THE STATE OF SOUTH CAROLINA
In the Supreme Court

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S.C. Supreme Court

APPEAL FROM THE SOUTH CAROLINA
WORKERS COMPENSATION COMMISSION

Opinion No. 5-082
SC Ct. App. filed February 13, 2013
Withdrawn, Substituted and Refiled March 27, 2013

Thomas Lee Brown, ..... Petitioner,

v.

Peoplease Corporation, and
Arch Insurance Company
c/o Gallagher Bassett Services, Inc. ..... Respondents.

**RESPONDENTS' RETURN
IN OPPOSITION TO PETITIONER'S
PETITION FOR WRIT OF CERTIORARI**

Pursuant to Rule 240(e), SCACR, Respondents Peoplease Corporation and Arch Insurance Company c/o Gallagher Bassett Services, Inc. hereby oppose Petitioner Thomas Brown's ("Petitioner") Petition for Writ of Certiorari ("Petition") of the Court of Appeals' Opinion No. 5082, as Withdrawn, Substituted and Refiled on March 27, 2013 ("Opinion"). Petitioner presents no novel questions of law, there was no dissent in the decision of the Court of Appeals, the Court of Appeals' decision is not in conflict with any prior decisions of this Court, and Petitioner's claim does not present any federal or constitutional issues. Rule 242(b), SCACR. Thus, Petitioner does not present any reasons or arguments that warrant this Court's review, and his request for the same should be denied.

## STATEMENT OF THE CASE

Petitioner Brown suffered a work-related injury on May 2, 2008 when a passenger vehicle drove under the truck he was driving, causing the truck to "jolt" when he put on the brakes. At the time of his accident, Petitioner was employed by Peoplease Corp. to drive a truck for Bulldog Trucking Peoplease. Petitioner had begun working for Peoplease a little over three months before his accident occurred.

Following his accident, Petitioner received extensive treatment for pain in the cervical region of his neck/back, including two surgeries. (R. 79-107, 115-116 / Appx. 141-169, 177-178).[1] In addition, following the accident Petitioner's diabetes worsened to the point that he is now insulin dependent. (R. 36-56 / Appx. 98-118) (R. 324, lines 2-7 / Appx. 387, lines 2-7). These injuries have been admitted. Petitioner's authorizing treating doctor is Dr. Scott Boyd and his family doctor, who treats his diabetes, is Dr. Algood. (R. 323, lines 19-24) (Appx. 386, lines 19-24). Although Petitioner underwent an MRI for his lower back in 2008, (R. 59-60, 69-70 / Appx. 121-122, 131-132), the record is devoid of any further treatment for his lower back.[2]

At the hearing before the Single Commissioner, Petitioner testified that he had been offered a pay rate of fifty-cents per mile by Bulldog; however, he could not identify who from Bulldog may have told him that. (R. 335, lines 11-19) (Appx. 398, lines 11-19) (R. 363, lines 12-22) (Appx. 426, lines 12-22). Furthermore, Petitioner acknowledged that he was actually employed by Peoplease, not Bulldog. (R. 338, lines 9-13 / Appx. 401, lines 9-13). Petitioner testified that reasons he switched from his prior employer, Boyd Brothers, to Peoplease was that

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[1] Respondents are providing cites to both the Appendix that was filed with this Court and the Record on Appeal that was filed with the Court of Appeals since Petitioner refers to the Record on Appeal in his Petition, but filed the Appendix with this Court. The page references are different between the Record on Appeal and the Appendix. For example, page 79 in the Record on Appeal is a medical record of an April 19, 2010 visit by Petitioner to Dr. Scott B. Boyd; however, this same medical record is found on page 141 of the Appendix.

[2] It is unclear what "undisputed facts" Petitioner is referring to on p. 7 of his Petition; however, one fact that is clearly undisputed that Petitioner did not receive any treatment for his lower back following the accident.

Peoplease was more local and would allow him more time at home, (R. 336, lines 5-6 / Appx. 399, lines 5-6) (R. 340, line 20 – 341, line 21 / Appx. 403, line 20 – 404, line 21), and he would not have to do as much heavy lifting/loading working for Peoplease as he did with Boyd Brothers. (R. 341, line 22 –342, line 4 / Appx. 404, line 22 – 405, line 4).

Ms. Monica Reese, corporate counsel for Peoplease, testified that she reviews every employment contract and completes the Form 20 for every workers' compensation claim. (R. 347, line 24 – 350, line 7 / Appx. 410, line 24 – 413, line 7). In this case, she reviewed the payroll of every driver who is in a similar position to Petitioner, which included the payroll for about 60 drivers. She testified that, extrapolated out over a year, Petitioner's wages would be approximately $26,000 for the year, which is a fair average of what Peoplease drivers working for Bulldog earn. (R. 350, lines 8-21 / Appx. 413, lines 8-21) (R. 357, lines 1-10 / Appx. 420, lines 1-10). The high end of salary that drivers in Petitioner's class would earn is forty-two cents per mile, or approximately $38,500 per year. (R. 356, lines 13-25 / Appx. 419, lines 13-25) (R. 359, line 12 – 360, line 8 / Appx. 422, line 12 – 423, line 8 (explaining the category of similarly situated employees)). Specifically, Ms. Reese testified that Peoplease does not pay any drivers in Petitioner's classification more than forty-two cents per mile and that she did not know of anyone who would have told him he would make fifty cents per mile. (R. 362, lines 5-22 / Appx. 425, lines 5-22). Petitioner was sixty years old at the time of the hearing before Single Commissioner David W. Huffstetler on October 22, 2010. (R. 323, lines 17-18 / Appx. 386, lines 17-18).

Following the hearing, Commissioner Huffstetler requested that Petitioner's counsel draft an order including several specific points and rulings. (R. 385 / Appx. 448). Although Petitioner's counsel drafted an order, Commissioner Huffstetler made changes to that order so

that it complied with his intended ruling. (Email from Kellie Lindler to Scott Garrett, Esq. and Preston F. McDaniel, Esq., dated November 23, 2010, R. 387 / Appx. 450 (forwarding message from Commissioner Huffstetler indicating he "made numerous changes to the proposed order")).

