

Case No. 09-30381

---

IN THE  
UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT

No. 09-30381

DARLENE L. MCDONALD  
Plaintiff-Appellant

V.

BRUNO & BRUNO, LLP EMPLOYEE BENEFIT PLAN  
AND CNA GROUP LIFE ASSURANCE COMPANY  
Defendant-Appellee

---

ON APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF LOUISIANA  
Civil Action No. 2:06-CV-3015  
HONORABLE MARTIN L.C. FELDMAN

---

**APPELLEE'S BRIEF**

Respectfully submitted,

BABINEAUX, POCHE', ANTHONY  
& SLAVICH, L.L.C.

BY: \_\_\_\_\_

Joel P. Babineaux, LA#21455 (T.A.)  
P.O. Box 52169  
Lafayette, LA 70505-2169  
Phone: (337) 984-2505  
Fax: (337) 984-2503  
E-mail: jbabineaux@bpasfirm.com

**ATTORNEYS FOR HARTFORD LIFE AND  
ACCIDENT INSURANCE COMPANY,  
DEFENDANT/APPELLEE**

**Case No. 09-30381**

---

**IN THE  
UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT**

---

**No. 09-30381**

**DARLENE L. MCDONALD  
Plaintiff-Appellant**

**V.**

**BRUNO & BRUNO, LLP EMPLOYEE BENEFIT PLAN  
AND CNA GROUP LIFE ASSURANCE COMPANY  
Defendant-Appellee**

**CERTIFICATE OF INTERESTED PARTIES**

The number and style of this case is as follows: “Darlene L. McDonald (Plaintiff-Appellant) v. Bruno & Bruno, LLP Employee Benefit Plan and CNA Group Life Assurance Company (Defendant-Appellee)” with Case No. 09-30381.

The undersigned counsel of record certifies that the following listed persons or entities have an interest in the outcome of this case. These representations are made in order that the Judges of this Honorable Court may evaluate possible disqualification or recusal.

1. Darlene L. McDonald (referred to herein as “McDonald”)--  
Plaintiff/Appellant

2. James F. Willeford, Attorney with Willeford Law Firm--Counsel for Plaintiff/Appellant (Darlene McDonald)
3. Reagan Toledano, Attorney with Willeford Law Firm--Counsel for Plaintiff/Appellant (Darlene McDonald)
4. CNA Group Life Assurance Company (referred to herein as “Hartford”)–Named Defendant/Appellee
5. Hartford Life and Accident Insurance Company (referred to herein as “Hartford”)--Proper Defendant Entity/Appellee
6. Joel P. Babineaux, Attorney/Member of Babineaux, Poché, Anthony & Slavich, L.L.C.--Counsel for Defendant/Appellee (“Hartford”)

Hartford (Defendant/Appellee) also submits the following information:

- A. CNA Group Life Assurance Company changed its name to Hartford Life Group Insurance Company. Hartford Life Group Insurance Company was then merged into its parent company Hartford Life and Accident Insurance Company. As such, CNA Group Life Assurance Company and Hartford Life and Accident Insurance Company are one and the same and the correct legal entity name is Hartford Life and Accident Insurance Company.
- B. Hartford Life and Accident Insurance Company is not a publicly held corporation.

C. Hartford Life and Accident Insurance Company is a wholly owned subsidiary of Hartford Life, Inc., which is a wholly owned subsidiary of Hartford Holdings, Inc. Hartford Holdings, Inc. is wholly owned by The Hartford Financial Services Group, Inc. The Hartford Financial Services Group, Inc. is a publicly traded corporation that has no parent corporation. No publicly held corporation currently owns 10% or more of its common stock. Allianz SE, a publicly held corporation that has no parent corporation, holds contingent rights to purchase more than 10% of the common stock of The Hartford Financial Services Group, Inc.

D. To the best of Hartford's information, knowledge or belief, there are no other publicly held corporations or publicly held entities, other than may have been identified and disclosed above, that have a direct financial interest in the outcome of this litigation.

E. Hartford is not a trade association.

F. Hartford is sometimes referred to by the trade name "The Hartford."

G. Bruno & Bruno, L.L.P. Employee Benefit Plan--Dismissed Defendant. Bruno & Bruno, L.L.P. Employee Benefit Plan was dismissed, pursuant to a consent motion filed by Darlene McDonald and by Order of the Court (See Record—USCA5 35).

Respectfully submitted,

BABINEAUX, POCHE', ANTHONY  
& SLAVICH, L.L.C.

BY: \_\_\_\_\_

Joel P. Babineaux, LA#21455 (T.A.)

P.O. Box 52169

Lafayette, LA 70505-2169

Phone: (337) 984-2505

Fax: (337) 984-2503

E-mail: [jbabineaux@bpasfirm.com](mailto:jbabineaux@bpasfirm.com)

ATTORNEYS FOR HARTFORD LIFE AND  
ACCIDENT INSURANCE COMPANY,  
DEFENDANT/APPELLEE

## **STATEMENT REGARDING ORAL ARGUMENT**

Hartford respectfully submits that oral argument is not necessary since the subject matter of this appeal involves the granting of summary judgment rendered in a case governed by the Employee Retirement Income Security Act of 1974 (“ERISA”; 29 U.S.C. §1001, et seq.) and is based on a judicial review of an administrative record submitted and contained in the record of the United States District Court. Moreover, cases of the United States Fifth Circuit Court of Appeals and the United States Supreme Court form the primary basis of the United States District Court’s decision and are controlling in this matter.

Hartford does respectfully submit, however, that in the event that this Honorable Court determines that this appeal is eligible for oral argument and in the event that this Honorable Court sets this appeal for oral argument, Hartford desires to present oral argument to this Honorable Court and expressly reserves all rights related to same.

**TABLE OF CONTENTS**

Certificate of Interested Parties.....i

Statement Regarding Oral Argument .....v

Table of Contents .....vi

Table of Authorities ..... viii

I. Statement of Subject Matter Jurisdiction and Appellate Jurisdiction ..... 1

II. Statement of the Issues ..... 1

III. Statement of the Case .....2

IV. Statement of the Relevant Facts .....5

    A. The Plan and the LTD Policy .....5

    B. McDonald’s Occupation .....7

    C. The Initial Claim Decision .....8

    D. The Appeal of Hartford’s Claim Decision and Hartford’s  
    Initial Appeal Determination.....11

    E. Hartford’s Reconsidered Appeal.....13

    F. The Post-Litigation Remanded Claim.....17

V. Standard of Review by the Appellate Court of the District  
Court’s Ruling .....20

VI. Summary of Argument .....21

VII. Argument .....23

    A. The Standard of Review Applicable to Hartford’s  
    Claim Decision is the Arbitrary and Capricious/

Abuse of Discretion Standard .....	23
B. Hartford Did Not Abuse Its Discretion and Its Decision to Deny Benefits Was Not Arbitrary and Capricious.....	26
1. The Independent Medical Reviews Correctly Comprise Part of the Substantial Evidence for Hartford’s Claims Decisions and Are Supported by the Administrative Record .....	28
2. McDonald’s Claim of Outside Physician Bias Must be Rejected.....	37
3. McDonald’s Argument that Hartford Should Have Exceeded the Limited Scope of the District Court’s Remand Order by Considering Her Social Security Award Rendered After Litigation Commenced Must Be Rejected .....	42
VIII. Conclusion .....	44
Certificate of Service .....	46
Certificate of Compliance .....	47

## TABLE OF AUTHORITIES

<i>Bellaire Gen. Hosp. v. Blue Cross Blue Shield</i> , 97 F.3d 822, 828-29 (5 <sup>th</sup> Cir. 1996).....	24, 25
<i>Bishop v. Sun Life Assurance Company of Canada</i> , 207 WL 141051, *3 (E.D. Ky. 2007) .....	39, 41
<i>The Black &amp; Decker Disability Plan v. Nord</i> , 123 S.Ct. 1965, 1972 (2003).....	35
<i>Davis v. UNUM Life Ins. Co. of America</i> , 444 F.3d 569, 575 (7 <sup>th</sup> Cir. 2006) .....	38
<i>Dowdy v. Hartford Life and Accident Ins. Co.</i> , 458 F.Supp.2d 289, 296 n. 9 (S.D. Miss. 2006) .....	38
<i>Duhon v. Texaco</i> , 115 F.3d 1305 (5 <sup>th</sup> Cir. 1994) .....	27
<i>Eastover Mining Co. v. Williams</i> , 338 F.3d 501, 510-11 (6 <sup>th</sup> Cir. 2003).....	41
<i>Firestone Tire and Rubber Company v. Bruch</i> , 489 U.S. 101, 109 S.Ct. 948 (1989) .....	24
<i>Gibala v. Eaton Corp. LTD Plan</i> , 2006 WL 3469540, *12 (N.D. Ill. 2006).....	39
<i>Gooden v. Provident Life and Accident Ins. Co.</i> , 250 F.3d 329, 333 (5 <sup>th</sup> Cir. 2001) .....	25, 35, 37
<i>Kalish v. Liberty Mutual/Liberty Life Assurance Co. of Boston</i> , 419 F.3d 501, 508 (6 <sup>th</sup> Cir. 2005) .....	39
<i>Lain v. UNUM Life Ins. Co. of America</i> , 279 F.3d 337 (5 <sup>th</sup> Cir. 2002).....	25, 26
<i>Meditrust Financial Services v. The Sterling Chemicals</i> , 168 F.3d 211 (5 <sup>th</sup> Cir. 1999) .....	24, 25
<i>Metropolitan Life Ins. Co. v. Glenn</i> , 128 S.Ct. 2343 (2008) .....	26

