THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM THE APPELLATE PANEL OF THE SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION

CASE NUMBER 2016-002321

DAVID LEMON, Employee, ... Appellant,

-vs.-

MT. PLEASANT WATERWORKS, Employer,
and STATE ACCIDENT FUND, Carrier, ...Respondents.

[INITIAL] BRIEF OF APPELLANT

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STATEMENT OF ISSUES ON APPEAL

Did the Workers' Compensation Commission Err, as a matter of law, by offsetting the Claimant's award of permanent and total disability by awards he had received for prior claims?

STATEMENT OF THE CASE

This is a workers' compensation appeal from the Decision and Order of the S.C. Workers' Compensation Commission issued on October 26, 2016.

Claimant/Appellant (hereinafter referred to as "Appellant") was involved in an admitted work accident on May 8, 2012 when he injured his lower back and legs while pulling a device designed to provide leverage on a sewer line. (Record 8, Page 2). As a result of his accident, Defendants/Respondents (hereinafter referred to as "Respondents") provided Appellant medical treatment and also paid him temporary total disability benefits.

On March 6, 2014, Appellant filed a Request for Hearing, alleging injuries to the back and bilateral legs, and seeking an award of permanent and total disability. On April 7, 2014, Respondents timely filed a Response. In addition, on May 1, 2014, Respondents filed a Request for Hearing, seeking a stop payment of temporary total disability compensation, a determination of permanency, and a request for credit for overpayment of temporary compensation.

On September 11, 2014, a hearing a was held on all pleadings before Single Commissioner Scott Beck ("Single Commissioner"). On January 7, 2015, the Single Commissioner issued a decision and

order (Record 1), wherein he set forth the following relevant Findings of Fact:

FINDINGS OF FACT:

1. I find, based upon the greater weight of the evidence, the Claimant is permanently and totally disabled pursuant to S.C. Code §42-9-10. The Claimant has sustained permanent injuries to more than one body part, namely, his back and both legs. As such, his claim for permanency is not restricted to the schedule of benefits as provided by S.C. Code §42-9-30. *Singleton v. Young Lumber*, 114 S.E. 2d 837 (S.C. 1960). The primary injury to the back has affected the use of both legs. This has been documented by both authorized treating physicians, Dr. Aymond and Dr. Duc. This finding is further supported by the Claimant's testimony that he continues to have low back pain and pain radiating into both legs and feet. The Claimant further testified as to the loss of balance and limitations with respect to his back, legs and feet. The Defendants have introduced no medical evidence or testimony to rebut the evidence that the Claimant has sustained permanent injuries to more than one body part.

3. I find that this is Claimant's fifth (5^{th}) work accident as an employee of Mt. Pleasant Waterworks, and he has received disability compensation for prior injuries as follows: 3/04/2009 back injury, 3 weeks of TTD; 4/26/2010 & 4/13/2011 right shoulder injuries, 25.4286 weeks of

TTD, and 75 weeks PPD per settlement; 10/3/2011 back injury, 20.5714 weeks of TTD, and 75 weeks of PPD per settlement. By date of hearing, Claimant will have received 122 weeks of TTD for the current injury.

4. As of the date of this proceeding on September 11, 2014, the Defendant was entitled to 321 weeks of credit. Any additional payments of temporary total disability since the date of the Hearing are to be applied as a credit for the Defendants. **I specifically find that I need not look any further than the plain language of S.C. Code §42-9-170. (emphasis added)**

12. The Defendant's vocational expert ultimately conceded that all of the jobs that she identified in her Labor Market Survey that the Claimant could perform required online applications and that it would be difficult for the Claimant to apply for these jobs because of his limited computer skills. Additionally, the expert conceded that the Claimant would most probably have to miss more than four (4) days of work per month because of his physical condition and that by definition, an individual who misses more than four (4) days per month from work, would be deemed to be vocationally disabled.

13. In contrast to the Defendant's vocational expert's equivocal testimony, the Claimant's vocational expert, David Price, unequivocally found that the Claimant is permanently and totally disability and is not a candidate

for vocational rehabilitation. (EX 1).