Commissioner Huffstetler found that Petitioner was permanently disabled as a result of the combination of the injury to his cervical spine and the aggravation of his diabetes, and awarded lifetime causally-related medical care for those two injuries. (Order and Award of the Single Commissioner, R. 8-9 / Appx. 70-71, November 23, 2010 ("Single Commissioner Order")). He also ruled that exceptional circumstances exist for determining an average weekly wage compensation rate that is fair and reasonable to all parties concerned. (R. 3, 8 / Appx. 65, 70). Commissioner Huffstetler found that there was "no documentary evidence to support Petitioner's testimony of having been promised 50 cents per mile," and Petitioner "did not identify the exact person that told him that at the time of employment." (R. 4 / Appx. 66). Commissioner Huffstetler accepted the testimony of Ms. Reese with respect to the determination of the average weekly wage issue. (R. 4-5, 8-9 / Appx. 66-67, 70-71). Finally, Commissioner Huffstetler found that the lumbar issues alleged by Petitioner were not supported by substantial evidence in the record. (R. 9 / Appx. 71).

Petitioner timely appealed to the Full Commission, arguing that he was entitled to lifetime medical care for his lower back and that his average weekly wage and compensation rate should be raised. The Full Commission heard oral argument on March 21, 2011 and requested a proposed order from counsel for Respondents. (R. 399-400 / Appx. 462-463). In addition to a full affirmation of the Single Commissioner, the request for a proposed order instructed, "[p]lease make sure the Appellate Panel Decision and Order recites the specific Findings of Fact and Rulings of Law of the Single Commissioner's Decision and Order." (R. 400 / Appx. 463).

The request for a proposed order also stated that, "[t]he Commissioners reserve the right to modify and/or delete any or all portions of the submitted Decision and Order." (R. 399 / Appx. 462). Thereafter, the Full Commission issued its Decision and Order on June 29, 2011 affirming the Single Commissioner's factual findings and conclusions of law. (Decision and Order of the Full Commission, R. 14-21 / Appx. 76-83, dated June 20, 2011 ("Full Commission Decision")).

Petitioner timely appealed to the Court of Appeals, which heard oral argument on October 16, 2012 and issued its original opinion on February 13, 2013 (Appx. 476-484), and a revised opinion on March 27, 2013. (Appx. 508-515).

## I. The Court of Appeals committed no error in affirming the manner in which the Commission's Decision and Order was drafted.

Petitioner continues to insist that the Commission committed error by requesting one of the parties to draft a proposed order. Although he admitted to the Court of Appeals that this is "one of the weaker cases" on which to make this argument, (Appx. 494), he nonetheless continues to argue, without any valid statutory or legal basis, that the Commission somehow is violating its statutory mandate and/or the Court of Appeals somehow does not fully understand its role as an appellate forum in the wake of the 2007 revisions to the South Carolina Workers' Compensation Statute ("Act"). Neither argument carries any weight, and certainly neither warrants this Courts' review. Contrary to Petitioner's suggestion otherwise, (Pet. p. 10), the issue of whether the Commission may request a party to draft a proposed order does not raise any novel issue of law and was not affected in any way by the 2007 Amendments to the Act.

First, the Commission did not violate its statutory authority or regulations – not S.C. Code Ann. §§ 42-17-40 or 42-17-50, 1-23-350 or S.C. Code Reg. § 67-709(e)(2) – by requesting a party to draft a proposed order for it. Instead, the Commission considered this matter, reviewed the record, heard argument and reached its own decision. The Commission's request

for a proposed order clearly stated that, "[t]he [Appellate] Panel has considered the matter and find a **FULL AFFIRMATION** of the Single Commissioner's Decision and Order." The Commission then instructed counsel for Respondents to "prepare a proposed order," and to "[p]lease make sure the Appellate Panel Decision and Order recites the specific Findings of Fact and Rulings of Law of the Single Commissioner's Decision and Order." (R. 399-400 / Appx. 462-463). As is readily apparent, the Commission neither told Respondents' counsel to "fill in the blanks" nor abdicated its responsibility in any way. The proposed order submitted by Respondents' counsel and subsequently adopted by the Commission did precisely what the Commission requested. The Findings of Fact and Conclusions of Law set forth in the Commission Decision are substantively the same as those set forth in the Single Commissioner's Decision,[3] which the Commission adopted as its own.

Petitioner's due process rights were not violated by the manner in which the Commission produced its Decision in this case. "Procedural due process requirements are not technical; no particular form of procedure is necessary. ... The United States Supreme Court has held, however, that at a minimum certain elements must be present. These include (1) adequate notice; (2) adequate opportunity for a hearing; (3) the right to introduce evidence; and (4) the right to confront and cross-examine witnesses." Vora v. Lexington Med. Ctr., 354 S.C. 590, 595, 582 S.E.2d 413, 416 (2003). Petitioner fails to articulate any part of the process before the Commission which denied him due process, only providing an off-the-cuff parenthetical "(i.e., notice of the issues)". (Pet. p. 13). There were no issues raised before the Appellate Panel or set forth in its Decision of which Petitioner did not have full notice. As was the case in Vora, here, Petitioner received ample due process.

[3] The differences between the two decisions are that, instead of saying, "I find ..." as in the Single Commissioner's Decision, the Commission Decision says "We find ..." In addition, the term "diabetes" is replaced with "diabetic condition." (R. 8-11 / Appx. 70-73) (R. 18-21 / Appx. 80-83). Such changes are not substantive.

Petitioner's statement that the law does not contemplate or allow a party to draft an Order of an appellate nature, especially a multimember consensus Order," (Pet. p. 13), is not supported by case law or statute. Furthermore, even if there were some limitation on having a party draft a proposed appellate opinion, such a practice would be least problematic where the appellate body's consensus decision affirms and adopts the lower tribunal's decision, as is the case here. This is because the intent and decision of the Appellate Panel is clearly set forth in its unanimous approval of the Single Commissioner's Decision.

Petitioner's reliance on Section 1-23-340 is entirely misplaced. That provision of the APA applies only where, "a majority of the officials of the agency who are to render the final decision **have not heard the case or reviewed the record** ..." S.C. Code Ann. § 1-23-340 (emphasis added). Such is not the case here – the Commission heard oral argument in this case and reviewed the record. (R. 18, 366-382 / Appx. 80, 429-445). Furthermore, the Commission adopted virtually verbatim the decision of the Single Commissioner who conducted the initial hearing. Thus, Section 1-23-340 simply is not applicable in this case.