<i>Mobley v. Continental Cas. Co.</i> , 405 F.Supp.2d 42, 49 n. 4 (D.D.C. 2005).....	41
<i>Pierre v. Connecticut General Life Ins. Co.</i> , 932 F.2d 1552 (5 <sup>th</sup> Cir. 1991), <i>cert. denied</i> , 502 U.S. 973, 112 S.Ct. 453 (1991) .....	24, 26
<i>Salley v. E.I. DuPont de Nemours &amp; Company</i> , 966 F.2d 1011, 1016 (5 <sup>th</sup> Cir. 1992) .....	40
<i>Singley v. Hartford Life and Accident Ins. Co.</i> , 497 F.Supp.2d 807, 812 n. 9 (S.D. Miss. 2007) .....	38
<i>Sweatman v. Commercial Union Insurance Co.</i> , 39 F.3d 594, 601 (5 <sup>th</sup> Cir. 1994) .....	21, 35
<i>Vega v. National Life Insurance</i> , 188 F.3d 287 (5 <sup>th</sup> Cir. 1999) ( <i>en banc</i> ) .....	25, 37, 44
<i>Vercher v. Alexander &amp; Alexander, Inc.</i> , 379 F.3d 222 (5 <sup>th</sup> Cir. 2004) .....	35
<i>Watson v. Met. Life Ins. Co.</i> , 2007 WL 2029291, *4 (E.D. Pa. 2007).....	40
<i>Wildbur v. Arco Chemical Co.</i> , 974 F.2d 631, 639 (5 <sup>th</sup> Cir. 1992).....	24, 25

**STATUTES**

29 C.F.R. §2560.503-1(h)(3)(iii) .....	38
28 U.S.C. §1291 .....	1
28 U.S.C. §1331 .....	1
29 U.S.C. §1001, et seq. (Employee Retirement Income Security Act of 1974; “ERISA”) .....	v, 1, 2, 5, 11, 20, 38, 41

## **I. STATEMENT OF SUBJECT MATTER JURISDICTION AND APPELLATE JURISDICTION**

Subject matter jurisdiction was originally vested with the United States District Court for the Eastern District of Louisiana pursuant to 28 U.S.C. §1331 based on an claim pursuant to the Employee Retirement Income Security Act of 1974 (29 U.S.C. §1001, et seq.) (“ERISA”).

Darlene L. McDonald’s (“McDonald”) appeal is based on a final judgment of the United States District Court for the Eastern District of Louisiana in which the District Court ruled on cross Motions for Summary Judgment in favor of Hartford, dismissing McDonald’s claims and lawsuit with prejudice. The District Court’s decision was based on the Administrative Record, including documents generated after the District Court remanded the claim for limited further investigation; the long-term disability policy (Policy No. SR-83116893) (“LTD Policy”), under which McDonald was covered by virtue of her participation in her employer’s long-term disability benefit plan; and the parties’ briefs. This Honorable Court has subject matter jurisdiction on appeal pursuant to 28 U.S.C. §1291.

## **II. STATEMENT OF THE ISSUES**

Appellee Hartford Life and Accident Insurance Company (“Hartford”) respectfully submits that the only issue this Honorable Court should consider is

whether the District Court erred in finding that Hartford did not abuse its discretion or act arbitrarily or capriciously in denying McDonald's claim for long-term disability ("LTD") benefits under the "Own Occupation" provision of the LTD Policy.

Hartford submits that the District Court properly found that Hartford's decision to deny benefits under the "Own Occupation" provision was reasonable, based on substantial evidence in the Administrative Record, and in accordance with the LTD Policy. Therefore, Hartford did not act arbitrarily and capriciously in denying McDonald's claim. Accordingly, the District Court did not commit reversible error in ruling in favor of Hartford on its Motion for Summary Judgment, in ruling against McDonald on her Motion for Summary Judgment or in dismissing McDonald's claims against Hartford with prejudice.

### **III. STATEMENT OF THE CASE**

On June 12, 2006, McDonald filed a lawsuit against Hartford (the insurer and claims administrator of the LTD Policy), asserting a claim for LTD benefits under ERISA.<sup>1</sup> Hartford answered McDonald's Complaint denying all substantive

---

<sup>1</sup> R. 11-15. References to the District Court record (which are paginated with the prefix "USCA5") are made herein by the abbreviation "R." followed by the applicable and actual page numbers (e.g., USCA5 11 - USCA5 15 is referred to as R. 11-15).

allegations and raising several defenses.<sup>2</sup> The parties each filed Motions for Summary Judgment with supporting briefs and submissions and Oppositions.<sup>3</sup> Hartford submitted the LTD Policy and the Administrative Record in support of its Motion for Summary Judgment.<sup>4</sup>

On March 28, 2008, the District Court issued an order remanding the claim to Hartford for a specific, limited investigation to clarify the opinions of McDonald's neurosurgeon.<sup>5</sup> This was because the neurosurgeon claimed that when he was contacted by the independent peer review physician retained by Hartford in order to discuss McDonald's abilities, he was unable to discuss her case fully as he was at the gym and did not have her chart available. The District Court therefore remanded the claim to Hartford "for the limited purpose of

---

<sup>2</sup> R. 19-28. Note that McDonald named, as defendants, Bruno & Bruno, L.L.P. Employee Benefit Plan and CNA Group Life Assurance Company. On Motion of McDonald, Bruno & Bruno, L.L.P. Employee Benefit Plan was dismissed. (See R. 35). CNA Group Life Assurance Company was incorrectly designated as the party defendant. CNA Group Life Assurance Company changed its name to Hartford Life Group Insurance Company. Hartford Life Group Insurance Company was then merged into its parent company Hartford Life and Accident Insurance Company. As such, CNA Group Life Assurance Company and Hartford Life and Accident Insurance Company are one and the same and the correct legal entity name is Hartford Life and Accident Insurance Company.

<sup>3</sup> R. 104-677.

<sup>4</sup> R. 209-527.

<sup>5</sup> R. 679-684.

interviewing and/or deposing Dr. Steck [the neurosurgeon] to clarify his position as regards McDonald's limitations."<sup>6</sup>

Hartford interviewed Dr. Steck in accordance with the District Court's Order, and, in light of the fact that Dr. Steck did not provide any new information or opinions, upheld its denial of LTD benefits. McDonald filed a Motion to Re-Open the Action and Re-Urged Motion for Summary Judgment.<sup>7</sup> Hartford filed its own Re-Urged Motion for Summary Judgment and submitted the Remanded Administrative Record and a supporting brief.<sup>8</sup> Hartford also filed a Memorandum in Opposition to Plaintiff's Re-Urged Motion for Summary Judgment.<sup>9</sup>

On April 29, 2009, the District Court issued an eighteen (18) page Order finding that Hartford's decision to deny McDonald's claim for LTD benefits was based on substantial evidence and that its decision was not arbitrary and capricious and that Hartford did not abuse its discretion.<sup>10</sup> The District Court granted Hartford's Motion for Summary Judgment and denied McDonald's Motion for

---

<sup>6</sup> R. 679-684.

<sup>7</sup> R. 775-776.

<sup>8</sup> R. 831-891.

<sup>9</sup> R. 892-903.

<sup>10</sup> R. 990-1007.

Summary Judgment.<sup>11</sup> The District Court issued a Final Judgment dated May 1, 2009 dismissing McDonald's lawsuit and claims.<sup>12</sup>

McDonald filed a Notice of Appeal on June 4, 2009.<sup>13</sup> McDonald filed an original Appellant Brief on or about June 19, 2009, to which Hartford now responds.

#### **IV. STATEMENT OF THE RELEVANT FACTS**

##### **A. THE PLAN AND THE LTD POLICY**

McDonald was a participant in an employee welfare benefit plan sponsored by her employer, Bruno & Bruno, L.L.P. ("Bruno & Bruno") (the "Plan").<sup>14</sup> The LTD portion of the Plan was funded by the LTD Policy.<sup>15</sup> Hartford was the claims administrator for McDonald's claim for benefits.<sup>16</sup> McDonald's claim is governed by ERISA and the LTD Policy provides Hartford with discretionary authority to determine eligibility for benefits and to interpret the terms of the LTD Policy.<sup>17</sup>

---

<sup>11</sup> R. 990-1007.

