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UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT

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DARLENE MCDONALD,

*Plaintiff-Appellant*

v.

BRUNO & BRUNO, LLP,

*Defendant-Appellee*

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Appeal from United States District Court

Eastern District of Louisiana

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Appellant's Brief

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## **CERTIFICATE OF INTERESTED PERSONS**

The following people and entities have an interest in this case as described in 5<sup>th</sup> Cir. Rule 28.21. These representations are for the judges of this Court to evaluate possible disqualification or recusal.

1. Plaintiff/appellant, Darlene McDonald;
2. Counsel for plaintiff/appellant, James F. Willeford and Reagan Toledano;
3. Defendant/appellee, Hartford Life and Accident Insurance Company (“Hartford”); and
4. Counsel for appellee, Joel P. Babineaux.

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Attorney for plaintiff/appellant

## **STATEMENT REGARDING ORAL ARGUMENT**

Appellant requests oral argument. The factual background and procedural history are complex; the case involves two rounds of motions for summary judgment, a remand back to the plan administrator, and the administrative record consist of over 300 pages of medical and insurance documents, most of which are important in determining whether Hartford abused its discretion denying plaintiff’s claim for disability benefits. Plaintiff, therefore, believes oral discussion of the facts and applicable precedents will benefit the Court.

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## **JURISDICTIONAL STATEMENT**

The District Court had subject matter jurisdiction under 28 U.S.C. Sec. 1331 because plaintiff/appellant's claim is for disability benefits under an employee benefits plan governed by the Employee Retirement Income Security Act of 1974, as amended, 29 U.S.C. Sec. 1001, et seq. ("ERISA"). This Court has jurisdiction under 28 USC Sec. 1291, as plaintiff/appellant appealed a final decision of the United States District Court for the Eastern District of Louisiana. The District Court entered judgment on May 1, 2009, and plaintiff filed her notice of appeal timely on May 4, 2009 under Fed. R. App. Proc. 4(a).

## **ISSUES PRESENTED**

Whether insurer abused its discretion denying ERISA disability benefits to a claimant with severe spinal ailments when treating physicians declared her unable to work fulltime, especially when insurer relied on opinions of non-examining physicians whose assessments omit significant ailments and contradict the medical records.

Whether a Social Security award of disability benefits is relevant in determining whether an insurer abused its discretion when the award was presented to the administrator after the District Court remanded the matter to the insurer to interview a treating physician.

## **STATEMENT OF CASE**

Plaintiff filed her complaint against Hartford in the United States District Court for the Eastern District of Louisiana on June 12, 2006. ROA 11, seeking

reversal of Hartford's denial of her claim for disability benefits as well as attorney fees, interest, and costs. This case has special procedural requirements because it is governed by ERISA. The parties submitted cross motions for summary judgment. ROA 104-192 (McDonald's) and ROA 203 – 574 (Hartford's). Both parties filed opposition memorandums. Hartford also filed a Motion in Limine/to Strike, ROA 575, seeking to strike an affidavit filed in support of plaintiff's Motion for Summary Judgment.

The District Court remanded the matter back to the plan administrator (Hartford) "for the limited purpose of interviewing and/or deposing Dr. Steck to clarify his position as regards plaintiff's limitations." ROA 679-684. Thereafter, Hartford filed a Motion for Reconsideration and Rule 60 Motion for Relief from Order, ROA – 685, which plaintiff opposed. The District Court denied, with reasons, Hartford's Motion. ROA -717.

Pursuant to the Court's order remanding the action, Hartford conducted a phone interview of Dr. Steck on November 10, 2008. Hartford then issued a decision denying plaintiff's claim for disability benefits. ROA 804.

Plaintiff then filed a Motion to Reopen the Action and a Re-urged Motion Judgment based on the administrative record and interview of Dr. Steck. ROA 725 – 774. Hartford also filed a Re-urged Motion for Summary Judgment. ROA 831 –

920. Both parties submitted opposition memorandums. The District Court denied plaintiff's motion for Judgment and granted Hartford's Motion for Summary Judgment. ROA 990. Plaintiff timely filed a notice of appeal of the judgment adopting the district court's order. ROA 1009.

### **STATEMENT OF FACTS**

Darlene McDonald, age 57, began working for Bruno and Bruno, LLP ("B&B" – a law firm in New Orleans), on February 2, 2002. She was the firm's office manager, business manager, and property manager, all of which required frequent computer use, prolonged sitting, standing, and walking. ROA– 401.

In July 2003, she began experiencing chronic back pain, with associated headaches, from degenerative disc disease throughout her entire spine (lumbar and cervical). ROA 477. She also has high blood pressure, tachycardia, thyroid problems, and high cholesterol. ROA 438, 316;

In June 2004, she was injured in a car accident, suffering a herniated disc and also exacerbating her pre-existing disc degeneration. Shortly after her accident, the pain in her neck and lower back increased significantly. ROA 316. Her lower back pain radiates into her right hip and down her right leg. ROA 442. It is aggravated by sitting and walking and partially relieved by rest. Her neck pain radiates into both shoulders. ROA 442.