Petitioner's assertion that the Court of Appeals' Opinion is in conflict with this Court's decision in Drake v. Raybestos-Manhattan, Inc., 241 S.C. 116, 127 S.E.2d 288 (1962) is both incorrect and misleading. Petitioner suggests that Drake stands for the proposition that the Commission cannot adopt the Single Commissioner's findings of fact or conclusions of law but, instead, must "make **its own** ..." (Pet. p. 12). That is not what Drake says or what it stands for. Drake involved a failure to make a specific finding of fact necessary to support the Commission's conclusions that the claimant both provided timely notice and filed her claim within the statutorily-prescribed period. There, the Commission merely stated the claimant provided timely notice and duly filed her claim but failed to find as a fact when she became

disabled and/or when she knew or should have known her disease was work-related. 241 S.C. at 126-127, 127 S.E.2d at 294. Here, in contrast and counter to Petitioner's suggestion, the Commission did not fail to make a finding on any necessary, underlying fact.

Second, there are numerous cases, as is the case here, where the Full Commission adopts the Single Commissioner's order, either verbatim or with modifications. There simply is nothing wrong with the Commission doing so. *See, e.g.*, Trotter v. Trane Coil Fac., 393 S.C. 637, 644, 714 S.E.2d 289, 292 (2011) (noting that "the Commission unanimously upheld the commissioner's order and adopted the findings of fact and conclusions of law contained there in full"); Hopper v. Terry Hunt Const., 383 S.C. 310, 313-314, 680 S.E.2d 1, 3 (2009) (noting with approval that, "[t]he full commission adopted the single commissioner's order in its entirety").

Third, the Commission has a long history of requesting that parties draft proposed orders, which the Commission can accept as written, modify, or reject altogether. There is no statutory or legal basis for Petitioner's objection to such a practice. In fact, the Commission frequently requests parties to draft proposed orders. *See, e.g.*, Lawson v. Hanson Brick America, Inc., 393 S.C. 87, 90, 710 S.E.2d 711, 712 (Ct. App. 2011) (accepting and then revising an order drafted by the employer); Matute v. Palmetto Health Baptist, 391 S.C. 291, 295 n.2, 705 S.E.2d 472, 474, n.2 (Ct. App. 2011) (accepting without comment an order drafted by the claimant). In fact, Petitioner seems to have no problem at all with the fact that the Single Commissioner in this case requested that he draft a proposed decision, (R. 385-386), which the Single Commissioner revised before issuing. (R. 387).[4] By adopting and affirming in its entirety the Single Commissioner's redrafted decision in this case, the Commission was not adopting an order drafted out of whole cloth by Respondents' counsel. There was no abdication of duty on the

[4] In pointing out this fact, Respondents in no way concede that a Single Commissioner or the Commission cannot adopt a decision as drafted by one party or the other, so long as the Single Commissioner or the Commission sets specific parameters for, reviews it and, if necessary, revises the decision prior to issuing it.

Commission's part – it did not allow a party "to fill in the blanks," as is suggested by Petitioner. In the end, Petitioner is unable to identify any statutory or regulatory basis for his assertion that the Commission may not request a party to draft a decision. In this case, the Commission reserved "the right to modify and/or delete any or all portions of the submitted Decision and Order," and provided specific directions to Respondents' counsel as to the contents of the decision. (R. 399-400 / Appx. 462-463).

Thus, this is not a novel issue, no matter how hard Petitioner attempts to contort the facts or the statutory requirements for drafting Commission Orders.

Finally, Petitioner implies that the Court of Appeals has somehow misapprehended its appellate role in the wake of the 2007 amendments to the Act, which provide that appeals from the Commission proceed directly to the Court of Appeals, rather than be heard by the circuit court in the first instance.[5] This argument is little more than smokescreen and should be readily dismissed. The requirement that Commission decisions contain all the specific findings of fact necessary to its legal conclusions, and that those findings be sufficiently detailed to permit appellate review, *e.g.*, Shealy v. Algernon Blair, Inc., 250 S.C. 106, 109-110, 156 S.E.2d 646, 648 (1967), and Nettles v. Spartanburg Sch. Dist. # 7, 341 S.C. 580, 588, 535 S.E.2d 146, 150 (Ct. App. 2000), did not change with the 2007 amendments.[6] In fact, in both Shealy and Nettles, the Commission failed to make a necessary factual finding to support its award of compensation. In Shealy, the Commission awarded disability benefits without first determining the extent of the

[5] At the same time, Petitioner applauded the Court of Appeals for performing "its statutory duty by addressing those issues in a thoroughly and thoughtful opinion." (Appx. 496-497). Petitioner cannot seem to make up his mind as to whether the Court of Appeals did or did not understand its statutory duty, or whether it has or has not thoroughly fulfilled the same.

[6] It is curious that Petitioner cites Davis v. La-Z-Boy Chair Co., 287 S.C. 121, 337 S.E.2d 238 (Ct. App. 1985) for this proposition. Although the Circuit Court remanded the matter to the Commission "with instructions to make specific findings of fact and conclusions of law," the appeal was dismissed as an impermissible interlocutory appeal so that the Court of Appeals did not have an opportunity to rule on the purported deficiencies in the Commission's decision. In any event, Davis is merely repetitive of Shealy and Nettles, and does not add any weight to Petitioner's argument.

claimant's inability, if any, to earn wages, or the amount the claimant actually was able to earn after his injury. 250 S.C. 106, 109, 156 S.E.2d at 648. In Nettles, the Commission failed to make a specific finding regarding whether the claimant was entitled to partial disability for her right lower extremity. 341 S.C. at 588, 535 S.E.2d at 150. No such failure exists here.

Here, the Commission properly set forth the factual basis for its conclusions and the Court of Appeals applied the appropriate standard of appellate review. Thus, Petitioner's renewed attack on the Commission's Decision and its newly crafted assault on the Court of Appeals' review of that Decision do not present any issues that require this Court's review, and his Petition should be denied.

## II. The Court of Appeals did not err in denying Petitioner's motion to submit additional evidence pursuant to S.C. Code 1-23-380(3).