The Single Commissioner then concluded, as a matter of law, as follows:

1. §42-9-10 provides for permanent total disability benefits; and

3. **§42-9-170** provides that the maximum exposure for the payment of disability benefits is 500 weeks for the multiple claims filed by an employee with the same employer. The maximum number of disability is 500 weeks. **I specifically find that there is no need to look any further than the plain language of §42-9-170 to determine the number of weeks of credit the Defendant is entitled to receive. (emphasis added)**

On January 20, 2015, Appellant filed a Form 30 request for Commission review. (Record 2). The essential basis for the appeal from the Single Commissioner's order was that he had erred by finding and awarding the Respondents a credit for the awards that the Appellant had received from prior claims when there was no statutory basis to do so. Certainly no credit was due pursuant to the specific code section stated in his order, Code Section 42-9-170, because this code section only applies to Code §42-9-10(B) awards but not to Code §42-9-10(A) awards.

It should be noted that the Respondents did not appeal any part of the Single Commissioner's order.

Oral arguments on the appeal from the Single Commissioner's Order to the Commission's Appellate Panel (hereinafter "Appellate

Panel") was scheduled and heard on April 20, 2015 (Record 3).

Most of the discussion before the Appellate Panel involved whether the Single Commissioner intended to award the Claimant permanent total disability benefits pursuant to Code §42-9-10(A) or Code §42-9-10(B) since the order only referenced §42-9-10, without specifying which subsection. Appellant argued that if the award was pursuant to Code §42-9-10(A) then Code §42-9-170 could not apply.

On September 11, 2015, the Appellate Panel issued a decision and order (Record 4), remanding the case back to the Single Commissioner (1) for a determination of the particular subsection of §42-9-10 used in the award of the present case; (2) for a determination of the statutes under which prior awards were issued; and (3) for any facts, analysis, conclusions of law, or other provisions that the Single Commissioner should deem necessary in the analysis of the §42-9-170 issue.

On May 9, 2016, the Single Commissioner issued a second decision and order (Record 5) in which he set forth the following Findings of Fact and Conclusions of Law:

Findings of Fact:

1. All Findings of Fact issued via the January 7, 2015 Decision & Order not inconsistent with the instant opinion are hereby reaffirmed herein.

2. The award in this case is based on 42-9-10(A).

3. The previous awards for injuries sustained with the same employer were awarded under 42-9-30.

4. The phrase "receives a permanent injury" in 42-9-170(B) refers to the present claim and "another permanent injury in the same employment" refers to the Claimant's prior injuries.

5. As a result of these additional findings of fact, the Claimant is subject to the 500 weeks limitation.

6. While I initially stated that I needed to not look any further than the plain language of S.C. Code Section 42-9-170, upon expanding my

research to other cases and statues, I am even more convinced that the law allows that the Defendants be given a credit for all indemnity benefits paid during the Claimant's employment with Mt. Pleasant Waterworks.

7. The Claimant was paid 3 weeks of TTD for his back claim, WCC #0902321, DOI 3/4/09.

8. The Claimant was paid 25.4286 weeks of TTD for his shoulder claim, WCC #1006927, DOI 4/26/10. The Claimant also injured and/or aggravated his shoulder on 4/13/11 (WCC #1103641) and was not paid TTD. WCC #s 1006927 and 1103641 were settled via a clincher for $30,357.75. The clincher provided that the settlement represented "any and all disability claims to include 25% to the right shoulder."

9. The Claimant was paid 75 weeks of PPD for the combination of claims #1006927 and #1103641.

10. The Claimant was paid 20.5714 weeks of TTD and 75 weeks of PPD for his back claim, WCC #1114198, DOI 10/3/11.

11. The Claimant previously incurred permanent partial disability through the loss of his shoulder (WCC #s 1006927 and 1103641).

12. The Claimant has currently incurred total permanent disability through the loss of another member, loss of his back with radiculopathy.

13. Defendants' liability per Section 42-9-170 is for his subsequent (back) injury only, which grants Defendants a credit or offset for all benefits paid for his two shoulder claims (totaling 100.4286, which is 25.4286 + 75). Such credit or offset is taken against the Claimant's maximum recovery of 500 weeks.

14. There has been no allegation, and no proof even if there had been an allegation, of paraplegia, quadriplegia, or physical brain damage.