She began seeing Dr. Burger, an orthopedic surgeon specializing in the spine. On July 12, 2004, Dr. Burger's examination reveals a pain level of 10 on a 10-point scale. ROA 316. Dr. Burger summarized her condition as follows:

Ms. McDonald has a history of an insult with severe low back pain and radiating leg pain and recent onset numbness in her upper arms. An MRI [of 9/10/04] shows clearly that she has multiple level disc degeneration with some levels worse than the others in the lower lumbar spine . . . Most of her pain could be attributed to the severe disc degeneration with actual back pain . . . An x-ray of her C-spine . . . shows three level disc degeneration with severe inverted lordosis and anterior osteophyte formation, C4-5, C5-6, and C6-7.

Dr. Burger further explains the complexity of her spinal problem and how surgery is unlikely to relieve her pain:

A patient with multiple level early onset disc degeneration which probably was there before the accident and became symptomatic due to the severe acceleration/deceleration injury. This patient does not have a problem that can be alleviated by surgery. It is a multiple-level problem . . .

On October 10, 2004, Dr. Burger noted Ms. McDonald's intermittent, burning pain in her lower cervical spine, radiating down both arms. ROA 328. A month later, she filled out a Hartford form, stating that Ms. McDonald could not tolerate prolonged sitting in front of a computer, ROA 343, which was a large part of her job. Dr. Burger recommended a cervical fusion of 4-5, 5-6, and 6-7. ROA

442. She further advised that she would not be pain-free after the surgery, and although initially she would feel relief, her pain would return. ROA 388.

She was referred to Dr. John Steck, a neurosurgeon, in December 2004. Dr. Steck noted her MRI results showed cervical spine spondylosis at 4-5, 5-6, and 6-7, stenosis at 4-5, a large herniated disk at 2-3, and multilevel, degenerative disc disease. ROA 442-443. Initially, Dr. Steck believed surgery was not a good option because, although surgery on her condition can be helpful, the results can be unpredictable. ROA 443. Nonetheless, Dr. Steck determined that her severe pain warranted surgery. ROA 441.

On December 28, 2004, Dr. Steck performed back surgery, specifically a laminectomy and discectomy at L2-L3 with interbody and posterior lateral fusion with instrumentation (pedicle screws and a cage). ROA 444. Six weeks later, as Dr. Berger predicted, Dr. Steck reported that she was “doing quite well” and “having back pain only after sitting four to five hours” ROA 483. In February 2005, Dr. Steck signed a prescription note allowing her to work part-time for four hours a day and three days a week. ROA 459. She went back to work on this schedule, only to find that her increasing pain was too great to continue working. In May 2005, in conjunction with her increasing pain, she applied for long-term disability benefits. ROA 479.

As both Dr. Steck and Dr. Burger had warned, the results of her back surgery proved unpredictable. Her pain continued, fluctuating between levels less painful than before her surgery to levels more painful. A few months after her surgery, she became incontinent with increased urinary urgency without warning (a common side-effect of spinal compression). ROA 331. She continued having spinal headaches and muscle spasms. Results from an MRI of her cervical spine taken on June 30, 2005 (six months after surgery) revealed severe disc degeneration and severe bilateral foraminal stenosis. ROA 453. Results from her lower back MRI also revealed disc degeneration throughout. ROA 452. She takes Vicodin and Baclofen to curb her pain and muscle spasms. ROA 331. She also has had numerous epidural steroid injections to alleviate her pain, but those have only provided temporary relief.

On April 8, 2005, Dr. Puente, a neurologist, saw her and reported the following:

She has limited range of motion in the neck ... the muscles of her neck are tight ...muscular cervicgia (neck pain) and associated headaches with limb pain secondary to significant DJD (degenerative joint disease) of the cervical spine . . . her best option may well be to follow-up with her pain specialist, Dr. Hubbell. ROA 437.

By July 12, 2005, her pain increased to such an extent that she could not get in and out of the bathtub. ROA 500. Her grandchildren had to help her dress

because she cannot bend. ROA 500. Her daughter and son-in-law moved in with her to help take care of the house. ROA 500. In July 2005 she returned to Dr. Steck with complaints of increasing cervical pain. ROA 434.

Hartford sent a Medical Assessment Tool (“MAT”) to Dr. Steck on July 13, 2005, asking Dr. Steck if he felt Ms. McDonald could work. He stated that she could not perform fulltime work because computer work exacerbated her neck pain, and she has problems bending and stooping. ROA 432. He also stated that she cannot sit and stand for a long period and that her condition was permanent. ROA 507. Hartford sent a similar MAT to Dr. Hubble, but for some reason, his answers are not included in the record. ROA 471.