Petitioner next takes issue with the Court of Appeals' disposition of his Motion Pursuant to S.C. Code §1-23-380(3) for Leave to Submit Additional Evidence and to Stay the Appeal Filed in this Matter Pending Further Hearing of the SC Workers' Compensation Commission with Memo in Support ("Motion to Remand"). (R. 219-245 / Appx. 282-308). The Court of Appeals properly held that the evidence Petitioner sought to have admitted was not material and that he failed to present a good reason why he did not present this evidence to the Commission. (R. 12-13 / Appx. 74-75) (Appx. 514-515).

Petitioner attempts to establish a requirement that the Court of Appeals had to "meticulously" set out all the facts that support its decision to deny Petitioner's Motion to Remand. (Pet. p. 15). However, as this Court instructed in Byers v. South Carolina Alc. Bev. Cont. Comm'n, 305 S.C. 243, 245, 407 S.E.2d 653, 654 (1991), "[i]n considering such an application [under *section 1-23-380*], 'the taking of additional evidence is a matter within the

sound discretion of the trial judge.'"[7] "The party challenging a discretionary ruling of the court has the burden of showing a clear abuse of discretion." Cloyd v. Mabry, 295 S.C. 87, 90, 367 S.E.2d 171, 173-174 (Ct. App. 1988). An abuse of discretion arises when an order is controlled by an error of law or, where the order rests on a factual basis, it lacks evidentiary support. Byers, 305 S.C. at 245, 407 S.E.2d at 655. Here, there was no abuse of discretion.

Contrary to Petitioner's assertions, the Court of Appeals adequately analyzed and explained its reasons for denying Petitioner's Motion to Remand. (R. 12-13 / Appx. 74-75) (Appx. 514-515). First, the Court of Appeals determined the evidence was not material. In order for evidence to be material, there must be a "logical or rational connection between the fact sought to be presented and a matter of fact in issue in the case." Gause v. Livingston, 251 S.C. 8, 13, 159 S.E.2d 604, 607 (1968); *see also* Knight v. South Carolina Dept. of Health & Env. Control, 1998 SC ENV LEXIS 69, Docket No. 97-ALJ-07-0746-CC, *14 (May 29, 1998), *citing* 31 A C.J.S. Evidence § 202 (1996) (noting that, for evidence to be material, "there must be a rational connection to a proposition in issue").

Despite Petitioner's protestations otherwise, the card purporting to state what Bulldog might pay a driver has no bearing on the wage rate that was offered by Peoplease, Petitioner's actual employer. As noted above, Petitioner acknowledged that he was employed by Peoplease, not Bulldog. (R. 338, lines 9-13 / Appx. 401, lines 9-13). The proffered card does not mention Peoplease in any way. Furthermore, there is no indication of where or when Petitioner obtained the card, who created it and/or to whom it was intended to apply. Thus, whatever Bulldog might or might not have offered drivers who might have worked directly for Bulldog is not material to

[7] Note that, in Byers, the circuit court was acting in its appellate capacity to review an agency decision, as was the Court of Appeals in this case.

Petitioner's claim. Even if the card was admitted into the record, it would not and could not change the outcome because it does not reflect any promise Petitioner's employer made to him.

In this respect, the facts of this case are very similar to those in Byers. In Byers, this Court overturned a circuit court's grant of a motion under the predecessor of Section 1-23-380(3) based on the fact that the proffered evidence was not material. This Court held that, "the Commission could properly have denied petitioner's application [in an off-premises wine and beer permit proceeding] based solely on" evidence that had already been submitted regarding the proximity of the store to a church, school and residence. 305 S.C. at 246, 405 S.E.2d at 655. As a result, consideration of the factors on which the applicant proposed to submit additional evidence (the level of police protection and the amount of vandalism, littering and drag racing in the community), "were not necessary and are immaterial. Since such factors are not necessary and material to the Commission's determination, there would be no benefit to allowing further evidence to be presented on these factors." Id., 405 S.E.2d at 655. Similarly, a card with the name of an entity other than Petitioner's employer is not material to what his wages with Peoplease were. Thus, there is evidentiary support for the Court of Appeals' conclusion that the proffered evidence is not material.

In reaching its conclusion in Byers, this Court explained that the case relied on by the circuit court, Port Oil Co., Inc. v. Allen, 286 S.C. 286, 332 S.E.2d 787 (Ct. App. 1985), had been legislatively overruled by amendments to S.C. Code 61-9-320. This explanation went to the fact that the Court of Appeals' decision in Byers was controlled by an error of law. No such error of law exists here and, as set forth above, the Court of Appeals' determination of this matter rests on solid evidentiary support.

Furthermore, in addition to finding that the proffered evidence is not material, the Court of Appeals also concluded that Petitioner presented no good reason for failing to present this evidence in the hearing before the Single Commissioner and the Appellate Panel. Although there does not appear to be a specific test for demonstrating "good reason" under Section 1-23-380(3), clearly some showing beyond the fact that Petitioner had not looked carefully enough through his own files to locate the evidence is required. *See* Bowick v. South Carolina Dept. of Rev., 1995 S.C. Tax LEXIS 235, Docket No. 95-ALJ-17-0480-CC (Dec. 8, 1995) (refusing to remand for the submission of additional evidence where "the evidence ... could have been discovered by the exercise of due diligence" before the hearing); *see also* Knight at *13, 17 (requiring that "new" evidence be demonstrated in order to show that "good cause" exists to remand the case). Here, the proffered evidence is not "new" – Petitioner has admitted it was in his possession but he simply failed to locate it. (R. 6 / Appx. 289 (noting that, "subsequent to the hearing at the direction of Counsel for the Petitioner, Petitioner went through his records and then while going through records in preparation for a subsequent hearing requesting a lump sum payment of benefits, the Petitioner found a card that he was given at the time that he applied for employment with Bulldog Hiway Express")). Although Petitioner suggested in his Brief to the Court of Appeals that he did not know, and had no reason to know, that he had the card in his possession, (Appx. 32), he did not allege such lack of knowledge when he moved the Court of Appeals initially. (*See* R. 219-229 / 282-292)). He now suggests that "there is no evidence in the Record that the Petitioner knew the documentation sought to be admitted as additional evidence was in his possession at the time of the hearing." (Pet. p. 17). Petitioner's attempt to "dance" around this issue belies his inability to articulate any good reason for his failure to produce this evidence at the hearing before the Single Commissioner. To allow Petitioner to

supplement the record at this late date would allow him two bites at the same apple, which would be patently unfair to Respondents, and would open the door for workers' compensation claimants, as well as other applicants before administrative bodies, to pursue their cases with less than due diligence, knowing they can ask this Court to remand for admission of additional evidence they uncover once they carefully search their files. Any such search could and should have been performed prior to the hearing. At a minimum, Petitioner could have moved at the hearing before the Single Commissioner to hold the record open for additional evidence if Petitioner felt the need to supplement the record in any way. *See* Martin v. Rapid Plumbing, 369 S.C. 278, 287, 631 S.E.2d 547, 552 (Ct. App. 2006). Petitioner has not presented any good reason why he should be allowed to supplement the record at this late date, and his motion was properly denied.

