threatening behavior on the part of a claimant who is injured while at work, but who brought about their own physical injury by instigating an injurious confrontation. This has come to be known as “the aggressor defense”.

This concept was the subject of a recent CRB decision, which summarizes the nature of the aggressor defense. We quote from that decision, which also refers to and quotes from other cases:

When determining whether an injury arose out of and in the course of Claimant’s employment, D.C. Code § 32-1503(d) states,

Liability for compensation shall not apply where injury [footnote omitted] to the employee was occasioned solely by his *intoxication or by his willful intention* to injure or kill himself or another. (Emphasis added.)

Commonly called the “aggressor defense,” a Claimant is not entitled to benefits under the Act when his or her injury is a result of an altercation where the Claimant is the aggressor. In the case of *Bird v. Advance Security, supra*, it was held that to be compensable in cases where there was an altercation which lead to the Claimant’s disability, two conditions must be met: (1) the nature of the employment requires regular contact between employees or individuals, which is likely to cause a strain on temperaments, and emotions, and increased likelihood of friction; and (2) the injured party was not the aggressor. *H&AS No. 84-69, OWC No. 0015644* (June 7, 1985)(*Bird*) [footnote omitted].

In *Bird*, the Director cited as precedent *Hartford Accident & Indemnity Co. v. Cardillo*, 112 F.2d 11 (D.C. App. 1940), in reaching a determination whether a claim brought by the claimant was barred for injuries arising from a workplace fight between co-workers. *Hartford Accident Co.* involved similar facts of an

injury arising from an altercation at work between co-workers.

Quoting *Hartford*, the Director noted,

In language laden with dicta, Judge Rutledge sets forth what Professor Larson refers to as the “friction-and-strain” doctrine. *See*, 1 A. Larson, *the Law of Workmen’s Compensation*, §11.16(a). According to Judge Rutledge, regardless of the nature of a fight among co-workers, whether personal or work-connected, injuries to a *non-aggressor* participant in a dispute between co-workers is compensable if, essentially, the fight occurs at work. Work, after all, “places men under strains and fatigues from human and mechanical impacts creating frictions.”

Hartford Accident, 112 F.2d at 17. (Emphasis added.)

In the case of *Graber v. Sequoia Restaurant Group*, CRB No. 11-045 (June 25, 2011) (*Graber*), the CRB affirmed the finding that the Claimant in that case, as the aggressor, was not entitled to workers compensation benefits. The CRB noted:

The ALJ, however, considered the evidence in the record as a whole pursuant to the *Bird* test and determined:

[I]t is clear to the Undersigned that the Claimant was the aggressor on August 9, 2009. Under the *Bird* analysis, the Undersigned does find that the nature of the Claimant's employment does require regular contact with his co-workers, including Mr. Brewer which can cause a strain on emotions increasing workplace friction. However, the Claimant fails the second prong of the *Bird* test.

The surveillance footage the Undersigned reviewed (as well as the corroborating witness testimony) shows Mr. Brewer walking away from the Claimant when the altercation occurred. Indeed, in the instant before the Claimant pushed or struck the back of Mr. Brewer's head, Mr. Brewer was clearly walking away from the Claimant and had his back fully towards the Claimant. The Claimant chose to come from behind Mr. Brewer while he was walking away and physically attack Mr. Brewer. As such, the Claimant can clearly be labeled the aggressor.

This finding is also supported by the testimony of the Claimant's credible co-workers who were present at the restaurant on the date of the injury. Although the exact verbage [*sic*] used between the Claimant and Mr. Brewer in the moments before the actual physical altercation is unclear, all witnesses agreed that they had begun to separate and walk in different directions. Their testimony

is consistent with the surveillance video which reveals that Mr. Brewer was, in fact, walking away. The Claimant chose to follow Mr. Brewer and strike him in the back of the head. As the Claimant has no memory of the incident, he was unable to recall the exact events and refute any of the testimony of the witnesses or to give a clear picture of the substance of the communication right before the physical altercation.

There is substantial evidence in the record to support the finding that the work-related altercation was over: Mr. Graber and Mr. Brewer walked in different directions, physically had separated, and had resumed their respective duties when Mr. Graber struck Mr. Brewer in the back of his head from behind. At the risk of being redundant, the CRB is constrained to uphold a Compensation Order that is supported by substantial evidence, even if there also is contained within the record under review substantial evidence to support a contrary conclusion and even if the CRB might have reached a contrary conclusion. Because the ruling that Mr. Graber was the aggressor is supported by substantial evidence, this tribunal simply cannot review and reweigh evidence anew as Mr. Graber would prefer.