Ms. McDonald began seeing Dr. Paul Hubbell, a pain management specialist, in October 2004 and has continuously treated with him to date for pain management. Dr. Hubbell reviewed her MRI results and stated in a June 21, 2005 progress note that her MRI indicates multilevel cervical spondylosis with facet arthropathy as the source of her pain. ROA 423. In a letter of February 13, 2006, Dr. Paul Hubbell wrote to Barry Turner of the UDC explaining that Ms. McDonald cannot return to fulltime work although she may be able to perform part-time work. ROA 282. He further explains:

Ms. McDonald cannot return to fulltime work . . . Ms. McDonald has significant muscle spasms, headaches, and limitation of position for instance with her head looking at a CRT screen, looking down at her paperwork, etc . . . Ms. McDonald received lumbar surgery from Dr. Steck and I would defer to Dr. Steck . . . to determination of her ability to work as it directly relates to the lumbar spine and associated pain. It is obvious that there is an objective finding of facet pathology and it is obvious that there are objective findings of disc pathology. Her physical exam indicates significant pain with extension maneuver and lateral bending. The patient's subjective complaints coincide with facet pain. ROA 283.

Ms. McDonald also provided Hartford with a letter from Dr. Paul Hubbell of August 21, 2007 in which he opines that she is permanently disabled. ROA 757.

Dr. Hubbell states:

I think it is very unlikely she will be able to return to work in any type of gainful employment and I would consider her totally and permanently disabled due to her degenerative condition of her cervical and lumbar spine causing her to have persistent pain and muscle spasms. She is functionally very limited with any type of prolonged activity such as sitting, standing, walking, bending, etc.

Although she returned to work after surgery, she only worked part-time (4 hours/day, 3 days/week). ROA 99. She explained to Hartford that she could not work a full day because of increasing pain, and that the physical requirements were not a major factor. ROA 511.

She stopped working at B&B October 12, 2005 because of overwhelming pain. Hartford denied her claim for disability benefits by letter of September 30,

2005, stating that her medical records “fail to support an inability to perform the material and substantial duties of [her] occupation.” ROA 400-402. The letter recounts her medical history and opinions of her treating physicians who had declared her incapable of working fulltime because of her severe pain. Despite those opinions, Hartford denied her claim based on an opinion of a physician, Dr. LeForce, it had hired to review her medical records only. Dr. LeForce did not examine her in person but determined that she could work fulltime in a sedentary capacity and that she could not climb, bend, or stoop (bending is one of her job requirements). ROA 401.

She appealed Hartford’s denial by letter of October 10, 2006, pointing out that Hartford failed to obtain opinions from each of her treating physicians, all of whom were familiar with her severe back problems. ROA 399. She also attached medical documents from Dr. Burger, ROA 382, as well as numerous other medical documents supporting her inability to perform fulltime work. ROA 294.

Hartford denied her appeal by letter of January 26, 2006. ROA 294-296. During the appeal review, Hartford hired another doctor, Dr. Turner, to review her medical records. Dr. Turner determined that she was capable of working fulltime in a sedentary job although he never saw her in person. Hartford states in its denial letter that Dr. Steck advised that she was capable of returning to fulltime, sedentary

work without restrictions. However, Dr. Steck did not believe she was capable of fulltime work and explained that Dr. Pick had called him while he was working out at a health club when he did not have her medical records in front of him. Dr. Steck explained the severity of her spinal ailments and declared he felt she was totally disabled. ROA 145-146. Dr. Turner claims to have spoken to one of Ms. McDonald's physicians, other than Dr. Steck, who said that she could not work fulltime. ROA 520-521. But Hartford did not consider that doctor's opinion and instead focused only on Dr. Steck.

Ms. McDonald requested yet another appeal of the denial of her claim and submitted more information substantiating her inability to work, including letters from her and Dr. Hubbell that explain the severity of her condition and why her pain prevents her from working fulltime. ROA 247. Hartford hired another medical consultant, Dr. Pick, who claims to have spoken with her doctors. Dr. Pick reported that both treating physicians, Drs. Steck and Hubbell, recommended a FCE before releasing her to work. Hartford did not request a FCE and instead denied her appeal without further review. ROA 248.

After exhausting her administrative appeals, she filed suit seeking to reverse Hartford's decision. ROA 11. She and Hartford filed cross-motions for judgment on the administrative record. The District Court issued a ruling on those motions

to remand the matter back to the administrator for the sole purpose of interviewing Dr. Steck to clarify his opinion on whether she can work. During the remand on April 21, 2008, Ms. McDonald provided Hartford with the Social Security Administration's award of disability benefits, ROA 769-770, which awarded her benefits starting October 23, 2007, retroactive to October 12, 2005. ROA 758-768.

Hartford interviewed Dr. Steck by phone on November 10, 2008. Barbara Phelps, a nurse employed by Hartford, conducted the interview, a transcript of which can be found in the Record on Appeal. ROA 749-752. A copy of the CD containing the audio version of the conversation can also be found in the Record on Appeal.

After the interview, Hartford issued a ruling by letter of November 21, 2008 denying the claim. ROA 754-755. Ms. McDonald then filed a motion to reopen the action and re-urged motion for judgment on the administrative record. Hartford filed a cross motion for judgment. The District Court denied her motion and granted Hartford's. Ms. McDonald timely submitted this appeal.

### **SUMMARY OF THE ARGUMENT**

The administrative record consists of evidence showing Ms. McDonald is incapable of performing her occupation on a fulltime basis, including opinions of

all her treating physicians and the SSA administration's finding that she is unable to work any occupation fulltime.