Clearly, where a party has had an opportunity to fully present his case before a tribunal, there is no good reason to re-open the record for the submission of additional evidence. Green v. E.B. Gresham Co., 168 S.C. 395, 407, 167 S.E.2d 659, 663 (1933). In fact, the Commission's Regulations provide that "[a]ll available evidence and testimony shall be presented at the scheduled hearing or a party must move for an adjournment according to R. 67-613." S.C. Code Regs. § 67-612(J); *see also* Morgan v. JPS Auto., 321 S.C. 201, 204, 467 S.E.2d 457, 459 (Ct. App. 1996). Petitioner failed to do either here.

Petitioner's argument that he did not know that his wage rate would be at issue, or that he would need to document his entitlement to the wage he believed was appropriate is countered by the fact that Respondents' Forms 20 and 51 specifically contended that the average weekly wage should be $589.69. (R. 22, 25 / Appx. 84, 87). Furthermore, both Petitioner and Respondents raised the issue of the appropriate average weekly wage in their Pre-Hearing Briefs to the

Commission. (*See* R. 27-31 / Appx. 89-93 (Petitioner's Pre-Hearing Brief noting average weekly wage was still at issue and attaching a full page of argument stating that he believed average weekly wage should be $795.90)) (R. 169 / Appx. 231 (Respondents' initial Pre-hearing Brief indicating that "Representatives of Peoplease Corporation may be called to testify," and clearly stating the average weekly wage should be only $589.69)). Respondents' Amended Pre-Hearing Brief designated Ms. Monica Reese as the Peoplease employee who would testify at the hearing and indicated that wage information from similar Peoplease employees might be presented. (R. 182 / Appx. 244).[8] Petitioner's argument that he was notified only eight days prior to the hearing,[9] when he learned that Ms. Reese would testify on Respondents' behalf, that his wages would be at issue is unavailing. The amount of the average weekly wage was clearly disputed between the two parties. In any event and at a minimum, Petitioner knew prior to the hearing that Ms. Reese would testify to the wage issue and failed to object to her testimony in a timely fashion, (R. 355, line 13 – 356, line 9 / Appx. 418, line 13 – 419, line 9), thereby waiving any objections he may have had to the timeliness of Ms. Reese's testimony at the hearing before the Single Commissioner. *See* Washington v. Whitaker, 317 S.C. 108, 114, 451 S.E.2d 894, 898 (1994) (holding that "it is well settled that a contemporaneous objection must be made to preserve an argument for appellate review").

Thus, Petitioner was aware that his average weekly wage would be an issue, would be in fact one of the central issues at the hearing before the Single Commissioner and had full opportunity to present his case to both the Single Commissioner and later to the Full Commission. He also knew or should have known he bore the burden of proving his entitlement

[8] Note that, pursuant to the Commission's regulations, parties are "under a duty to promptly supplement a response with respect to any question directly addressed on the form ..." S.C. Reg. Code § 67-611.B(1). That is what Respondents did here.

[9] Although the Petition alleges Petitioner had only a seven-day notice, his earlier Motion to Remand alleged he had an eight-day notice that Ms. Reese would be testifying at the hearing. (R. 227 / Appx. 290).

to benefits and that he was required to submit all of his evidence at the hearing or request to hold the record open or delay the hearing. Clade v. Campion Labs., 330 S.C. 8, 11, 496 S.E.2d 856, 858 (1998) (holding that "[t]he claimant has the burden of proving facts that will bring the injury within the workers' compensation law ..."); Martin, 369 S.C. at 287, 631 S.E.2d at 552; S.C. Code Regs. § 67-612(J).

The Court of Appeals properly denied Petitioner's motion to submit additional evidence under S.C. Code Ann. § 1-23-380. As a result, there is no reason to grant Petitioner's request for certiorari review of this issue.

### III. The Court of Appeals properly upheld the Commission's determination of Petitioner's average weekly wage.

Petitioner incorrectly alleges that the Court of Appeals applied the wrong legal standard to the Commission's determination of his average weekly wage, from which his compensation rate is derived. Neither the Court of Appeals nor the Commission applied an incorrect legal standard. Section 42-1-40 provides four different methods of determining average weekly wage. The standard method of determining average weekly wage is to take the, "total wages paid for the last four quarters immediately preceding the quarter in which the injury occurred ... divided by fifty-two or by the actual number of weeks for which wages were paid, whichever is less." S.C. Code Ann. § 42-1-40. The second and third methods provide two alternative approaches for calculating the average weekly wage where employment prior to the injury was less than 52 weeks. Id. Where, as has been determined is the case here, "for exceptional reasons the foregoing would be unfair, **either to the employer or employee**, such other method of computing average weekly wages may be resorted to as will most nearly approximate the amount which the injured employee would be earning were it not for the injury." S.C. Code Ann. § 42-1-40 (emphasis added).