<sup>12</sup> R. 1008.

<sup>13</sup> R. 1009.

<sup>14</sup> R. 209-244.

<sup>15</sup> R. 209-244.

<sup>16</sup> R. 209-244; R. 245-527.

<sup>17</sup> R. 11-15; R. 209-244, including R. 240.

The LTD Policy provides LTD benefits if, during the “Elimination Period”<sup>18</sup> (ninety (90) consecutive days), a participant suffers from an injury, sickness or illness that prevents her from performing the essential duties of her own occupation.<sup>19</sup> This benefit is available for twenty-four months following the expiration of the Elimination Period and is considered the “Own Occupation” period or standard of disability.<sup>20</sup> In the present case, the Elimination Period commenced on December, 28, 2004 and expired on March 28, 2005.<sup>21</sup> The Own Occupation period of disability commenced March 29, 2005 and expired on March 28, 2007.<sup>22</sup>

To continue to receive benefits beyond the Own Occupation period, a claimant must satisfy the “Any Occupation” standard of disability.<sup>23</sup> During the Any Occupation period, an individual may continue to receive LTD benefits (up to a maximum age of sixty-five (65)) for as long as the participant has an injury,

---

<sup>18</sup> The “Elimination Period” is the period of continuous disability which must be satisfied before an individual is eligible to receive LTD benefits. R. 209-244, including R. 218 and R. 221.

<sup>19</sup> R. 209-244, including R. 220.

<sup>20</sup> R. 209-244, including R. 220.

<sup>21</sup> R. 209-244.

<sup>22</sup> R. 209-244.

<sup>23</sup> R. 209-244, including R. 220.

sickness or illness that prevents her from performing one or more of the essential duties of any occupation for which she is otherwise qualified by education, training or experience and is otherwise not gainfully employed.<sup>24</sup>

In the present case, McDonald submitted a claim for LTD benefits under the Own Occupation standard for disability.<sup>25</sup> Because her claim was denied, and because one must remain disabled through the Own Occupation period in order to become eligible for benefits under the Any Occupation provision, Hartford has not determined McDonald's eligibility for benefits under the Any Occupation standard and there is no administrative record upon which such a decision could be made. As such, only Hartford's decision to deny benefits under the Own Occupation standard is ripe for review.

### **B. MCDONALD'S OCCUPATION**

While employed with Bruno & Bruno, McDonald held the position of Office Manager.<sup>26</sup> The position was primarily administrative and clerical in nature and did not involve significant physical demands.<sup>27</sup> McDonald provided a Human

---

<sup>24</sup> R. 209-244, including R. 220.

<sup>25</sup> R. 245-527.

<sup>26</sup> R. 488-490.

<sup>27</sup> R. 488-490.

Resources function, interacting with employees and handling personnel issues.<sup>28</sup> McDonald worked with vendors, and reviewed accounts payable, and reviewed and approved supply requests.<sup>29</sup> She reviewed and prepared reports and was involved in payroll and related matters.<sup>30</sup> She scheduled meetings and provided other assistance to attorneys.<sup>31</sup>

### **C. THE INITIAL CLAIM DECISION**

McDonald was involved in a motor vehicle accident in 2003.<sup>32</sup> She continued to work in her position as Office Manager at Bruno & Bruno until she underwent lumbar fusion surgery in December, 2004.<sup>33</sup> Her last day of full-time work was December 27, 2004.<sup>34</sup> In February, 2005 (still within the Elimination Period of December 28, 2004 through March 28, 2005), McDonald returned to

---

<sup>28</sup> R. 488-490.

<sup>29</sup> R. 488-490.

<sup>30</sup> R. 488-490.

<sup>31</sup> R. 488-490.

<sup>32</sup> R. 245-527.

<sup>33</sup> R. 245-527.

<sup>34</sup> R. 245-527.

work on a part-time basis and continued working thereafter for a period of time.<sup>35</sup>

McDonald subsequently filed a claim for LTD benefits in June, 2005.<sup>36</sup>

In connection with McDonald's LTD claim submission, she provided a Physician's Statement from Dr. John Steck, her neurosurgeon, providing a diagnosis of lumbar stenosis, cervical stenosis and headaches.<sup>37</sup> In the Physician's Statement, Dr. Steck indicated that she was working on a part-time basis and that she was capable of performing sedentary duties.<sup>38</sup> The only restrictions imposed by Dr. Steck were bending, stooping, climbing and lifting more than ten (10) pounds.<sup>39</sup>

Upon receipt of McDonald's claim, Hartford began collecting information and records from McDonald, her employer and her treating physicians.<sup>40</sup> Hartford then retained Reed Review Services to assign a qualified outside physician to perform an Independent Medical Review.<sup>41</sup> Dr. Bruce LeForce (Neurology and

---

<sup>35</sup> R. 245-527., including R. 459.

<sup>36</sup> R. 477-479.

<sup>37</sup> R. 477-479.

<sup>38</sup> R. 477-479.

<sup>39</sup> R. 477-479.

<sup>40</sup> R. 245-527.

<sup>41</sup> R. 411-413.

Clinical Neurophysiology) conducted this review and issued a report.<sup>42</sup>

Dr. LeForce's report reflects that he reviewed and analyzed the medical records provided by McDonald and her treating physicians,<sup>43</sup> including clinical notes, functional assessments, discharge summaries, operative reports and MRI reports.<sup>44</sup> He noted that McDonald did not have any documented abnormalities from neurological examinations.<sup>45</sup>

Dr. LeForce opined that McDonald had some functional restrictions as a result of her medical conditions, finding that she should not climb, bend or stoop and that she could not lift or carry more than ten pounds.<sup>46</sup> He found that she would be capable of sitting for up to eight hours per day given an opportunity for frequent breaks and changes in position.<sup>47</sup> Based on the medical information presented and the limitations noted, Dr. LeForce opined that McDonald was capable of full-time, sedentary employment.<sup>48</sup>

---

<sup>42</sup> R. 411-413.

<sup>43</sup> R. 411-413.

<sup>44</sup> R. 411-413.

<sup>45</sup> R. 411-413.

<sup>46</sup> R. 411-413.

<sup>47</sup> R. 411-413.

<sup>48</sup> R. 411-413.

After conducting a review and assessment of the medical records, information presented by McDonald's employer and McDonald concerning her job duties, the specific information from McDonald's treating physicians regarding her limitations, and the results of Dr. LeForce's Independent Medical Review, Hartford concluded that the evidence submitted did not support a functional impairment that would preclude McDonald from performing the material and substantial duties of her regular occupation on a full-time basis. Hartford therefore denied McDonald's claim for LTD benefits by letter dated September 30, 2005.<sup>49</sup>

**D. THE APPEAL OF HARTFORD'S CLAIM DECISION  
AND HARTFORD'S INITIAL APPEAL DETERMINATION**

McDonald appealed the denial and submitted additional information and medical records in support of her appeal.<sup>50</sup> Hartford also gathered additional information during the appeal.<sup>51</sup>

In accordance with ERISA claims regulations, Hartford obtained an independent medical review of all the medical information in the record, including the new material collected during the appeal.<sup>52</sup> Hartford engaged the services of an

---

<sup>49</sup> R. 400-402.

<sup>50</sup> R. 399.

<sup>51</sup> R. 245-527.

<sup>52</sup> R. 297-305.

entity separate and distinct from the physician vendor used during the initial claim review.<sup>53</sup> On appeal, it retained University Disability Consortium (“UDC”) to refer an independent physician to conduct an Independent Medical Review.<sup>54</sup> Dr. Barry Turner (Board Certified in Orthopedic Surgery) conducted the Independent Medical Review and evaluation on appeal and, after reviewing all of the medical information in the administrative record, issued a thorough report dated January 24, 2006.<sup>55</sup>

In his report, Dr. Turner addressed in detail the medical records and information that he reviewed as part of his evaluation and included a summary of the reports and records of McDonald’s treating physicians, including McDonald’s medical history, treatment, progress notes and diagnostic test results.<sup>56</sup> After conducting his medical evaluation, Dr. Turner determined the following:<sup>57</sup>

- a. There was a satisfactory cervical and lumbar diskectomy with fusion and there were no complications or any resulting radiculopathy, myelopathy or nerve root compression.
- b. Electrodiagnostic studies showed no evidence of radiculopathy. The

---

<sup>53</sup> R. 306; R. 297-305.

<sup>54</sup> R. 297-305.

<sup>55</sup> R. 297-305.

<sup>56</sup> R. 297-305.

<sup>57</sup> R. 297-305.

neurological evaluations were essentially normal and there was no evidence of any significant impairment.