The District Court erred in finding opinions of three reviewing physicians as substantial evidence justifying Hartford's denial of this claim. The Court ignored that the medical assessments provided by the three reviewing physicians contradict the evidence reviewed by either omitting spinal ailments from their overall assessment or by outright falsehoods. The Court also ignored that these physicians work for record-reviewing companies that do repeat business with Hartford and that each has been cited for giving biased and deficient opinions in ERISA cases. And as this court has determined, because the nature of Ms. McDonald's disability is pain from severe spinal ailments, Hartford's failure to order an IME or FCE is a factor that further indicates it abused its discretion.

The District Court also erred in finding the SSA award irrelevant, as it was submitted to Hartford during the remand period when the administrative process was open. Under *Vega* and the *Estate of Bratton*, the award should be part of the administrative record and considered by this Court in determining whether Hartford abused its discretion.

## ARGUMENT

### I. Standard of Review

#### a. Appellate Standard of Review

This Court reviews a district court's grant of summary judgment and denial of a cross motion for summary judgment under Rule 56 of the Fed. R. Civ. Proc. *de novo*, using the same standard as the district court. Shaw Constructors v. ICF Kaiser Engineers, Inc., 395 F.3d 533, 538 (5<sup>th</sup> Cir. 2004); Travelers Cas. & Sur. Co. of America v. Baptist Health Systems, 313 F.3d 295, 297 (5<sup>th</sup> Cir. 2002).

#### b. Standard of Review in the District Court

This Court reviews a plan administrator's failure to award disability benefits for an abuse of discretion. Chacko v. Sabre, Inc., 473 F.3d 604, 610 (5<sup>th</sup> Cir. 2006). Abuse of discretion review is synonymous with arbitrary and capricious review in the ERISA context. Lain v. Unum, 279 F.3d 337, 342 (5<sup>th</sup> Cir. 2002). When reviewing for arbitrary and capricious actions resulting in an abuse of discretion, an administrator's decision is upheld if supported by substantial evidence. Meditrust Fin. Servs. Corp v. Sterling Chems. Inc., 168 F.3d at 215 (5<sup>th</sup> Cir. 1999). Substantial evidence is such evidence that a reasonable mind might accept as adequate to support a conclusion. Ellis v. Liberty Life Assurance Co. of Boston, 394 F.3d 262, 273 (5<sup>th</sup> Cir. 2005).

ERISA mandates that a plan administrator “shall discharge his duties . . . in the interest of participants and beneficiaries . . . for the exclusive purpose of . . . providing benefits to participants and their beneficiaries.” 29 USC Sec. 1104(a)(1). When an insurance company acts as both the claims administrator and the ultimate payer of benefits, as here, this Court should consider that conflict as a factor in determining whether the insurance company abused its discretion in denying benefits. Metropolitan Life Insurance Company v. Glenn, 128 S.Ct. 2343 (2008).

**II. The District Court erred finding Hartford did not abuse its discretion in denying Ms. McDonald’s disability benefits.**

The District Court erred finding that Hartford’s denial of disability benefits was based on substantial evidence. All treating physicians declared that Ms. McDonald cannot perform her occupation on a fulltime basis. Yet the District Court found opinions of three reviewing physicians Hartford hired as substantial evidence. ROA 1005. As discussed below and as discussed thoroughly in Ms. McDonald’s Motions for Judgment and Reply Memorandums, those opinions do not constitute substantial evidence.

**a. Ms. McDonald is unable to perform the material duties of her occupation.**

Ms. McDonald's medical condition need only prevent her from performing her occupation, not any occupation, in order to be disabled under the terms of the policy. Hartford defines disability as follows:

Disability means . . . you are . . . continuously unable to perform the Material and Substantial duties of your regular occupation; and not gainfully employed... unable to earn more than 80% of your monthly earnings in any occupation you are qualified for. . . ROA 220-221.

Material and Substantial duties means the necessary functions of Your Regular Occupation which cannot be reasonably omitted or altered. ROA 238.

Her job as B&B's office manager, business manager, and property manager, required frequent computer use, standing, walking, and bending and stooping while filing. ROA 513,487-490. According to B&B, her job included handling confidential information and therefore she was the only employee who updated and filed employee records, which required bending, stooping, and reaching. ROA 511.

All of Ms. McDonald's treating physicians have declared her incapable of working fulltime in any capacity. Dr. Berger reported to Hartford that she could not tolerate the prolonged sitting in front of a computer required of her job. ROA 343. Dr. Steck reported to Hartford that she could not perform fulltime work because computer work exacerbated her neck pain, and she has problems bending and stooping. ROA 432. He further declared that she cannot sit and stand for a

long period of time and that her condition was permanent. ROA 507. Dr. Hubbell explains her work ability as follows:

I think it is very unlikely she will be able to return to work in any type of gainful employment and I would consider her totally and permanently disabled due to her degenerative condition of her cervical and lumbar spine causing her to have persistent pain and muscle spasms. She is functionally very limited with any type of prolonged activity such as sitting, standing, walking, bending, etc. ROA 757.