It is agreed that, "the objective of wage calculation is to arrive at a fair approximation of the claimant's probable future earning capacity," because the disability "reaches into the future, not the past." Sellers v. Pinedale Residential Ctr., 350 S.C. 183, 191, 564 S.E.2d 694, 698 (Ct. App. 2002). However, Petitioner twists the finding in Sellers in an attempt to lock the Commission into accepting any speculative future wages put forth by a claimant as the basis of the Commission's average week wage determination. That is not the holding of Sellers. Instead, where exceptional reasons exist, the "statute provides an **elasticity** or **flexibility** with a view toward always achieving the ultimate objective of reflecting **fairly** a claimant's probable **future** earning loss." Sellers, 350 S.C. at 191, 564 S.E.2d at 698 (emphasis added). The goal of the average weekly wage calculation is "to arrive at a **fair** approximation of the claimant's probable future earning capacity," Bennett v. Gary Smith Builders, 271 S.C. 94, 98, 245 S.E.2d 129, 131 (1978) (emphasis added), but not a **windfall** to the claimant. *See*, Brunson v. Wal-Mart Stores, Inc., 344 S.C. 107, 112, 542 S.E.2d 732, 734 (Ct. App. 2001) (holding that an average weekly wage based on dual employment status, when the claimant only intended to work two jobs for a short period of time, was "grossly unfair" to the employer). Thus, the Commission exercises discretion and flexibility in reaching an average weekly wage calculation that is fair to **both** the claimant and the employer.

Petitioner suggests the Commission erred by looking to what his future earning capacity might be with his present employer, and suggests the only correct result is compensation at the greatest extent possible under the Act. (Pet. p. 19). Patently, the test is not how much Petitioner would have made if he had continued working for his prior employer, or what hypothetically he might be able to make with some unnamed, uncontemplated future employer. Instead, after finding that exceptional reasons exist under Section 42-1-40 for it to calculate Petitioner's

average weekly wages, the Commission properly determined Petitioner's average weekly wage in a manner that both looks to the future and that is fair to both the claimant and the employer. In short, the Commission exercised its discretion and based Petitioner's average weekly wage, not at the rate he was earning with Peoplease at the time of the accident, not at the rate he had made working for his prior employer, Boyd Brothers, and not at the wage he alleges he was promised by someone at Bulldog but, instead, at the top rate a driver in Petitioner's class could ever earn with Peoplease. (R. 3-5, 9-10, 18-20 / Appx. 65-67, 71-72, 80-82).

Petitioner's suggestion that he is entitled to a higher average weekly wage because he might make more money with some other unnamed employer in the future, (Pet. p. 19), is entirely speculative and not supported by any evidence in the record. Similarly, Petitioner's assertions about what he made while working for Boyd Brothers are irrelevant. Not once did Petitioner testify that he had plans to go back to his former employer or to find employment with some other company where he would make more money. In analyzing this issue, it is important to keep in mind that Petitioner was sixty years old at the time of the hearing before the Single Commissioner. (R. 323, lines 17-18 / Appx. 386, lines 17-18). The only evidence in the record is that Petitioner planned to continue working for Peoplease.

Petitioner continues to insist that he has established that he was promised 50 cents per mile and even more. However, Petitioner's testimony on this point was both unreliable[10] and flatly contradicted by other testimony in the record. Specifically Ms. Reese testified to the following:

- As part of her role as corporate counsel for Peoplease, she supervises and manages all workers' compensation claims. (R. 348, line 25 – 349, line 3 / Appx. 411, line 25 – 412, line 3);

[10] Petitioner could not remember who might have told him he would make fifty cents per mile. (R. 335, lines 11-19 / Appx. 398, lines 11-19) (R. 363, lines 12-22 / Appx. 426, lines 12-22).

- She reviews every employment contract with Peoplease and completes the Form 20 for every workers' compensation claim. (R. 347, line 24 – 350, line 7 / Appx. 410, line 24 – 413, line 7);

- In this case, she reviewed the payroll of every driver who is in a similar position to Claimant, which included the payroll for about 60 drivers and, from that information, extrapolated out what Petitioner's wages would be for the year, which is a fair average of what Peoplease drivers working for Peoplease earn. (R. 350, lines 8-21 / Appx. 413, lines 8-21) (R. 357, lines 1-10 / Appx. 420, lines 1-10);

- Based on her position, experience with Peoplease, and her review of payroll to prepare for this case, she calculated that the high end of salary that drivers in Petitioner's situation would earn is forty-two cents per mile, or approximately $38,500 per year. (R. 356, lines 13-25 / Appx. 419, lines 13-25) (R. 359, line 12 – 360, line 8 / Appx. 422, line 12 – 423, line 8); and

- Ms. Reese confirmed that Peoplease does not pay any drivers in Petitioner's classification more than forty-two cents per mile and stated that she did not know of anyone who would have told Petitioner he would make fifty cents per mile. (R. 362, lines 5-22 / Appx. 425, lines 5-22).

The Court of Appeals properly upheld the Commission's determination of Petitioner's average weekly wage based on Ms. Reese's testimony.

Despite his claims otherwise, the "documentary evidence" consisting of Petitioner's paystubs do not support his argument that he was told he would make fifty cents per mile, or that "he was paid as much as $1.00/mile." (Pet. p. 19). The paystubs appearing at R. 160-163 / Appx. 222-225 are not entirely legible. However, what they do indicate is that the payment on the check was calculated at a "Rate" of $1.00 for "Hours" of work. For instance, the June 27, 2008 paystub reflects 177.50 hours, not miles, paid at a rate of $1.00 per hour. (R. 161 / Appx. 223). The February 1, 2008 paystub reflects 368 hours, not miles, paid at a rate of $1.00 per hour. (R. 162 / Appx. 224). Thus Petitioner's argument that the record contains evidence that he was paid at $1.00/mile does not withstand scrutiny, was apparently rejected by the Court of Appeals, and should be disregarded by this Court.

There was no legal error simply because Petitioner was not awarded benefits based on the average weekly wage he sought. Petitioner has presented no reasons that warrant a review by this Court of the average weekly wage issue, and his Petition should be denied.

## IV. The Court of Appeals properly upheld the Commission's determination that Petitioner is not entitled to lifetime medical care for his lower back.

Petitioner is simply incorrect in asserting that the Court of Appeals either overlooked or disregarded undisputed evidence that his current lower back problems were caused by the accident and/or that the Court of Appeals erred as a matter of law by failing to award him lifetime medical care for his lower back. As noted above, [t]he claimant has the burden of proving facts that will bring the injury within the workers' compensation law, and such award must not be based on surmise, conjecture or speculation." Clade, 330 S.C. at 11, 496 S.E.2d at 858. The fact that Petitioner failed to prove his entitlement to lifetime medical care for his lower back does not mean any error was committed by the Commission or the Court of Appeals.