- c. McDonald's last office visit with Dr. Steck was in October 2005 and documentation indicated that secretary level work would be permissible. Dr. Steck's assistant indicated that sedentary level work could be performed on a full-time basis since Dr. Steck did not provide any other restrictions or time limitations in his orders and recommendation.
- d. McDonald's ability to engage in sedentary work levels on a part-time basis (which she had been engaging) was an indicator that she could perform such activities on a full-time basis without any further restrictions or limitations.

Based on the appeal review of the claim and the information submitted by McDonald and her treating physicians, along with the outside physician review, Hartford made a decision to uphold the original claim determination and it denied McDonald's appeal.<sup>58</sup> Hartford determined that the totality of the evidence presented indicated that McDonald's lumbar fusion surgery was successful and that she had the physical capacity to meet the demands of at least sedentary type work activities on a full-time basis; as such, she did not meet the "own occupation" definition of disability.<sup>59</sup>

#### **E. HARTFORD'S RECONSIDERED APPEAL**

By letter dated March 9, 2006, McDonald wrote to Hartford's Appeals

---

<sup>58</sup> R. 294-296.

<sup>59</sup> R. 294-296.

Specialist and requested a reconsideration of her claim.<sup>60</sup> Although Dr. Steck's assistant had expressed to Dr. Turner that McDonald was capable of full-time, sedentary work, McDonald asked Hartford to again attempt to talk directly to Dr. Steck about her limitations.<sup>61</sup> McDonald also requested that additional efforts be made to talk to another one of her treating physicians (Dr. Evalina Burger) despite her prior unresponsiveness to Dr. Turner's attempted phone calls.<sup>62</sup>

Even though McDonald had exhausted her administrative remedies, and Dr. Steck's failure to speak to Dr. Turner was neither Hartford's fault nor necessary to adjudicate McDonald's appeal, Hartford, in good faith, agreed to reconsider McDonald's appeal.<sup>63</sup> And, rather than simply ask Dr. Turner to try to call Dr. Steck yet again, Hartford further agreed to obtain (and pay for) yet another independent physician review.<sup>64</sup> UDC referred the review to Dr. Robert Y. Pick (Board Certified in Orthopedic Surgery), who conducted a comprehensive review and medical evaluation and issued a detailed report dated April 7, 2006.<sup>65</sup>

---

<sup>60</sup> R. 274-277.

<sup>61</sup> R. 274-277.

<sup>62</sup> R. 274-277.

<sup>63</sup> R. 271-273.

<sup>64</sup> R. 249-263.

<sup>65</sup> R. 249-263.

In his report, Dr. Pick provided a comprehensive summary of the medical reports from treating physicians, as well as summaries of McDonald's medical records from all of her treating physicians (including Dr. Steck, Dr. Hubbell and Dr. Burger).<sup>66</sup> Dr. Pick also addressed his discussions with all three of McDonald's treating physicians.<sup>67</sup>

After seven unsuccessful attempts, Dr. Pick was finally able to speak with Dr. Burger on March 28, 2006.<sup>68</sup> Dr. Burger expressed that she had not seen McDonald since November 2004.<sup>69</sup> As such, she did not have current information on McDonald.<sup>70</sup>

After eight attempted calls to Dr. Hubbell, Dr. Pick was finally able to speak with him on March 30, 2006.<sup>71</sup> Dr. Hubbell could not provide any information on McDonald's functional capabilities, restrictions or limitations.<sup>72</sup> When questioned on whether or not McDonald could perform sedentary work activities, he replied:

---

<sup>66</sup> R. 249-263.

<sup>67</sup> R. 249-263.

<sup>68</sup> R. 249-263.

<sup>69</sup> R. 249-263.

<sup>70</sup> R. 249-263.

<sup>71</sup> R. 249-263.

<sup>72</sup> R. 249-263.

“instead of guessing, get a functional capacity evaluation.”<sup>73</sup> Dr. Pick then asked Dr. Hubbell about objective medical findings and Dr. Hubbell confirmed that the only objective diagnostic report was the MRI.<sup>74</sup>

As to Dr. Steck, Dr. Pick was able to speak with him after seven attempted phone calls.<sup>75</sup> Dr. Steck conveyed a diagnosis of lumbar stenosis and chronic pain.<sup>76</sup> Dr. Steck further expressed that McDonald could perform sedentary work activities for eight (8) hours a day and that she would be restricted to lifting under twenty (20) pounds.<sup>77</sup> Dr. Steck further indicated that a functional capacity evaluation could document McDonald’s ability to engage in an even higher level of work category.<sup>78</sup>

Based on his review of McDonald’s medical records and information provided by treating physicians, along with his discussions with treating physicians, Dr. Pick rendered the following medical opinions:<sup>79</sup>

---

<sup>73</sup> R. 249-263.

<sup>74</sup> R. 249-263.

<sup>75</sup> R. 249-263.

<sup>76</sup> R. 249-263.

<sup>77</sup> R. 249-263.

<sup>78</sup> R. 249-263.

<sup>79</sup> R. 249-263.

- a. McDonald underwent a successful operation in December 2004 with a satisfactory post-operative progress report and recovery and improvement reported by Dr. Steck.
- b. McDonald's self-reported complaints did not warrant any specific intervention by McDonald's treating physicians and conservative care was appropriate.
- c. Medical records did not contain any substantive objective orthopedic/musculoskeletal findings that would prevent McDonald from engaging in full-time work activities in at least the sedentary-light work category on a full-time basis.
- d. Dr. Steck had indicated that McDonald could engage in sedentary-light category work activities on a full-time basis.

By letter dated April 26, 2006, Hartford's Appeal Specialist notified McDonald of its final decision on its reconsideration of her long term disability benefits appeal.<sup>80</sup> In particular, the Appeal Specialist advised McDonald that the evidence did not support a functional impairment that would preclude her performing her regular occupation.<sup>81</sup>

#### **F. THE POST-LITIGATION REMANDED CLAIM**

After McDonald commenced litigation and in response to cross-motions for summary judgment, on March 28, 2008 the District Court remanded the case to Hartford for the limited purpose of obtaining clarification from Dr. John Steck

---

<sup>80</sup> R. 247-248.

<sup>81</sup> R. 247-248.

concerning his opinions on McDonald's limitations.<sup>82</sup> The District Court found that Hartford's decision to deny the reconsidered appeal was based, in part, upon the conclusions of Dr. Pick, which were based on a telephone conversation with Dr. Steck while he was at the gym and did not have McDonald's chart available.<sup>83</sup> The District Court remanded the case to Hartford "for the limited purpose of interviewing and/or deposing Dr. Steck to clarify his position as regards to McDonald's limitations."<sup>84</sup>

On remand, a Registered Nurse interviewed Dr. Steck to clarify his findings with respect to the relevant period of disability and the interview was recorded.<sup>85</sup> Dr. Steck confirmed that the surgery that he performed was successful and that, neurologically, everything appeared normal.<sup>86</sup> Dr. Steck did not present any new or clarified objective medical findings during the interview.<sup>87</sup> In fact, Dr. Steck reported he last saw McDonald in October, 2005.<sup>88</sup>

---

<sup>82</sup> R. 679-684.

<sup>83</sup> R. 679-684.

<sup>84</sup> R. 679-684.

<sup>85</sup> R. 835-855; R. 799-802.

<sup>86</sup> R. 835-855; R. 799-802.

<sup>87</sup> R. 835-855; R. 799-802.

<sup>88</sup> R. 835-855; R. 799-802.

Dr. Steck stated that McDonald complained of pain and that pain could affect her ability to work.<sup>89</sup> He acknowledged that her self-reported pain could not be imaged or graded and was purely subjective.<sup>90</sup> He stated that different patients may have different pain levels post-surgery and that some may be able to work and others may not.<sup>91</sup> Critically, he also frankly stated that, if a patient is *physically able* to work but that the pain makes them miserable when they get home, perhaps they *should* not work.<sup>92</sup>

However, Dr. Steck did not give any opinions as to any specific physical limitations affecting McDonald during the relevant period (the Elimination Period and the twenty-four (24) month Own Occupation period thereafter).<sup>93</sup> Dr. Steck did not provide any specific physical limitations or restrictions that, in his opinion, would preclude McDonald from performing the material duties of her own occupation.<sup>94</sup> He also expressed that he would have to defer to McDonald's pain management physician, Dr. Hubbell, who had not provided any specific physical

---

<sup>89</sup> R. 835-855; R. 799-802.

<sup>90</sup> R. 835-855; R. 799-802.

<sup>91</sup> R. 835-855; R. 799-802.

<sup>92</sup> R. 835-855; R. 799-802.

<sup>93</sup> R. 835-855; R. 799-802.