15. The Claimant's incapacity for work is total due to his current condition.

16. As of his May 8, 2012 date of injury for the instant claim, the Claimant had already lost 25% of his back (75 weeks) pursuant to the clincher agreement for SCC #1114198.

17. Because the Claimant had already been compensated for 25% loss of use of his back under the SC Workers' Compensation system, the Claimant had only 75% of his back available to be awarded as of the date of his injury May 8, 2012.

18. Pursuant to Hopper v. Firestone Stores, Medlin v. Greenville County, and other relevant cases, Defendants are entitled to a credit or offset for the PPD paid to the Claimant for loss of his use of his back, i.e. 75 weeks, per WCC #1114198.

19. Pursuant to United Technologies v. S.C. Second Injury Fund, Roberts v. McNair, and other relevant cases, Defendants are entitled to a credit or offset for the TTD paid to the Claimant during his back claims, i.e. 3 weeks per WCC #0902321 and 20.5714 weeks per #1114198.

Conclusions of Law:

1. Pursuant to Section 42-9-10(A) the Claimant is permanently and

totally disabled based upon age, education level, ongoing complaints, medications, restrictions, limitations, and inability to identify work that he could complete, considering his condition.

2. Wyndham v. R.A. & E.M. Thornley and Co., provides that Section 42-9-170 limits "to five hundred weeks the total compensation available for successive permanent injuries sustained in the same employment." 291 S.C. 496, 354 S.E.2d 399 (Ct. App. 187).

3. Section 42-9-170 provides that if an employee previously has incurred permanent partial disability through the loss of a hand, arm, shoulder, foot, leg, hip, or eye and by subsequent accident incurs total permanent disability through the loss of another member, the employer's liability is for the subsequent injury only, except that the employee may receive further benefits as provided under the provisions of Section 42-9-35.

4. Hopper v. Firestone Stores provides that compensation due, if any, "must be based only upon the extent to which the loss or loss of use existing after the last injury exceeds that which existed prior thereto." 222 S.C. 143, 72 S.E.2d 71 (S.C.1952).

5. Medlin v. Greenville County provides that the maximum compensation is five hundred weeks and that, once the value of a body part is "written off" then that portion of the body part is "nonexistent insofar as the Act is concerned." 303 S.C. 484, 401 S.E.2d 667 (S.C. 1991).

6. United Technologies v. S.C. Second Injury Fund provides that temporary compensation, even if paid in another state pursuant to another stat's laws, are considered weeks of indemnity compensation. 318 S.C. 213, 456 S.E.2d 901 (S.C. 1995).

7. Roberts v. McNair Law Firm provides that temporary compenation is considered weeks of indemnity compensation and that "the period for compensation may not exceed 500 weeks." 366 S.C. 50, 691 S.E.2d 453 (S.C. 2005).

8. Gestinger v. Owens-Corning Fiberglass provides that, upon an award of 500 weeks of compensation, an offset should be granted for previous payments. 335 S.C. 77, 515 S.E.2d 104 (S.C. 1999).

9. Crisp v. SouthCo., Inc. provides that "in general, a person injured within the Act may not receive compensation for a period exceeding five hundred weeks" and, in so finding, quoted Section 42-9-10(A). 401 S.C. 627, 738 S.E.2d 835 (S.C. 2013).

10. Reed-Richards v. Clemson University provides that, in SC, "the normal statutory maximum [is] 500 weeks." 371 S.C. 304, 638 S.E.2d 77 (S.C. 2006).

11. James v. Anne's provides that "the maximum period for benefits is generally 500 weeks" and "in no case may the period covered by the compensation exceed five hundred weeks" except in cases of paraplegia, quadriplegia, and physical brain damage. 390 S.C. 188, 701 S.E.2d 730 (S.C. 2010).

On May 23, 2016, Appellant filed a second Form 30 Request for Commission Review (Record 6) from the Single Commissioner's second

order. Again, the Appellant maintained that the offset from the award for permanent total disability for awards relating to prior unrelated claims was unlawful.