As the Court of Appeals has noted,

> Section 42-15-60 does not explicitly state that the medical treatment must be causally related to the original compensable injury. However, the statute does require the employer to furnish medical treatment from the date of 'an injury' and thus implies that payment for medical treatment in cases of permanent disability would be paid **only** if related to the original compensable injury.

Munn v. Nucor Steel, 336 S.C. 28, 31-32, 518 S.E.2d 289, 290 (Ct. App. 1999) (emphasis added). "It naturally follows that any medical treatment claimed under § 42-15-60 must be causally related to the 'injury by accident' arising out of and in the course of employment." Munn, 336 S.C. at 32, 518 S.E.2d at 290. The Act is not a general insurance scheme covering all employee injuries, Roper Hosp. v. Clemons, 326 S.C. 534, 537 n.1, 484 S.E.2d 598, 599 n.1 (Ct. App. 1997) (instructing that, "the act should be converted into a form of insurance"), and Petitioner's attempt to treat it as such here should be denied.

Although Petitioner correctly, albeit somewhat flamboyantly, sets forth the substantial evidence standard, (Pet. pp. 21-22), he incorrectly suggests that that standard has been misapplied in this case. Contrary to Petitioner's accusations, the Court of Appeals reviewed the Record and properly determined that "the few medical references in the record are insufficient to prove a causal link, and the substantial evidence in the record supports the Appellate Panel's decision that Brown presented no medical evidence that related his lumbar problems to the accident." (Appx. 509-512).

The Commission is given discretion to weigh and consider all the evidence, both lay and expert, when deciding whether causation has been established." Tiller v. National Health Care Ctr. of Sumter, 334 S.C. 333, 339-40, 513 S.E.2d 843, 846 (1999). As such, the Commission is entitled to believe all, part or none of a witness's testimony. Holcomb v. Dan River Mills/Woodside Div., 286 S.C. 223, 225, 333 S.E.2d 338, 340 (Ct. App. 1985). Concomitantly, once admitted, expert testimony is to be considered just like any other testimony. Tiller, 334 S.C. at 340, 513 S.E.2d at 846. Indisputably, it is the Commission's prerogative to weigh the evidence, both lay and expert. Sharpe v. Case Prod., Inc., 336 S.C. 154, 161, 519 S.E.2d 102, 106 (1999) (even where medical opinions are "uncontroverted," the final determination of fact remains with the Commission where those opinions are "merely deductions drawn from certain symptoms"); *see also* Pack v. South Carolina Dept. of Transp., 381 S.C. 526, 536, 673 S.E.2d 461, 466-67 (Ct. App. 2009) (observing that the "Commission need not accept or believe medical or other expert testimony, even when it is unanimous, uncontroverted, or uncontroverted").

The record is replete with evidence of treatment provided for Petitioner's cervical injury and the aggravation of his diabetes. (R. 36-56, 66-107 / Appx. 98-118, 128-169). In contrast,

the evidence concerning his lower back problems is tenuous, speculative, contradictory and unsupported by any treatment records. Thus, the Commission's findings of fact that Petitioner suffered only a work-related cervical injury and aggravation of his underlying diabetic condition, and that "[t]here is no specific medical report that ties the lumbar problems to the injury at work," are supported by substantial evidence in the record and should be upheld by this Court.[11]

Petitioner's arguments regarding specific evidence that he insists is "undisputed" are misplaced and do not warrant further review. First, the emergency room notes from July 6, 2008 that Petitioner quotes, (Pet. p. 22), state quite clearly that, "History [was] obtained from patient." (R. 61 / Appx. 123). Thus, the statement that, "pt was in a mvc 2months ago when he developed the pain," (R. 61 / Appx. 123), was **Petitioner's** version of events as recorded by the emergency room staff. Clearly, a medical record merely recounting a history provided by a claimant does not constitute independent medical evidence establishing causation. While in certain circumstances, statements by a claimant at a hearing where he or she is subject to cross-examination might support such a causal link, such unsubstantiated statements by a claimant to a medical provider where there is no ability to test their veracity cannot establish causation.[12] Furthermore, although the emergency room notes indicate "Lower back pain after mvc," they also state, "Patient denies back pain." (R. 63 / Appx. 125). Thus, the evidence Petitioner relies on is insufficient to establish causation and, at best, is contradictory and internally inconsistent.

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[11] To the extent Petitioner suggests, as he did below, that Respondents conceded his lower back injury was compensable, he is incorrect. Respondents vigorously denied Petitioner's entitlement to medical care for his lower back at the hearing before the Single Commissioner, (R. 322, 342-343 / Appx. 385, 405-406), and before the Full Commission. (R. 376-378 / Appx. 439-441). Respondents clearly stated that this is, "not a back claim, there's not any evidence to substantiate a finding of lifetime medical care for his lower back." (R. 378, lines 16-18 / Appx. 441, lines 16-18).

[12] In addition, the suggestion that Petitioner "does a lot of heavy lifting at work," (R. 61 / Appx. 123), is contradicted by Petitioner's own testimony that one of the reasons he took the job with Peoplease was that he would not have to do the loading and unloading that was required in his prior position with Boyd Brothers. (R. 341, line 19 – 342, line 4 / Appx. 404, line 19 – 405, line 4).

Second, Petitioner notes that he was referred to Dr. Abu-Ata. (Pet. p. 22). However, Dr. Mahmoud Abu-Ata treated Petitioner solely for his cervical neck/back problems. Dr. Abu-Ata, relying again on Petitioner's "description of his pain," ordered an MRI done of both Petitioner's cervical and lumbar areas of his back. (R. 69-70 / 131-132). Those tests were performed on July 25, 2008, (R. 57-60 / Appx. 119-122), after which **all** of the treatment provided to Petitioner was to the cervical area. (R. 67-68, 79-107, 115-116 / Appx. 129-130, 141-169, 177-178). Note that Petitioner recounts that due to his severe cervical condition, he was "an emergency referral to Dr. Scott Boyd, neurosurgeon ..." (Pet. p. 23). There was no similar referral – emergency or otherwise – to deal with any lower back issues and no subsequent treatment.