<sup>94</sup> R. 835-855; R. 799-802.

limitations or restrictions.<sup>95</sup>

In sum, Dr. Steck did not provide any new or clarified information or objective findings. Dr. Steck's opinions were consistent with previous information developed by Hartford during the original claim, appeal and reconsidered appeal process, and each stage included the benefit of a review by an independent physician. As such, by correspondence dated November 21, 2008, Hartford's Appeals Specialist advised McDonald's counsel that after having fully considered the information and opinion obtained from Dr. Steck, his statements in the interview were not sufficient to change Hartford's prior decision.<sup>96</sup>

**V. STANDARD OF REVIEW BY THE APPELLATE COURT OF THE DISTRICT COURT'S RULING**

When reviewing a District Court's judgment in an ERISA benefits case on appeal, this Honorable Court has expressed the following standard of review:

The Supreme Court's decision in *Bruch* and our decision in *Pierre* determine the proper standard of review in a §1132(a)(1)(B) action for review of the plan administrator's determination of benefits. On appeal from a district court's judgment in a §1132(a)(1)(B) case, our traditional standards of review apply, and we review *de novo* the district court's holding on the question of whether the plan administrator abused its discretion or properly denied a claim for benefits. However, we will set aside the district court's factual

---

<sup>95</sup> R. 835-855; R. 799-802.

<sup>96</sup> R. 836-837.

findings underlying its review of the plan administrator's determination only if clearly erroneous.<sup>97</sup>

## **VI. SUMMARY OF ARGUMENT**

Hartford engaged in a full and fair review of McDonald's claim by fairly evaluating and weighing all of the information in the Administrative Record, including the opinions of McDonald's treating physicians. Procedurally, Hartford rendered a full and fair review by obtaining three independent medical reviews. This included a new review after agreeing in good faith, and although under no obligation to do so, to reconsider its appeal decision. That new review included discussions with all three treating physicians identified by McDonald, ensuring that their opinions were considered once again.

Substantively, Hartford's decision was supported by substantial evidence. None of the three independent medical reviewers rendered opinions that were drastically different from McDonald's physicians. Tellingly, not all of McDonald's treating physicians were uniform in their assessment of her conditions, prognosis, treatment and abilities. Moreover, they were not uniformly supportive of her alleged inability to work. As such, this is not a simple case of a claims administrator faced with and rejecting a solid, consistent block of treating

---

<sup>97</sup> See *Sweatman v. Commercial Union Insurance Co.*, 39 F.3d 594, 601 (5<sup>th</sup> Cir. 1994) (emphasis added).

physician support in favor of drastically and incredibly different opinions of peer review physicians that could, under certain circumstances, appear to be an abuse of discretion. Rather, in this case, the opinions of the treating and reviewing physicians, while not uniform, were clearly variations on the same theme. In addition, McDonald's physicians supported her ability to work at least part-time which, in fact, McDonald did during part of the relevant period. As a result, Hartford's decision to deny benefits based on the LTD Policy language was indeed supported by substantial evidence and not an abuse of discretion.

Similarly, Hartford's decision on remand was well-supported. It utilized a Registered Nurse to interview McDonald's treating physician as directed by the District Court. Dr. Steck's interview did not provide any new support for McDonald's claim. Rather, Dr. Steck frankly explained that people who can physically work, but are miserable doing so, perhaps should not work. The LTD Policy does not provide benefits under such circumstances.

As such, the District Court was correct in upholding Hartford's decision. Its well-reasoned and thorough opinion properly concluded that Hartford's factual determinations were supported by substantial evidence in the Administrative Record such that there was a rational connection between the known facts and the decision. The District Court correctly concluded that Hartford did not abuse its

discretion and did not act arbitrarily or capriciously in its processes or determinations.

As a result, the District Court's decision must be affirmed and McDonald's arguments rejected. Her criticisms of the independent physician reviews are not only unfounded, they miss the mark in that the reviews were not the sole bases for denial and only Hartford's final decision is under review. McDonald's claim of bias by the outside physicians performing Independent Medical Reviews is without factual support or evidence in the District Court record and such a claim is not legally viable. Finally, McDonald's assertion that Hartford should have exceeded the scope of the District Court's limited Remand Order by considering a Social Security award rendered after litigation commenced must be rejected.

## **VII. ARGUMENT**

### **A. THE STANDARD OF REVIEW APPLICABLE TO HARTFORD'S CLAIM DECISION IS THE ARBITRARY AND CAPRICIOUS/ ABUSE OF DISCRETION STANDARD**

There is no dispute that the LTD Policy provides Hartford with discretionary authority to determine eligibility for benefits and to interpret the LTD Policy.<sup>98</sup> As a result, the standard of review to be applied by the District Court when reviewing

---

<sup>98</sup> R. 240.

Hartford's decision to deny benefits is the arbitrary and capricious/abuse of discretion standard.<sup>99</sup>

When reviewing cases alleging arbitrary and capricious actions resulting in an abuse of discretion, the United States Fifth Circuit Court of Appeals will affirm an administrator's decision if it is supported by substantial evidence.<sup>100</sup> A decision is arbitrary only if "made without a rational connection between the known facts and the decision or between the found facts and the evidence."<sup>101</sup> In addition, if a claimant is "given an opportunity to present the facts to the administrator, [the Court's] review of factual determinations is confined to the record available to the administrator."<sup>102</sup>

Under the arbitrary and capricious standard, the District Court must only consider whether the insurer's decision is supported by substantial evidence as

---

<sup>99</sup> See *Firestone Tire and Rubber Company v. Bruch*, 489 U.S. 101, 109 S.Ct. 948 (1989); *MediTrust Financial Services v. The Sterling Chemicals*, 168 F.3d 211 (5th Cir. 1999); *Pierre v. Connecticut General Life Insurance Co.*, 932 F.2d 1552 (5<sup>th</sup> Cir. 1991), *cert. denied*, 502 U.S. 973, 112 S.Ct. 453 (1991).

<sup>100</sup> *MediTrust Financial Services v. The Sterling Chemicals*, 168 F.3d 211, 215 (5th Cir. 1999).

<sup>101</sup> *Id.*, citing *Bellaire Gen. Hosp. v. Blue Cross Blue Shield*, 97 F.3d 822, 828-29 (5th Cir. 1996).

<sup>102</sup> *Id.*, citing *Wildbur v. Arco Chemical Co.*, 974 F.2d 631, 639 (5th Cir. 1992).

reflected in the administrative record.<sup>103</sup> The United States Fifth Circuit Court of Appeals has further instructed that “a district court must inquire only whether the ‘record adequately supports the administrator’s decision’.”<sup>104</sup> A decision is arbitrary only if “made without a rational connection between the known facts and the decision or between the found facts and the evidence.”<sup>105</sup> The District Court’s review “need only assure that the administrator’s decision falls somewhere on the continuum of reasonableness—even if on the low end.”<sup>106</sup>

When the insurance carrier is also the claims administrator, the courts have recognized that an inherent conflict of interest may exist. When presented with an inherent conflict, the U.S. Fifth Circuit Court of Appeals considers such conflict simply as a factor in applying the arbitrary and capricious standard.<sup>107</sup> As instructed by the United States Supreme Court, the arbitrary and capricious

---

<sup>103</sup> See *MediTrust Financial Services v. The Sterling Chemicals*, 168 F.3d 211, 215 (5th Cir. 1999). In addition, “[a]ssuming that both parties were given an opportunity to present the facts to the administrator, [the District Court’s] review of factual determinations is confined to the record available to the administrator.” *Id.* (citing *Wildbur v. Arco Chemical Co.*, 974 F.2d 631, 639 (5<sup>th</sup> Cir. 1992)).

<sup>104</sup> See *Gooden v. Provident Life and Accident Ins. Co.*, 250 F.3d 329, 333 (5<sup>th</sup> Cir. 2001).

<sup>105</sup> *Id.*, citing *Bellaire Gen. Hosp. v. Blue Cross Blue Shield*, 97 F.3d 822, 828-29 (5<sup>th</sup> Cir. 1996).

<sup>106</sup> *Id.* at 297.

<sup>107</sup> See *Vega v. National Life Insurance*, 188 F.3d 287 (5<sup>th</sup> Cir. 1999) (*en banc*); see also *Lain v. Unum Life Ins. Co. of America*, 279 F.3d 337 (5<sup>th</sup> Cir. 2002).

standard of review still applies and the inherent conflict may only be considered as a single factor in determining whether or not the insurer abused its discretion.<sup>108</sup>

When “the only evidence of a conflict is that the claims administrator is an insurance company, the decision is reviewed ‘only with a modicum less deference’.”<sup>109</sup> At all times, the District Court must give deference to the insurer’s factual findings and its factual conclusions as related to the extent of the medical conditions presented.<sup>110</sup>

In the case at bar, application of the arbitrary and capricious/abuse of discretion standard directs that Hartford’s claim decision and the District Court’s granting of Hartford’s Motion for Summary Judgment be affirmed.

**B. HARTFORD DID NOT ABUSE ITS DISCRETION AND ITS DECISION TO DENY BENEFITS WAS NOT ARBITRARY AND CAPRICIOUS**

Because Hartford had discretion to determine benefit eligibility, the District Court was not permitted to substitute its judgment for that of Hartford, but, instead, properly considered whether Hartford abused its discretion and arbitrarily denied McDonald’s claim for benefits based on the information contained in the

---

<sup>108</sup> See *Metropolitan Life Ins. Co. v. Glynn*, 128 S.Ct. 2343 (2008).