Although Hartford's reviewing physicians stated that she could perform fulltime sedentary work, Ms. McDonald's doctors have repeatedly declared she lacks such capacity. According to the U.S. Dept. of Labor's Dictionary of Occupational Titles, "sedentary work involves sitting most of the time, but may involve walking or standing for brief periods." Diaz v. Prudential Ins. Co. of Am., 499 F.3d 640, at 645 (7<sup>th</sup> Cir. 2007). Ms. McDonald is unable to sit down for a significant amount of time. ROA 507. She is constantly in extreme pain and sitting exacerbates her pain. Dr. Steck noted that she is unable to sit for a prolonged amount of time and that her condition is permanent. ROA 432, 460, 507. He also states:

one of the problems with lumbar degenerative disc disease is poor sitting tolerance. There are many patients that have [this] disease and are unable to work because of the pain associated with sitting... I think there is little chance that she will return to work and would consider her totally disabled. ROA 771-772.

In Brooking v. Hartford, 167 F. Appx. 544 (6<sup>th</sup> Cir. 2006), a claimant with a back problem similar to Ms. McDonald's condition was wrongfully denied benefits. The facts in *Brooking* are similar to Ms. McDonald's situation: treating physicians declared the claimant incapable of sedentary work, but the insurer's doctor stated the opposite even though he had not examined the claimant. The Court found the claimant could not sit for more than four hours in a day and that sitting was a significant pain-provoking activity. See also McGill v. Unum, 2005 US Dist. Lexis 6604 (E.D. La. 2005).

**b. Opinions of Hartford's reviewing physicians do not constitute substantial evidence**

Although Hartford's reviewing physicians found Ms. McDonald could perform sedentary work on a fulltime basis, their opinions do not constitute substantial evidence because they are mere conclusory statements about her work ability, which contradict her MRI records and other medical information allegedly reviewed, and none of the reviewing physicians mention her pain and its effect on her work ability. Moreover, as courts have found, when the nature of a claimant's disability is severe pain from spinal ailments, relying on non-examining physicians without a Functional Capacity Evaluation ("FCE") or an ("Independent Medical Examination") is insufficient. Each of the three reviewing physician's opinions are summarized below.

**i. Dr. LeForce (first reviewing physician)**

Hartford relied on an opinion of Dr. Bruce LeForce to deny Ms. McDonald's initial claim for disability benefits. Dr. Leforce works for the Reed Reviewing Services, a record-reviewing company that does repeat business with Hartford. Dr. LeForce reviewed her records and then determined that she could sit up to eight hours per day if given an opportunity for frequent breaks and changes in position. He also opined that she cannot climb, bend, or stoop. ROA 401. Bending is an essential duty of her job as defined by B&B. Hartford's reliance on an opinion that provides she cannot perform a material duty of her occupation is one factor that suggests that Hartford abused its discretion denying this claim. The District Court dismissed this argument because Ms. McDonald had told Hartford that she was "get[ting] help filing to avoid bending and stooping." ROA 1006.(*infra*).

Dr. LeForce's medical opinion does not constitute substantial evidence because his assessment contradicts the evidence he allegedly reviewed. He states that the June 30, 2008 MRI of her cervical spine only shows disc degeneration without spinal stenosis or nerve-root impingement. ROA 413. However, that MRI actually shows nerve-root impingement at both C4-5 and C5-6, foraminal stenosis at C6-7, severe right foraminal stenosis at C5-6, severe disc degeneration, severe bilateral. ROA 452. The MRI impression reiterates impingement on the spinal

cord. ROA 452. Dr. LeForce does not mention the MRI results of the lumbar spine in his assessment, ROA 412, which show slight nerve-root impingement, bulging discs, and degeneration. ROA 450.

**ii. Dr. Turner (second reviewing physician hired on appeal)**

On appeal, Hartford hired another record-reviewing physician, Dr. Turner (an orthopedic surgeon working for the University Disability Consortium (“UDC”)) to review her medical records to determine whether she can work fulltime. Dr. Turner’s report recounts some of the medical evidence in the administrative record and then states the following:

If in fact she is capable of sedentary work on a part-time basis 4 hours 3 times a week there is no reason why she could not work fulltime at sedentary to light level labor without further restrictions or limitations.  
AR – 170.

This is not a medical opinion. He provides no assessment of the evidence he reviewed, but instead gave a conclusory opinion on her work ability, which omits any consideration of the pain she suffers from.

Moreover, like Dr. LeForce, Dr. Turner’s final diagnosis and discussion contradicts the evidence he reviewed. He states there is no evidence of definite herniated disk or nerve root compression, ROA 376, and that her MRI results of June 10, 2005 do not show spinal cord impingement and herniated disks. ROA 165. Apparently, Dr. Turner was looking at the wrong MRI because there is no

MRI dated June 10, 2005 in the administrative record. There is, however, an MRI dated June 30, 2005, but, as discussed above, that MRI actually shows nerve-root impingement, and bulging discs. ROA 450, 452.