The second appeal to the Appellate Panel was heard by the Panel on August 15, 2016. (Record 7). The Full Commission reviewed the Single Commissioner's order of May 9, 2016 and on October 26, 2016, issued a Decision and Order affirming the Single Commissioner's May 9, 2016 Decision and Order in full. (Record 8).

On November 10, 2016, Appellant filed his notice of appeal to the Court of Appeals, appealing the Decision and Order of the Workers' Compensation Commission dated October 26, 2016.

FACTS

There are no factual issues in dispute. The only issue presented is a matter of law.

ARGUMENT

The S.C. Workers' Compensation Commission erred, as a matter of law, by offsetting the Appellant's award for permanent and total disability by awards he had received for unrelated prior claims when there was no statutory or common law basis to do so.

On January 7, 2015, the Single Commissioner awarded the Appellant permanent and total disability benefits pursuant to S.C. Code §42-9-10. (Record 1). This disability award has never been challenged by the Respondent.

As stated above, the Appellant was injured on May 8, 2012 while performing heavy manual labor. He injured his low back and legs while pulling a device designed to provide leverage on a sewer

line. (Record 8, Pg. 2). At the time of his injury, the Appellant was earning $636.04. (Record 1, Pg. 3, Stipulation 2). According to the Single Commissioner, the Appellant was awarded permanent and total disability benefits because of the permanent injuries to his back and both legs. The primary injuries to the back that affected both legs was documented by both of his treating physicians, Dr. Aymond (Record 1, APA 26) and Dr. Duc (Record 1, APA 4). Accordingly, benefits were awarded pursuant to S.C. Code §42-9-10. Benefits were not restricted to the schedule of benefits as provided by S.C. Code §42-9-30. (Record 1, Finding of Fact 1).

On remand from the Single Commissioner, the Appellate Panel specifically found that the award for permanent and total disability benefits was pursuant to S.C. Code §42-9-10(A). (Record 8, Finding of Fact 2, Pg. 10). The Panel also concluded as a matter of law:

1. "Pursuant to §42-9-10(A) the Claimant is permanently and totally disabled based upon age, education level, ongoing complaints, medications, restrictions, limitations, and inability to identify work that he could complete, considering his condition." (Record 8, Conclusion of Law 1, Pg. 12).

THE OFFSET FOR §42-9-10(A) APPLIES

The Appellant maintains that the only limitation on the number of weeks that he can receive for permanent and total disability benefits is 500 weeks pursuant to S.C. Code §42-9-10(A). As such, the Appellant also concedes that the Respondents are entitled to a

credit for the weeks of temporary total disability benefits that have been paid to the Claimant for the injury resulting from the subject accident.

S.C. Code §42-9-10(A) provides that "when the incapacity for work resulting for an **injury** is total, the employer shall pay...to the injured employee...a weekly compensation...in no case may the period covered by the compensation exceed 500 weeks."

S.C. Code §42-1-160 provides "**injury**" and "personal injury" meaning only injury by **accident** arising out of and in the course of employment."

Based upon the above, it is submitted that the cap of 500 weeks only applies to an injury arising from an accident; one accident, not multiple accidents. In the present case, the injury sustained by the Claimant from his accident of May 8, 2012 can only result in the maximum award of 500 weeks, inclusive of any weeks paid for temporary total disability benefits. As such, the Claimant does not dispute the credit awarded by the Single Commissioner with respect to the prior weeks that had been paid for temporary total disability benefits relating to the subject accident.

"Under South Carolina workers compensation law, a claimant is entitled to compensation for a total disability resulting from a work-related injury. S.C. Code Ann. §42-9-10 (1985 and Supp. 1995). The term "disability" is defined as "incapacity because of injury to earn the wages that the employee was receiving at the time of the injury in the same or any other employment." Orr v. Elastomeric Products, 323 S.C. 342, 474 S.E.2d 448 (Ct. App. 1996).

In Wigfall v. Tideland Utilities, Inc., 354 S.C. 100, 580 S.E.2d 100 (2003), the Supreme Court distinguished between the "two competing models" of workers' compensation. "The first, the economic model, defines disability and incapacity in terms of the claimant's loss of earning capacity as a result of the injury. The second, the medical model, provides awards for disability based upon degrees of medical impairment to specified body parts." Supra, at 104.