<sup>109</sup> See *Lain v. Unum Life Ins. Co. of America*, 279 F.3d 337, 343 (5<sup>th</sup> Cir. 2002).

<sup>110</sup> See *Pierre v. Connecticut General Life Insurance Co.*, 932 F.2d at 1558.

Administrative Record.<sup>111</sup> The District Court was correct in finding that substantial evidence existed in the Administrative Record and the Remanded Administrative Record to support Hartford's claim decision and the District Court correctly upheld Hartford's determination that McDonald was not eligible for LTD benefits. As a result, Hartford respectfully submits that the District Court's granting of Hartford's Motion for Summary Judgment must be affirmed.

McDonald launches three primary lines of attack on Hartford's claim decision and the District Court's ruling. First, McDonald contests the medical opinions of the outside physicians conducting the Independent Medical Reviews and Hartford's reliance on those medical opinions. Second, McDonald claims that the reviewing physicians were biased and that, as a result, their medical evaluations should be discounted. Third, McDonald argues, incredibly, that despite the very specific and limited directive of the remand Order, not only Hartford – but the District Court in reviewing the decision after remand – should have exceeded the limited scope of the remand by considering a Social Security award rendered well after Hartford's final appeal decision and after litigation commenced. As analyzed below, Hartford respectfully submits that this Honorable Court must reject McDonald's arguments.

---

<sup>111</sup> See *Duhon v. Texaco*, 115 F.3d 1305 (5<sup>th</sup> Cir. 1994).

**1. The Independent Medical Reviews Correctly Comprise Part of the Substantial Evidence for Hartford's Claims Decisions and Are Supported by the Administrative Record**

McDonald contests the merits of the medical opinions of the three (3) outside physicians conducting Independent Medical Reviews during Hartford's administrative claim process. Their evaluations, as well as the reports from McDonald's treating physicians and McDonald's medical records themselves, demonstrate that their opinions provide substantial evidence for Hartford's claim decision.

At the outset, McDonald cannot escape the fact that her own treating physicians were not consistently supportive of her claim of disability. Dr. John Steck (Neurosurgeon) reported in his June, 2005 Attending Physician Statement that McDonald was capable of sedentary work activities.<sup>112</sup> Dr. Steck's earlier chart note in April, 2005 clearly indicates that McDonald's surgery was successful and that she was doing overall better than her pre-operative condition.<sup>113</sup> Throughout the claims history, it is clear that Dr. Steck supported McDonald's ability to work on at least a part-time basis.

With regard to Dr. Hubbell (Pain Management), he never provided any

---

<sup>112</sup> R. 478-479.

<sup>113</sup> R. 480.

medical evidence to support McDonald's inability to work. Dr. Hubbell's primary care of McDonald involved pain management and he did not render any specific or supported opinions about whether or not McDonald could engage in sedentary work activities.<sup>114</sup>

Finally, Dr. Evalina Burger (Orthopedist) was unable to provide any medical evidence to support McDonald's inability to perform work activities. Although she had originally indicated in November, 2004, that surgery might be necessary for a perceived cervical problem, she later changed her position in October, 2005, based on an updated MRI and noted that McDonald did not qualify for surgical intervention.<sup>115</sup>

During the remand, McDonald's primary treating physician, Dr. John Steck, asserted that he had very little interaction with McDonald since her last visit in October, 2005 and he had not provided her with any current medical treatment.<sup>116</sup> According to Dr. Steck, McDonald had a successful lumbar fusion surgery and although she reported subjective complaints of pain following surgery, she appeared neurologically normal and everything appeared to be fine.<sup>117</sup> Although

---

<sup>114</sup> R. 249-263.

<sup>115</sup> R. 388 and 348.

<sup>116</sup> R. 835-855; R. 799-802.

<sup>117</sup> R. 835-855; R. 799-802.

McDonald made self-reported complaints of pain, such reports were subjective and, according to Dr. Steck, there was no way to image or grade the pain.<sup>118</sup> According to Dr. Steck, any opinion about McDonald's inability to work would be totally based on subjective, self-reported claims by McDonald and he was not in a position to render an opinion on disability.<sup>119</sup> Finally, Dr. Steck did not express any specific limitations or physical restrictions that would preclude McDonald from performing the material duties of her sedentary occupation on a full-time basis and Dr. Steck did not give an opinion as to any specific physical limitations on McDonald for the relevant period of disability (the Elimination Period and the twenty-four (24) month Own Occupation period thereafter).<sup>120</sup>

As a result, McDonald's own treating physicians did not provide consistent or convincing support for her inability to perform the duties of her own occupation on a full-time basis. Therefore, it was reasonable for Hartford to consider the thorough evaluations and reports from the outside physicians (Dr. Bruce LeForce, Dr. Barry Turner and Dr. Robert Pick) conducting Independent Medical Reviews during the claim, appeal and appeal reconsideration process when assessing

---

<sup>118</sup> R. 835-855; R. 799-802.

<sup>119</sup> R. 835-855; R. 799-802.

<sup>120</sup> R. 835-855; R. 799-802.

whether the medical evidence submitted provided due proof of disability under the LTD Policy.

McDonald's argument that Dr. LeForce's opinion is not substantial evidence not only mischaracterizes his review, but overemphasizes its importance in the administrative review process. Dr. LeForce's review was performed at the initial denial level, not at the appeal level. After the initial denial level, McDonald submitted additional records that were evaluated at the appeal level -- and not by Dr. LeForce. Therefore, his review has limited relevance in evaluating whether Hartford's final decision – the decision at issue –was supported by substantial evidence.

Nevertheless, McDonald unfairly mischaracterizes Dr. LeForce's review. McDonald suggests that Dr. LeForce reached wildly different conclusions, based on the same evidence, from her treating physician, Dr. Steck. But a close examination of their opinions reveals that they were, in many ways, similar. Dr. Steck, at that time, opined that McDonald "can't sit or stand for long periods of time; Has problems [with] bending & stooping & typing on computer causes neck pain."<sup>121</sup> Dr. LeForce's restrictions, ironically, were more detailed than Dr.

---

<sup>121</sup> R. 432.

Steck's. Dr. LeForce agreed that McDonald should not climb, bend or stoop.<sup>122</sup> He also found that she could not lift or carry more than ten pounds.<sup>123</sup> He opined that she could stand or walk occasionally, which is not inconsistent with Dr. Steck's opinion that she should not stand for long periods of time.<sup>124</sup> He found that McDonald was capable of sitting for up to eight hours a day, provided she were given the opportunity for frequent breaks and changes in position.<sup>125</sup> This is, again, not inconsistent with Dr. Steck's opinion, because although he stated that McDonald could not perform full time work that involved sitting, standing and walking for varying periods of time, his explanation was limited to the comments quoted above. It is difficult for McDonald to argue that Hartford was arbitrary in relying on Dr. LeForce's opinion when it was not materially different from her own treating physician's opinion.

McDonald's argument is also flawed because it unfairly attempts to criticize Dr. LeForce's opinion in a vacuum rather than in its appropriate place as one piece of evidence in the record. Because Hartford did not rely solely on Dr. LeForce's opinion in issuing its initial denial, criticizing this one piece of evidence does not

---

<sup>122</sup> R. 411-413.

<sup>123</sup> R. 411-413.

<sup>124</sup> R. 411-413.

<sup>125</sup> R. 411-413.

invalidate the decision. Rather, the denial must be examined as a whole. The denial letter clearly recites Dr. Steck's opinions, the findings of the medical records (including McDonald's successful lumbar surgery), and an examination of McDonald's occupational duties before concluding that the record evidence, as a whole, did not support a finding a disability.<sup>126</sup> Moreover, as stated above, because Dr. Steck's and Dr. LeForce's opinions were not drastically different, and because Dr. Steck's restrictions were not very specific, it was not unreasonable for Hartford to accept Dr. LeForce's restrictions in rendering its decision. Therefore, critique of Dr. LeForce's opinion alone is not enough to render the entire decision arbitrary.

With regard to Dr. Barry Turner, McDonald's criticism of his medical opinion does not merit reversal for many of the same reasons that apply to her unfounded criticism of Dr. LeForce's opinion. Because Hartford provided McDonald with a second appeal review and obtained a medical evaluation by yet another physician, Dr. Pick, Dr. Turner's review has limited relevance because it was not the final or sole opinion that Hartford ultimately relied on to issue its final decision on appeal. The final decision at issue in this case was made with the benefit of additional medical information that McDonald submitted after Dr. Turner's review and after a third outside physician communicated with each of

---

<sup>126</sup> R. 411-413.

McDonald's treating physicians. This final decision was also affirmed on a limited remand review after giving Dr. Steck the opportunity to provide clarification of his opinions.