Next, Petitioner points to Dr. Boyd's medical notes, (Pet. p. 23), that indicate he was treating Petitioner for "back and neck pain." (R. 95 / Appx. 157). In particular, Petitioner points to Dr. Boyd's checking of "yes" to the question, "Is it your opinion to a reasonable degree of medical certainty that the problems [Petitioner] has with his neck and back and his need for medical care either stem directly from the automobile accident of May 2, 2008 or the accident aggravated and cause to become symptomatic a pre-existing conditions in his neck and back which resulted in the need for medical care?", (R. 90 / Appx. 152), as evidence supporting a causal link between Petitioner's lower back pain and his job-related accident. However, other medical records reveal that Dr. Boyd used the terms "neck" and "back" interchangeably to refer to Petitioner's cervical area. Dr. Brown advised Bulldog that, "Mr. Brown is having **back** surgery 09/02/08." (R. 93 / Appx. 155 (emphasis added)). The September 2, 2008 surgery, performed by Dr. Boyd, was an anterior cervical discectomy and fusion. (R. 105-106 / Appx. 167-168). Thus, the fact that Dr. Boyd checked "yes" to a question framed by Petitioner's attorney is inherently ambiguous. Petitioner's counsel may have intended for the word "back" to

refer to Petitioner's lower back, but it is not how Dr. Boyd used the term in other medical records, so his meaning on this form is unclear at best. Because Dr. Boyd was only treating Petitioner for his cervical problems and provided absolutely no treatment to Petitioner's lower back, it is more likely that he was answering the questionnaire with regard to the cervical area of Petitioner's back than that he was opining on an area he had never treated. (R. 79-107 / Appx. 141-169).

Similarly, it is unclear whether Dr. Blake Moore, who performed an independent medical review on April 4, 2009, was referring to the cervical or lumbar region of Petitioner's back when he stated that there was a causal connection between Petitioner's "back and neck pain," and his workplace incident. In any event, although Dr. Moore evaluated Petitioner and reviewed his medical records, there would have been no medical records chronicling any treatment to the lumbar region for him to review, as there has been no medical treatment to Petitioner's lower back. Furthermore, Dr. Moore's statement re causation is based on the Petitioner's "report" only, and certainly not on any medical treatment records in the file, as there were none. Thus, his comments and conclusions regarding Petitioner's back are both inconclusive and speculative because they are not based on medical records, and the Commission properly declined to credit them any weight. *See* Pack, 381 S.C. at 536, 673 S.E.2d at 466-67.

Petitioner points to one speculative statement by Dr. Forrest as proof that substantial evidence does not support the Commission's Decision, despite the fact that Petitioner admits Dr. Forrest recognized that there were no studies indicating the etiology of Petitioner's lower back complaints. (R. 119 / Appx. 181). Although Petitioner correctly notes that Dr. Forrest stated, "[i]t is certainly most likely that Mr. Brown's ongoing symptoms including those in the neck and upper extremities as well as the low back and lower extremities are the result of the motor

vehicle accident of May '08," Dr. Forrest immediately qualified that statement by saying only that the lower back "also certainly seems to be related to the motor vehicle accident for the same reason as noted above, but has not been evaluated adequately at this point." Dr. Forrest specifically noted the absence of any studies of the lumbar spine, so his statements are purely speculative, based on nothing other than Petitioner's self-serving statements.

At the hearing, although invited by his counsel to state that his accident caused lower back problems, Petitioner only stated only that the pain goes up and down but he could not pinpoint the origin of his back pain:

Q: And, then, but you also reported problems with your low back. What kind of problems are you having with your low back?

A: Well, that's been ongoing, **the pain it goes up and down my back**.

Q: Does some of it emanate from your low back, though, and does it start there?

A: Well, **it seems like it starts from the back of my neck and goes down** and then sometimes it varies also. It be coming up, it feels different all the time. **I really couldn't pinpoint in particular**.

(R. 334, line 16 – 335, line 1 / Appx. 397, line 16 – 398, line 1) (emphasis added). Thus, even Petitioner was unable to definitively pinpoint the source or cause of any alleged lower back pain.

Petitioner's statement that, "[t]here is no evidence in the Record that any treatment needed for or problems he was having with his back in any area of his back, separate and apart from his neck, are related to the automobile accident," appears to conceded Respondents' point – there simply is no evidence causally linking any problems Petitioner may be having with his lower back to his work related accident. Assuming, however, that Petitioner did not intended to concede this point, Respondents point out that the causal link was Petitioner's burden to prove, and that the substantial evidence standard asks whether substantial evidence supports the Commission's factual determinations, not whether there is any evidence in the record that might

support the opposite conclusion, which is the result Petitioner is urging upon this Court. In addition, Petitioner's assertion that, "nor was any treatment ever not authorized and paid for by Respondents," (Pet. p. 24), is simply irrelevant. Petitioner testified that he has had absolutely no surgery or any medical treatment on his lower back. (R. 342, lines 17-23 / Appx. 405, lines 17-23). Respondents have not refused to pay for treatment to Petitioner's lower back precisely because there has been none. All of the treatment authorized and paid for by Respondents has been to Petitioner's neck and cervical injuries, which include the upper, or cervical, region of his back, and for his diabetes.

The Court of Appeals properly reviewed the evidence and correctly concluded that the Commission's determination that Petitioner "presented no medical evidence that related his lumbar problems to the accident," was supported by substantial evidence in the record. Petitioner has presented no legal error or factual deficiencies in the Court of Appeals' determination of this issue and, therefore, his Petition for review of this issue should be denied.

## CONCLUSION

For the reasons set forth herein, this Court should deny Petitioner's Petition for Writ of Certiorari in its entirety, including the request that this matter be remanded to the Commission for the admission of late-submitted evidence.

Respectfully submitted,

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May 28, 2013

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THE STATE OF SOUTH CAROLINA
In the Supreme Court

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APPEAL FROM THE SOUTH CAROLINA
WORKERS COMPENSATION COMMISSION

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Opinion No. 5-082
SC Ct. App. filed February 13, 2013
Withdrawn, Substituted and Refiled March 27, 2013

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Thomas Lee Brown,..... Petitioner,

v.

Peoplease Corporation, and
Arch Insurance Company
c/o Gallagher Bassett Services, Inc..... Respondents.

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**PROOF OF SERVICE**

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I certify that on the 28th day of May 2013, I served the **Respondents' Return in Opposition to Petitioner's Petition for Writ of Certiorari** on Thomas Lee Brown by depositing a copy of it in the United States Mail, postage prepaid, addressed to his attorney of record:

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