Apparently, Hartford retained Dr. Turner simply to make a record to deny her claim. At the time, the record contained evidence of her inability to perform her job fulltime, including opinions from all her treating physicians that she could not work fulltime. The record also contained an opinion by Hartford reviewing physician, Dr. LeForce. If Section 1104(a)(1) of ERISA means anything, insurance companies are not free to hire numerous reviewing physicians to make a record to bolster benefit denials.<sup>1</sup>

### **iii. Dr. Pick (third reviewing physician)**

Ms. McDonald requested a third appeal of the denial of her claim and submitted more information substantiating her inability to work, including letters from her and Dr. Hubbell that explain the severity of her condition and why pain prevents her from working. ROA 247. Hartford hired another medical consultant, Dr. Pick, who claims to have spoken with her doctors. Dr. Pick reported that both treating physicians, Drs. Steck and Hubbell, recommended an FCE before

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<sup>1</sup> 29 USC Sec. 1104(a)(1) provides that administrators must “discharge [its] duties” in respect to discretionary claims processing “solely in the interests of the participants and beneficiaries” of the plan, Sec. 1104(a)(1) . . .

releasing her to work. ROA 258. Hartford did not request an FCE and instead denied her appeal without further review.

Dr. Pick's report lacks a medical assessment based on the records he reviewed. Instead, he states that there is no documentation or substantiation that Ms. McDonald cannot engage in at least sedentary-light work category on a fulltime basis. ROA 258. He also states documents describe degenerative arthritic changes of the cervical and lumbar spine. While true, the documents also show severe disc degeneration, disk bulging, nerve-root impingement, stenosis, foramina narrowing, all of which substantiate her pain complaints and which Dr. Pick omits in his final opinion. ROA 450, 452.

#### **iv. Hartford's reviewing physicians taken together**

##### **1. Mischaracterization of evidence**

Hartford has chosen non-examining, non-treating physicians over treating physicians. While not automatically unreasonable to do so, it is unreasonable when the non-treating physicians' reports are inaccurate and unsubstantiated by the records allegedly reviewed and based on an invalid premise that subjective symptoms cannot be disabling. Spangler v. Lockheed Martin, Inc., 313 F.3d 356, 362 (6<sup>th</sup> Cir. 2002)(A decision may be arbitrary and capricious when based on opinions of defendant's physicians, especially when they have not met with the claimant and their conclusions are contrary to those of treating physicians).

Although the Supreme Court in *Black & Decker v. Nord* rejected a “treating physician” rule that mandated deference to the treating doctor, courts can still look at the factual basis and reasoning in a non-examining doctor’s opinion and conclude that it is inadequate to overcome a contrary opinion from the treating physician. Kalish v. Liberty Mutual, 419 F.3d 501, 508 (6<sup>th</sup> Cir. 2005).

Each of Hartford’s treating physicians mischaracterized the results of her MRIs. As explained above, Dr. Leforce stated that the medical records did not show spinal stenosis or nerve-root impingement, when the records he reviewed confirm both conditions. Dr. Turner stated the MRI did not show nerve root compression or bulging discs, when both were shown on the MRI. And Dr. Pick stated that he only saw degenerative changes in her spine, failing to mention her severe disc degeneration, disc bulging, nerve-root impingement, stenosis foramina narrowing, all of which were shown on the MRI reports he reviewed and all of which cause severe pain. Hartford is not free to accept its reviewing physicians’ reports without considering whether its conclusions follow logically from the underlying medical evidence. Garrett v. Hartford Life and Accident Ins. Co., 2007 U.S. Dist. LEXIS 82919 (E.D. Ar. 2007) citing Abram v. Cargill, 395 F. 3d. at 887 (8<sup>th</sup> Cir. 2005); Menard v. Hartford, 2006 US Dist. LEXIS 78767 (M.D. Fl. 2006)(finding Hartford abused its discretion relying on its reviewing physicians who offered no indication as to why they disagreed with treating physicians).

Like Ms. McDonald's case, the *Menard* Court was faced with a claimant who suffered from back problems, an administrative record containing both objective and subjective evidence of pain, and Hartford's reviewing doctors who indicated she could work. The court stated that "severity of a condition is illustrated by the amount of pain a patient is in." The Court was not convinced by Hartford's position that the claimant's own characterizations of pain should be disregarded. Nor did the Court find persuasive the dismissive reports of Hartford's physicians.<sup>2</sup>

## **2. Ignorance of pain**

None of Hartford's reviewing physicians mentioned how pain would affect her ability to work. Nor could they have since he never examined her to witness the type of pain she experienced. Such opinions are not substantial evidence that would justify denying her claim. Clausen v. Standard Ins. Co., 961 F. Supp. 1446 (U.S. Co. 1997) (IME that did not address primary reason claimant was incapable of work was not substantial evidence); Audino v. Raytheon Co. Short Term Dis. Plan, 129 Fed. App'x 882, 885 (5<sup>th</sup> Cir. 2005).