Similar to McDonald's criticism of Dr. LeForce's report, she unfairly characterizes Dr. Turner's opinion as a simple, "non-medical" statement that because McDonald could work part-time, she could work full-time. This is a grossly inaccurate characterization of his report. To the contrary, Dr. Turner's report elaborated on the following:<sup>127</sup>

- a. There was a satisfactory cervical and lumbar discectomy with fusion and there were no complications or any resulting radiculopathy, myelopathy or nerve root compression.
- b. Electrodiagnostic studies showed no evidence of radiculopathy. The neurological evaluations were essentially normal and there was no evidence of any significant impairment.
- c. McDonald's last office visit with Dr. Steck was in October 2005 and documentation indicated that secretary level work would be permissible. Dr. Steck's assistant indicated that sedentary level work could be performed on a full-time basis since Dr. Steck did not provide any other restrictions or time limitations in his orders and recommendation.
- d. McDonald's ability to engage in sedentary work levels on a part-time basis (which she had been engaging) was an indicator that she could perform such activities on a full-time basis without any further restrictions or limitations.

---

<sup>127</sup> R. 297-305.

Based on the medical evidence presented, Dr. Turner's opinions are not only supported, but they are also reasonable. Dr. Turner's report demonstrates that he reviewed the same medical information as presented to Plaintiff's treating physicians. The fact that Dr. Turner may have had differing interpretations does not render his opinions invalid. Moreover, Dr. Turner's determination that McDonald could perform sedentary work activities on a full-time basis reconciles with and is a reasonable extension of Dr. Steck's opinion that McDonald could work on at least a part-time basis. Dr. Turner's opinions are clearly supported by medical evidence presented in the Administrative Record.

With regard to Dr. Robert Pick, McDonald's criticism of his opinion is notably weaker than her attacks on the other two physicians' opinions and, at best, amounts to a simple disagreement with his conclusions. Her disagreement with Dr. Pick's opinion and her argument that Hartford and the District Court should give overriding deference to her treating physicians (who gave, at times, inconsistent conclusions) is not legally viable.<sup>128</sup>

---

<sup>128</sup> See *The Black & Decker Disability Plan v. Nord*, 538 U.S. 822 (2003), 123 S.Ct. 1965, 155 L.Ed.2d 1034 (2003); *Sweatman v. Commercial Union Insurance Co.*, 39 F.3d 594 (5<sup>th</sup> Cir. 1994); *Gooden v. Provident Life and Accident Insurance Co.*, 250 F.3d 329 (5<sup>th</sup> Cir. 2001); *Vercher v. Alexander & Alexander, Inc.*, 379 F.3d 222; 2004 U.S. App. LEXIS 15420 (5<sup>th</sup> Cir. 2004) (rejecting the application of a treating physician rule and any requirement that an insurer give any particular weight or deference to differing opinions of treating physicians).

McDonald's arguments regarding the lack of a Functional Capacity Examination, arising in the context of Dr. Pick's evaluation, are misleading. She states that that Dr. Pick reported that both Drs. Steck and Hubble "recommended an FCE before releasing her to work." To quite the contrary, Dr. Hubble's comment can only be interpreted to be one of irritation or sarcasm in having to speak with a physician conducting a medical review on behalf of a disability insurance carrier. As Dr. Pick reported, when he asked Dr. Hubble whether McDonald could engage in sedentary work activities, he replied, "instead of guessing, get a Functional Capacity Examination."<sup>129</sup> This, of course, defeated the purpose inasmuch as Dr. Pick was asking Dr. Hubble for *his own* opinion based on his personal treatment of McDonald. Dr. Pick reported that Dr. Steck mentioned a FCE only after stating that McDonald could engage in sedentary work activities for eight hours per day and that an FCE might actually document the ability to engage in a higher work capacity.<sup>130</sup>

McDonald cannot dispute that Hartford does not bear a contractual or legal burden to obtain a FCE on her behalf; she had the burden of proof, and had ample opportunity – and two appeals – to submit an FCE in support of her claim.

---

<sup>129</sup> R. 249-263.

<sup>130</sup> R. 249-263.

McDonald cannot dispute that neither of her treating physicians ordered a FCE in order to assist them in rendering opinions regarding her work capacity, and to suggest that Hartford should have done so is disingenuous and is contrary to established law.<sup>131</sup>

Based on the totality of the medical information presented in the Administrative Record and Remanded Administrative Record, Hartford's claim decision is supported by substantial evidence and the District Court did not commit reversible error in affirming Hartford's denial of McDonald's claim for benefits.

## **2. McDonald's Claim of Outside Physician Bias Must Be Rejected**

In appeal briefing, McDonald goes to considerable length to attack the physicians conducting Independent Medical Reviews during the claim process. McDonald argues that their opinions should be discounted because of UDC's alleged relationship with Hartford or alleged criticism in other cases.<sup>132</sup>

Hartford engaged the services of UDC for referral to physicians to conduct Independent Medical Reviews during the initial appeal and on the reconsidered appeal. Hartford did not contract directly with the physicians and did not select the

---

<sup>131</sup> See *Vega v. National Life Insurance*, 188 F.3d 287 (5<sup>th</sup> Cir. 1999) (*en banc*); *Gooden v. Provident Life and Accident Insurance Co.*, 250 F.3d 329 (5<sup>th</sup> Cir. 2001) (holding that an administrator does not have a duty to investigate a claim such as the seeking out of additional medical information beyond the submissions of a claimant).

<sup>132</sup> Dr. LeForce was not a UDC physician.

physicians assigned by UDC. UDC is an “independent company that contracts with practicing specialists to assess medical evidence and determine patients’ functionality.”<sup>133</sup>

It is self-evident that the fair evaluation of a disability claim may, on a case by case basis, require the medical expertise of a physician to conduct an Independent Medical Review and that these physicians or physician provider groups (just like treating physicians) charge for their services. In fact, ERISA administrators are required by ERISA’s claims regulations to decide disability claimants’ appeals in consultation with at least one appropriate qualified “health care professional” in situations involving medical judgment.<sup>134</sup> When insurers engage such professionals, whether as in-house physicians or independent consultants, insurers are simply “[p]aying for legitimate and valuable service in order to evaluate a claim thoroughly.”<sup>135</sup> Accordingly, District Courts and Appellate Courts are not swayed by “conclusory allegations of bias” against

---

<sup>133</sup> See *Singley v. Hartford Life and Accident Ins. Co.*, 497 F.Supp.2d 807, 812 n. 9 (S.D. Miss. 2007); *Dowdy v. Hartford Life and Accident Ins. Co.*, 458 F.Supp.2d 289, 296 n. 9 (S.D. Miss. 2006). In both of the referenced cases, the District Court affirmed Hartford’s claim decisions which were based, in part, on medical opinions and evaluations of UDC assigned physicians.

<sup>134</sup> See 29 C.F.R. §2560.503-1(h)(3)(iii).

<sup>135</sup> See *Davis v. UNUM Life Ins. Co. of America*, 444 F.3d 569, 575 (7<sup>th</sup> Cir. 2006).

consulting physicians retained or utilized by insurers.<sup>136</sup> Instead, a claimant must present “specific evidence that the opinions of these physicians were improperly affected by their financial interest.”<sup>137</sup> Such evidence, to be persuasive, must be “separate and apart from the fact that [the physicians] were being compensated by the administrator for their work.”<sup>138</sup>

In the present case, McDonald did not proffer any evidence of actual bias or any actual conflict of interest of the reviewing physicians (or UDC) in connection with the administrative claim process or in connection with the District Court proceedings. Moreover, McDonald did not proffer any facts and the District Court record is devoid of any evidence that the outside physicians (or UDC) engaged in any impropriety, that the physicians lacked the requisite medical qualifications or that they engaged in any conduct or took actions which skewed their views, evaluations or opinions. Rather, McDonald simply disagrees with their assessment of her physical capabilities. Without any such evidence having been proffered by McDonald with the District Court and without any actual evidence to support the

---

<sup>136</sup> See *Kalish v. Liberty Mutual/Liberty Life Assurance Co. of Boston*, 419 F.3d 501, 508 (6<sup>th</sup> Cir. 2005).

<sup>137</sup> See *Bishop v. Sun Life Assurance Company of Canada*, 207 WL 141051, \*3 (E.D. Ky. 2007).

<sup>138</sup> See *Gibala v. Eaton Corp. LTD Plan*, 2006 WL 3469540, \*12 (N.D. Ill. 2006).

allegations made, McDonald's argument must be rejected.<sup>139</sup>

Interestingly, this Honorable Court, in *Salley v. E.I. DuPont de Nemours & Company*,<sup>140</sup> in addressing the inapplicability of a treating physician rule or any special deference to a treating physician, noted the conflict of interest existing with treating physicians and stated as follows:

This court has not addressed the propriety of the “treating physician rule” in ERISA cases. We have considerable doubt about holding the rule applicable in ERISA cases. Under it, the treating physician would stand to profit greatly if the court were to find benefits should not be terminated. This is a clear and strong conflict of interest [for the treating physician] and we are doubtful that a court should defer automatically to his or her testimony. (Emphasis added).