Id. at 4-5 (footnotes omitted).

Moore v. WMATA, CRB No. 204 (June 13, 2016), at 3 – 5.

By eliminating, in *Ramey* and *McCamey*, the “objective” test of *Dailey*, the court broadly expanded the concept of “compensable injury”. *See, Muhammad v. DOES*, 34 A.3rd 488 (D.C. 2012, at 491 - 492; *see also, Dahlman v. AARP*, CRB No. 14-039 (February 11, 2015), at 13.

A fundamental change in the meaning of what constitutes an injury under the District of Columbia Workers’ Compensation Act, D.C. Code § 32-1501, *et seq.* (the Act) has broader implications than just those related to the case making the change. Changing the meaning of “injury” to a *claimant* implies a change in meaning of “injury” where the term is used elsewhere in the Act.

Under *Ramey* and *McCamey*, conditions or events of whatever character that result in a stress injury to a worker are now considered sufficient to cause a compensable injury.

Concomitantly, a claimant’s willful intent to cause harmful stress to another (such as by unreasonably detaining a customer, acting in a rude or demeaning way towards a customer, or acting as if one is about to strike a co-worker) is an intentional action seeking to cause injury to another. Put another way, when the definition of compensable injury expanded, so did the definition of “intent to injure another.”

As the court has made clear, there is no reason why a stress claim ought to be treated any differently than a physical injury claim: where the work-related injury is the result of the employee's own intentionally threatening or engaging in other workplace behavior that is directed at another person, an injury that results to the employee is not compensable. The willful intent to injure another bars the claim.

We are cognizant of the fact that consideration of factors such as "fault" or "negligence" has no place when considering entitlement to workers' compensation benefits. But this "no-fault" concept is concerned with fault in the sense of tort analysis, i.e., negligence or contributory negligence as they affect liability.

We do not consider this a question of "fault" in that sense, any more than we consider the aggressor defense rule in physical injury cases to be "fault-based". It is more properly viewed as being part of the "course of employment" consideration, with such behavior not being part of the employee's job; rather, it constitutes a deviation therefrom.⁴

Given that the effect of the *Ramey/McCamey* evolution concerning the meaning of "injury" has never before been the subject of an AHD or CRB decision, neither the parties nor the ALJ presented or responded to the argument or considered how the aggressor defense could affect the outcome of this case.

Thus, we vacate the award and remand the matter to the ALJ to further consider whether the facts as found concerning the actions of Claimant prior to the date of injury constitute such actions as to bar the claim for compensation as discussed above.

CONCLUSION AND ORDER

The ALJ's determination that the lack of medical evidence presented by Employer and the erroneous characterizations of the work environment as being hostile or harassing were sufficient to overcome the presumption of compensability is not in accordance with the law, and the denial based thereon is vacated. The matter is remanded to AHD for further consideration of the compensability of this claim in light of the aggressor defense, and if necessary, consideration of such other issues that were presented for resolution but were not decided in the CO.

So ordered.

⁴ This aggressor analysis has never, to our knowledge, been applied to a mental-mental stress injury case. This is not surprising because until *Ramey* and *McCamey*, an adverse psychological reaction to what was previously considered "normal" workplace stress was not considered a compensable injury. See, *Porter v. DOES*, 625 A.2d 886 (D.C. 1993), endorsing the "objective test"¹ in *Dailey v. 3M*, H&AS No. 85-259 (May 19, 1988).

APPEAL RIGHTS

To appeal a final Order or Decision of the Compensation Review Board, you must file a Petition for Review with the District of Columbia Court of Appeals within 30 calendar days of the mailing date shown on the Certificate of Service attached to that Order or Decision.

The D.C. Court of Appeals is located at 430 E Street NW, Washington DC 20001 and is open from 8:30 a.m. to 5:30 p.m., Monday through Friday, except for legal holidays. For information about the D.C. Court of Appeals procedure please call the Court at (202) 879-2700.

In addition to filing a Petition for Review with the D. C. Court of Appeals, to appeal this decision you also must send copies of the Petition for Review to:

- (1) The counsel for the opposing party at the address shown on the Certificate of Service attached to the Order or Decision.**
- (2) Todd S. Kim, Solicitor General
Office of the Attorney General
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- (3) Compensation Review Board
Department of Employment Services
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**PRICE-RICHARDSON v. WASHINGTON METROPOLITAN AREA TRANSIT AUTHORITY
(WMATA)
CRB No. 16-015**

CERTIFICATE OF SERVICE

I certify that on July 8, 2016, the attached Decision & Remand Order was sent by U.S. mail, postage pre-paid, or hand-delivered, as noted, addressed as indicated below:

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