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<sup>2</sup> Similarly, the *Work* Court found a Hartford denial as an unfair reading of the claimant's medical records and improper contradiction of treating physicians. Work v. Hartford Life and Acc. Co., 2007 App. LEXIS 21023 (3<sup>rd</sup> Cir. 2007). There, claimant suffered from a medical condition strikingly similar to Ms. McDonald's. Hartford's reliance on its reviewing physicians' conclusions, who did not examine the claimant, was deficient. In *Work*, the SSA did not find claimant entitled to benefits. Work v. Hartford, at 2005 US Dist LEXIS 28136 (E.D. Pa. 2005).

### 3. Evidence of bias

Notably, all three of Hartford's reviewing physicians have been cited by other courts for giving biased or deficient opinions in ERISA cases. Dr. LeForce has been cited by at least one federal district court for mischaracterizing evidence in a report given in a disability case through his work with Reed Review Services. Finley v. Hartford, 2007 US Dist. Lexis 91950, at 16 (N.D. Ca. 2007)(Leforce overstated the length of time the claimant spent gardening in its review of claim, and the court further notes Leforce's opinion warrants skepticism because the company he works for (Reed Review Services) stood to benefit financially from continued business with Hartford).

Drs. Turner and Pick work for the University Disability Consortium ("UDC"). Hartford's significant and ongoing relationship with UDC has been noted in several recent federal court decisions. Powell v. Hartford, 2007 US Dist. Lexis 17311 (W.D. Ky. 2006); Finley v. Hartford, 2007 US Dist Lexis 65591 (N.D. Cal. 2007)("Hartford did not address the potential conflict of interest arising from its 'volume discount type arrangement' with UDC and the fact that it is the only insurer with which UDC has a contract). In Caplan v. CNA Financial Corp., 544 F.Supp.2d 984, 991-92 (N.D.Cal., 2008), Judge Wilken pointed out:

Hartford's structural conflict of interest is accompanied by its reliance on UDC, a company which Hartford knows benefits financially from

doing repeat business with it, collecting more than thirteen million dollars from Hartford since 2002. It follows that Hartford knows that UDC has an incentive to provide it with reports that will increase the chances that Hartford will return to UDC in the future - in other words, reports upon which Hartford may rely in justifying its decision to deny benefits to a Plan participant.

UDC Drs. Pick and Turner have been cited by another federal court for giving biased and deficient opinions on a claimant's work ability although neither had examined the claimant. Hicklin v. Hartford, 2007 U.S. Dist. LEXIS 96059, at 36 (C.D. Cal. 2007). The facts in *Hicklin* are strikingly similar to Ms. McDonald's situation. Both claimants suffered from spinal disk disease exacerbated in car accidents and both tried returning to work after spinal surgery, but the constant sitting with computer work caused too much pain for fulltime work. Hartford denied Hicklin's claim, relying on opinions of Drs. Pick and Turner instead of treating physicians. The Court found significant that Hartford failed to order an IME or other actual examination and instead relied on paper-reviewing physicians.

The *Hicklin* Court acknowledged UDC's conflict of interest. UDC maintains a contractual relationship with Hartford under which it derives 75% of its annual income by providing file reviews for Hartford. Hicklin, U.S. Dist. LEXIS 96059, at 19. Dr. Pick performs 60 to 80 medical reviews per month or over 700 reviews per year for insurers. Over 80% of his time is devoted to conducting reviews for insurance companies. Id. at 23. The Court found Dr.

Pick's assessment omitted significant spinal ailments, just as he did when providing an assessment of Ms. McDonald's MRI records. Id. at 23. The Court also noted that Dr. Turner failed to note spinal ailments in the MRI records he allegedly reviewed in giving his assessment, which is exactly what he did in this case. Id. at 20. The Court also discussed the nature of Dr. Turner's practice, which consists primarily of record reviews for insurance companies; between 2004 and 2006 he made more than \$100,000 per year reviewing files for UDC. Id. at 19.

**c. The totality of the administrative record shows Hartford abused its discretion in denying this claim**

In addition to reasons discussed above, the following facts show Hartford abused its discretion in denying this claim:

1. Dr. LeForce (1<sup>st</sup> reviewing physician Hartford hired) reviewed her records and determined she cannot climb, bend, or stoop. ROA 401. Bending is an essential duty of her job as defined by B&B. Hartford's reliance on an opinion that provides she cannot perform a material duty of her occupation is one factor that suggests that Hartford abused its discretion denying this claim. Saffle v. Sierra Pacific Power Co., 85 F.3d 455 (9<sup>th</sup> Cir. 1996)(plan administrator abused its discretion in determining claimant could perform job with accommodations when company had not offered such accommodations); see also Rigg v. Cont'l Cas. Co., 2004 US Dist LEXIS 8009 (N.D. Ca. 2004).

The District Court erred dismissing this argument because she told Hartford her coworkers helped her bend while filing, as the standard for disability is whether she can perform the material duties of her occupation not whether she and other employees can perform the material duties of her occupation.

2. In its final denial on remand, Hartford stated that Dr. Steck advised that her ongoing complaints of pain are “subjective in nature and cannot be graded and that he was unable to determine if or when Ms. McDonald could have returned to work fulltime after the lumbar surgery.” ROA 804. Hartford conveniently failed to mention that Dr. Steck stated that her subjective complaints of pain “are based on objective data in that she has degenerative disk disease in the lumbar spine she has documented lumbar disc herniation that was bad enough to require a lumbar decompression fusion. ROA 800.”