Other courts have similarly recognized the countervailing potential for “bias and conflict of interest on the part of a treating physician.”<sup>141</sup> Treating physicians “often succumb to the temptation to accommodate their patients . . . at the expense of third parties such as insurers,” and thus may exhibit “strong pro-claimant

---

<sup>139</sup> McDonald's citation to a California District Court's criticism of UDC or referral physicians is not evidence in the case at bar and in the record before this Honorable Court. Moreover, McDonald did not sufficiently litigate the issues now raised for District Court adjudication. As such, McDonald's claims and arguments cannot be considered.

<sup>140</sup> 966 F.2d 1066 (5<sup>th</sup> Cir. 1992).

<sup>141</sup> See *Watson v. Met. Life Ins. Co.*, 2007 WL 2029291, \*4 (E.D. Pa. 2007) (upholding administrator's decision to accord “greater weight to its reviewing physicians than to [claimant's] treating physicians”).

biases.”<sup>142</sup> Thus, as one court recently observed, if a potential “conflict of interest alone were sufficient to discredit the testimony of a physician in an ERISA case,” then “nearly all treating *and* consulting physicians . . . would be disqualified.”<sup>143</sup>

These statements are particularly poignant in light of Dr. Steck’s remarks during the post-remand interview. Dr. Steck could only state that he feels that, even if his patients *can physically work*, perhaps they should not if it makes them miserable. This, however, is not the standard for the receipt of LTD benefits under the LTD Policy.

As is evident in the Administrative Record, the outside reviewing physicians conducted thorough medical evaluations and reviews. There is no factual basis presented in this case and there is no legal basis existing to disqualify, disregard or discount the opinions of the outside reviewing physicians or to penalize Hartford for utilizing their professional medical services in its effort to provide McDonald with a full and fair review of her claim and as required by ERISA’s claims regulations.

---

<sup>142</sup> See *Eastover Mining Co. v. Williams*, 338 F.3d 501, 510-11 (6<sup>th</sup> Cir. 2003); See also *Mobley v. Continental Cas. Co.*, 405 F.Supp.2d 42, 49 n. 4 (D.D.C. 2005) (recognizing that, although reviewing physicians “may have had an incentive to conclude that plaintiff was not totally disabled, because he was hired and paid” by the administrator, the “same can be said of . . . plaintiff’s treating physician,” whose possible “bias in favor of plaintiff . . . may have influenced her conclusion that plaintiff is totally disabled”).

<sup>143</sup> See *Bishop v. Sun Life Assur. Co. of Canada*, 2007 WL 141051, \*3 (E.D. Ky. 2007) (emphasis added).

### **3. McDonald's Argument that Hartford Should Have Exceeded the Limited Scope of the District Court's Remand Order By Considering Her Social Security Award Rendered After Litigation Commenced Must Be Rejected**

McDonald argues that despite the specific remand instructions issued by the District Court in its March 28, 2008 Order and Reasons,<sup>144</sup> Hartford should have exceeded the limited scope of the remanded claim by considering a Social Security award issued more than one (1) year after McDonald filed her lawsuit. McDonald's argument is void of logic and support.<sup>145</sup>

In response to cross Motions for Summary Judgment, the District Court, in March 28, 2008, issued a ruling entitled "Order and Reasons."<sup>146</sup> The District Court ordered that the claim be remanded to Hartford, finding that the conclusions of a reviewing physician were based on a telephone conversation with a treating physician and that the treating physician did not recall the discussion "in the same light."<sup>147</sup> The District Court found it necessary to remand the claim back to Hartford "for the limited purpose of interviewing and/or deposing Dr. Steck [a

---

<sup>144</sup> R. 679-684.

<sup>145</sup> Hartford respectfully submits that this issue should not even be considered on appeal since McDonald did not request that the District Court include consideration of the Social Security award as part of the limited remanded review.

<sup>146</sup> R. 679-684.

<sup>147</sup> R. 679-684.

treating physician] to clarify his position as regards McDonald's limitations."<sup>148</sup>

At no time prior to the remand Order did Plaintiff argue or request that the remand include the taking of any other evidence or the consideration of any Social Security award or Social Security determination.

McDonald now claims that Hartford should have exceeded the scope of the Remand Order by considering the Social Security award and that the District Court committed reversible error by it not considering the Social Security award in subsequent summary judgment proceedings.

As held by the District Court, the Social Security Administration issued its award on October 23, 2007, more than one year after Hartford's final claim decision in April, 2006.<sup>149</sup> The award was also issued more than one year after McDonald filed her lawsuit.<sup>150</sup>

As a result, it is simply not reasonable, logical or proper to impose on Hartford an obligation to violate the terms of the remand order to consider the Social Security award, particularly since the award did not exist as of the time of the final claim decision. Moreover, it is not reasonable for the District Court to

---

<sup>148</sup> R. 679-684.

<sup>149</sup> R. 990-1007.

<sup>150</sup> R. 11-15.

deem as relevant a Social Security award issued after a claimant has already filed a lawsuit.<sup>151</sup>

Based on the foregoing, McDonald's argument that Hartford should have exceeded the scope of the limited Remand Order by considering the Social Security award rendered more than one year after litigation commenced, especially when McDonald never requested that the District Court include consideration of the award as part of the remanded claim, must be rejected.

### **VIII. CONCLUSION**

Hartford respectfully submits that the District Court properly found that it did not act arbitrarily and capriciously in denying McDonald's claim for LTD benefits under the Own Occupation standard of disability pursuant to the terms of the LTD Policy and based on the Administrative Record and Remanded Administrative Record. As such, the District Court did not commit reversible error in granting Hartford's Motion for Summary Judgment, denying McDonald's Motion for Summary Judgment and dismissing McDonald's claims and lawsuit. Hartford respectfully submits that the District Court's Order and Judgment must be affirmed and that McDonald must be cast with all costs of this appeal.

---

<sup>151</sup> See, for example, *Vega v. National Life Insurance*, 188 F.3d 287 (5<sup>th</sup> Cir. 1999) (*en banc*) (finding that a claimant is not allowed to expand the scope of the administrative record or to introduce or utilize evidence outside the administrative record after commencing litigation).

Respectfully submitted,

BABINEAUX, POCHE', ANTHONY  
& SLAVICH, L.L.C.

BY: \_\_\_\_\_

Joel P. Babineaux, LA#21455 (T.A.)

P.O. Box 52169

Lafayette, LA 70505-2169

Phone: (337) 984-2505

Fax: (337) 984-2503

E-mail: [jbabineaux@bpasfirm.com](mailto:jbabineaux@bpasfirm.com)

ATTORNEYS FOR HARTFORD LIFE AND  
ACCIDENT INSURANCE COMPANY,  
DEFENDANT/APPELLEE

**CERTIFICATE OF SERVICE**

I do hereby certify that I have on this 20<sup>th</sup> day of July, 2009, sent via Federal Express the original and seven (7) copies of the Appellee's Brief, along with one (1) compact disc containing the same, to the Honorable Charles F. Fulbruge, III, Clerk of Court for the U.S. Court of Appeals, Fifth Circuit, postage paid and properly addressed.

I hereby certify that I have on this 20<sup>th</sup> day of July, 2009, served two (2) copies of the Appellee's Brief and a compact disc on the following opposing counsel via federal express, postage prepaid and properly addressed:

James F. Willeford  
Attorney at Law  
Willeford Law Firm  
201 St. Charles Avenue  
Suite 4208  
New Orleans, LA 70170

---

JOEL P. BABINEAUX,  
Attorneys for Hartford Life and  
Accident Insurance Company,  
Defendant/Appellee

## CERTIFICATE OF COMPLIANCE

Pursuant to 5<sup>th</sup> Cir. R. 32.2 and .3, the undersigned certifies this brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7).

- (1) Exclusive of the exempted portions in 5<sup>th</sup> Cir. R. 32.2, the brief contains 8,782 words.
- (2) The brief has been prepared in proportionally-spaced typeface, using Microsoft Office Word 2003, in Times New Roman 14-point font, except for footnotes, which are proportionally-spaced typeface, using Microsoft Office Word 2003, in Times New Roman 12-point font.
- (3) One computer-readable compact disc copy of the brief is being filed with the clerk, and one such compact disc copy is being furnished to opposing counsel, and a copy of the printout of the number of words in the brief will be furnished upon request.
- (4) The undersigned understands that a material misrepresentation in completing this certificate, or circumvention of the type-volume limitation in 5<sup>th</sup> Cir. R. 32.2.7 may result in the court's striking the brief and imposing sanctions against the person signing the brief.

---

JOEL P. BABINEAUX,  
Attorneys for Hartford Life and  
Accident Insurance Company,  
Defendant/Appellee