The Court went on to state that "South Carolina provides three methods to obtain disability compensation: 1) total disability under S.C. Code Ann §42-9-10; 2) partial disability under S.C. Code Ann. §42-9-20; and 3) scheduled disability under S.C. Code Ann. §42-9-30. The first two methods are premised on the economic model, in most instances, while the third method conclusively relies upon the medical model with its presumption of lost earning capacity." Supra, at 105.[1]

Significantly, in the present case, the award for permanent total disability was pursuant to §42-9-10(A). Such an injury, which is not a §42-9-30 scheduled injury, causes sufficient loss of earning capacity to render an injured employee totally disabled. An example cited by the Court is one in which an employee experiences a double hernia after being injured while at work. In Coleman v. Quality Concrete Products, Inc., 245 S.C. 625, 142 S.E.2d 403

[1]Another manner in which an injured employee may be deemed to be entitled to permanent and total disability benefits is pursuant to §42-9-10(B), that does not apply in the present case. This loss of earning capacity is like a scheduled loss in §42-9-30, conclusively presumed based upon "the loss of both hands, arms, shoulders, feet, legs, hips, or vision in both eyes, or any two there of." See, footnote 4, Wigfall, at 118

(1965), "the Claimant established the double hernia, coupled with a lack of education or adequate job training, made him unable to find comparable, stable employment. The injury, combined with those other factors, diminished his earning capacity to such an extent as to entitle him to total disability." Wigfall, at 105-106.

Thus, the Appellant reiterates that since the finding of permanent total disability benefits in the present case was pursuant to Code §42-9-10(A), then the medical impairment model of disability consistent with §42-9-30 does not apply. Nor does disability based upon S.C. Code §42-9-10(B) apply.

THE OFFSET FOR S.C. CODE §42-9-170 DOES NOT APPLY

Although the Appellant takes no issue with the Commission's crediting the Respondents for the prior payments of temporary total disability compensation for the subject claim, the Appellant vehemently opposes the offset that was given to the Respondents for the awards that he had received for prior unrelated injuries pursuant to S.C. Code §42-9-30. Additionally, the specific code section that the Commission has relied on as a basis for such an offset, S.C. Code §42-9-170, does not apply.

S.C. Code §42-9-170(B)[2] states:

> If an employee receives a permanent injury as **specified in Section 42-9-30 or Section 42-9-10(B)** after having sustained another permanent injury in the same employment, he is entitled to compensation for both injuries, but the total compensation must be paid by extending the period and not by increasing the amount of weekly compensation, and in no case

[2]S.C. Code Section 42-9-170(A) does not apply because it was only effective until June 30, 2008.

> exceeding five hundred weeks. If an employee previously has incurred permanent partial disability through the loss of a hand, arm, shoulder, foot, leg, hip, or eye and by subsequent accident incurs total permanent disability **through the loss of another member**, the employer's liability is for the subsequent injury only, except that the employee may receive further benefits as provided under the provisions of Section 42-9-35. This subsection is effective on July 1, 2008. (Emphasis added)

It is well settled that the Workers' Compensation Act is an Act that is created by statute. Therefore, it is also well recognized that the law that is applicable to the Act and the Commission's authority to render decisions and orders are derived from the plain reading from the statutes contained in the Act. "Workers' compensation is a creature of statue. As such, we are bound to strictly construe the terms of the statute." Brown v. Bi-Lo, Inc., 354 S.C. 436, 581 S.E.2d 836, (2003). "Workers' compensation statutes provide an exclusive compensatory system in derogation of common law rights. See, Caughman v. Columbia YMCA, 212 S.C. 337, 47 S.E.2d 788 (1948). As such, when reading a workers' compensation statute we strictly construe its terms, leaving it to the Legislature to amend and define its ambiguities." Wigfall v. Tideland Utilities, Inc., 354 S.C. 100, 580 S.E.2d 100 (2003).