Hartford also omitted Dr. Steck’s statement that he has not seen her since 2005 and that any determination on her work ability should be made by her pain management physician, Dr. Hubble, who has repeatedly declared she is unable to perform her occupation and has written to Hartford and Hartford’s reviewing physicians stating that.

3. Dr. Hubbell and Dr. Steck explained to Dr. Turner that Hartford should order an FCE to determine her work capacity. Hartford did not order an FCE and instead denied her claim, relying on paper-reviewing physicians hired through medical consulting companies that do repeat business with Hartford, and without examining her to determine the amount of pain she suffers from. Kimball v. Hartford, 2008 U.S. Dist. LEXIS 15275 (W.D. La. 2008)(treating physicians functional limitations stand when no IME or FCE).
4. Hartford did not acknowledge or consider the Social Security Administration’s determination that she is totally disabled even though it received the decision, with reasons, during the remand period and before it made its final decision.
5. In its denial letters, Hartford does not discuss Ms. McDonald’s consistent complaints of pain and how it affects her ability to work. Her chronic pain prevents her from working, but Hartford has ignored all references to her pain. In its letter denial letter and letters denying her appeals, Hartford does not explain – or even mention – how her pain might preclude her from working. Instead, Hartford uses the fact that plaintiff can walk, sit, stand, and talk, as indicators of fulltime work capability.

**d. SSA award is relevant, yet unbinding.**

During the remand period on April 21, 2008, Hartford was provided with the SSA award, with reasons, ROA 758-768, and asked to consider it in determining her disability. ROA 769-770. Hartford, however, did not acknowledge the SSA award in its final denial of November 21, 2008. The District Court found the award irrelevant because the SSA issued its award on October 23, 2007, more than a year after Hartford finalized its denial of the claim in April 2006. ROA 1006. The Court further declared that Hartford did not have to consider the SSA's decision during the remand of March 28, 2008 because the remand was specifically limited to the purpose of clarifying Dr. Steck's position regarding plaintiff's limitations. ROA 1007.

**i. The SSA award should be part of the administrative record and therefore Hartford should have considered it.**

The Court's finding that Hartford was under no obligation to consider the SSA benefit award contradicts the spirit of ERISA law, which mandates that a plan administrator "shall discharge his duties . . . in the interest of participants and beneficiaries . . . for the exclusive purpose of . . . providing benefits to participants and their beneficiaries." 29 USC Sec. 1104(a)(1). The SSA decision further substantiates Ms. McDonald's claim that she cannot perform the material duties of her occupation on a fulltime basis retroactive to October 12, 2005, as the SSA

found her completely unable to work any occupation (much less her own), a standard more stringent than the one Hartford used to deny her claim.

The District Court judge cited an opinion he wrote to support its contention that because Hartford had made its final determination, it could not have considered the SSA award letter. Anderson v. Cytec Indus. Inc., 2009 WL 911296 at 7 (E.D. La. Mar. 27, 2009). The claimant in *Anderson* sought to supplement the administrative record after the insurer had made its final decision. The District Court provided a long discussion of whether the documents should be allowed under *Vega* and its progeny but ultimately did not decide the issue. *Anderson*, however, did not involve a remand back to the insurer, as here. The district court remanded the action back to Hartford to interview Dr. Steck and clarify his opinion on Ms. McDonald's work ability, thereby reopening the administrative process. Hartford should have considered the award. Estate of Bratton v. Nat'l Union Fir Ins. Co. of Pittsburgh, 215 F.3d 516 (5<sup>th</sup> Cir. 2000)(citing *Vega* and noting that additional information submitted to a plan administrator for consideration in determining disability should be treated as part of the administrative record.)

- ii. This Court, on appeal and on de novo review, should consider the SSA's determination as a factor in determining whether Hartford abused its discretion.**

The SSA's decision is relevant and instructive to a court determining whether a plan administrator has abused its discretion. Adams v. Met. Life. Ins. Co., 2007 U.S. Dist. LEXIS 56912 (M.D. La. 2007)(SSA award is highly material); Gellerman v. Jefferson Pilot, 376 F Supp 2d 724, 735 (S.D. Tex. 2005)(noting that "no court has held that an SSA determination is completely irrelevant.") It is particularly relevant because it is a conclusion by an impartial administrative agency that objective support exists for a treating physician's opinion. Adams, 2007 US Dist Lexis 56912 at 36.

### **III. Conclusion**

Hartford's decision to deny Ms. McDonald's disability benefits was not based on substantial evidence. The District Court erred in ignoring the deficiencies in the reviewing physicians' medical assessments and in finding the SSA award irrelevant (as it was submitted to Hartford during the remand period when the administrative process was open). Hartford's decision should be reversed, and the Court should award attorney fees, court costs, and interest to Ms. McDonald.

Respectfully submitted,

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### **Certificate of Service**

I certify that appellant's brief was mailed to appellants counsel on

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