As to the general construction of the Workers Compensation Act, workers' compensation pays an employee benefits for damages resulting from personal injury or death by accident arising out of and in the course of the employment. (S.C. Code Ann. §42-1-310). In

determining whether a work-related injury is compensable, the Workers' Compensation Act (Act) is liberally construed toward the end of providing coverage rather than denying coverage in order to further the beneficial purposes for which it was designed. Shealy v. Aiken Cnty, 341 S.C. 448, 535 S.E.2d 438 (2000) (citation omitted). Any reasonable doubt as to the construction of the Act will be resolved in favor of coverage. Mauldin v. Dyna-Color/Jack Rabbit, *308 S.C. 18, 22, 416 S.E.2d 639, 641 (1992).*

The primary issue on appeal is whether the Respondents are entitled to an offset for payments of prior awards to the Claimant. In order to credit the Employer for any payments from prior awards, it would have to be specifically authorized pursuant to §42-9-170(B) or specific case law.

The above Code Section specifically states that "if an employee received a permanent injury as specified in **§42-9-30** or **§42-9-10(B)** after having sustained another permanent injury in the same employment, he is entitled to compensation for both injuries...and in no case exceeding 500 weeks."

The clear reading of the statute is that this code section **only applies** if the Employee received an award for permanent injury as specified in **§42-9-30** or **§42-9-10(B)**. In the present case, since the Commission determined that the award was pursuant to §42-9-10(A) and not §42-9-10(B) [and certainly not §42-9-30], §42-9-170(B) simply does not apply.

The Commission then cites the second sentence of §42-9-170(B) as support for the credit for the prior awards. To do so would

torture the plain meaning of the statute. The second sentence of this subsection does not apply because this provision only applies when a Claimant sustains total permanent disability by a subsequent accident through the loss of another member. In this case the Claimant's award for permanent total disability was not based upon a loss of another member pursuant to Code §42-9-30. To the contrary, the award was pursuant to §42-9-10(A)[3]. There is absolutely no reference to S.C. Code §42-9-10(A) in Code §42-9-170(B). Its omission from the triggering statutes is significant.

The Commission also cites various cases as common law support for the offset attributable to the prior awards. Interestingly, most, if not all of, the cited cases precede the 2007 amendment to S.C. Code §42-9-170. As such, they do not apply in the present case. Lastly, none of the cases are on point to the specific issue presented in this appeal.

CONCLUSION

Based upon the above, it is respectfully submitted that the Commission erred by awarding the Respondents a setoff for the awards that the Claimant had received for his prior unrelated injuries. Simply stated, there is no lawful basis to do so in the present case.

Appellant urges this Court to reverse the Commission's ordering that the Appellant's award for permanent total disability benefits be offset by his prior awards for unrelated claims.

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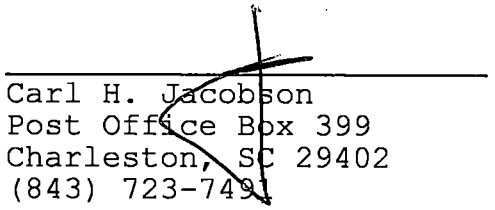
[3]Even if the present award was "through the loss of another member," the Employer's liability is for the subsequent injury only. In the present case, Appellant maintains and the Commissioner found that the subsequent injury caused the Claimant to become totally disabled, so the liability would be for permanent total disability benefits.

Respectfully submitted,



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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM THE APPELLATE PANEL OF THE SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION

CASE NUMBER 2016-002321

DAVID LEMON, Employee, ... Appellant,

-vs.-

MT. PLEASANT WATERWORKS, Employer,
and STATE ACCIDENT FUND, Carrier, ...Respondents.

PROOF OF SERVICE

I certify that I have served the [Initial] Brief of Appellant David Lemon and Designation of Matter to be included in the Record on Appeal by depositing a copy of it in the United States Mail, postage prepaid, on February 6, 2017, addressed to the attorney of record, J. Gabriel Coggiola, 421 Wando Park Blvd., Suite 100, Mt. Pleasant, SC 29464 [by certified mail with return receipt requested on February 6, 2017].

February 6, 2017

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February 6, 2017

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RE: David Lemon, Employee, Appellant vs.
Mt. Pleasant Waterworks, Employer, and
State Accident Fund, Carrier, Respondents
Case No. 2016-002321

Dear Sir/Madam:

Enclosed for filing is the Initial Brief of Appellant; Designation of Matter with Proof of Service in the above case.

Sincerely,

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