THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION

Opinion No. 5082
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Withdrawn, Substituted and Refiled March 27, 2013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.

PETITION FOR WRIT OF CERTIORARI

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CERTIFICATE OF COUNSEL

Counsel for Petitioner certifies that the Petition for Rehearing was made and finally ruled on by the Court of Appeals on March 27, 2013.

QUESTIONS PRESENTED

I. Did the Commission err as a matter of law by not performing its judicial and administrative function requiring it to write its own Appellate Panel Order, making its own Findings of Fact, Conclusions of Law and Decision, and instead allowing a party to write the Order and making Findings, Conclusions and a Consensus Decision for the Commission Panel not contained in the Record?

II. Did the Court of Appeals err as a matter of law by denying the Petitioner's Motion for Remand to be allowed to submit additional evidence pursuant to SC Code §1-23-380(3)?

III. Having determined that exceptional circumstances existed under SC Code §42-1-40, did the Commission and Court of Appeals err as a matter of law by applying the wrong legal standard and not raising the compensation rate to $591.73?

IV. Based on a review of the reliable, probative and substantial evidence in the Record as a whole, did the Commission err as a matter of law by not granting the Petitioner lifetime medical care for the problems he has with his low back?

STATEMENT OF THE CASE

This matter involves an appeal from the SC Workers' Compensation Commission which was originally commenced on July 13, 2010 with the filing of a Form 50 in an accepted claim wherein the Claimant (the Petitioner in this Court) requested an award for permanent and total disability benefits with lifetime medical care for all problems related to that injury. (R. p. 23). After the filing of a responsive

Form 51 by Peoplease/Bulldog Hiway Express denying that the Petitioner was totally and permanently disabled and entitled to lifetime medical care (R. p. 25), this matter was set for hearing before the Honorable David W. Huffstetler on October 22, 2010. Pursuant to Commission Regulations and the Administrative Procedures Act, the Petitioner timely filed his Pre-Hearing Brief, Notice of Witnesses, and APA Submissions fifteen (15) days before the hearing on October 7th setting forth the issues for decision by the Commissioner and the documentary evidence that would be placed into the Record at the hearing in support of the Petitioner's position. (R. p. 27). On October 12, 2010, the Defendants (the Respondents in this Court) filed their Pre-Hearing Brief and Notice of Witnesses and APA Submissions ten (10) days before the hearing. (R. p. 169). Subsequently on October 14th, the Defendants served by regular mail an "Amended" Pre-Hearing Brief specifically adding Ms. Monica Reese as a witness and noting that wage information from similar employees of Peoplease may be introduced concerning the average weekly wage and compensation rate issue. (R. p. 182). After the hearing, Commissioner Huffstetler issued his notes for Decision on October 25th and his Decision on November 23, 2010. (R. p. 385; p. 1). On December 6, 2010, the Petitioner filed a Form 30 - Request for Review by the Full Commission. (R. p. 186). The Petitioner submitted his

Full Commission Brief on February 14, 2011 and after the Defendants filed a responsive Brief on March 1, 2011, a hearing was held on the Request for Review by a three (3) member panel of the Commission on March 21, 2011. (R. p. 189; p. 203; p. 318). Subsequently the Judicial Director of the Commission issued a Form: Request for Proposed Order simply noting a, "Full Affirmation" of the Hearing Commissioner's Decision by the three (3) member Appellate Panel and requesting Defense Counsel draft a proposed Order making Findings of Fact and Conclusions of Law consistent with that Finding. (R. p. 399). A proposed Order was submitted on May 27, 2011 and by letter dated June 3, 2011, Counsel for the Petitioner filed objection to the proposed Order on the basis that it went beyond the directions of the Commission and renewed an objection to any party writing the Consensus Order of the Appellate Panel in any case. (R. p. 402; p. 410).

The Appellate Panel Decision as drafted by Defense Counsel was issued by the Commission Panel on June 29, 2011 and Notice of Intent to Appeal with Exceptions was filed with the Court of Appeals on July 27, 2011. (R. p. 14; p. 208).

Also on July 27, 2011 the Petitioner filed a Motion in the Court of Appeals for Leave to Submit Additional Evidence pursuant to the SC Administrative Procedures Act and to stay

the appeal in the Court pending a remand to the SC Workers' Compensation Commission for consideration of that additional evidence. (R. p. 219). By Order of the Honorable Daniel G. Pieper dated November 2, 2011, that Motion was denied on which there is no reconsideration pursuant to the Appellate Court Rules and the briefing in this case then followed. (R. p. 12). The Decision of the SC Court of Appeals which affirmed the Decision of the Commission which for the first time addressed the specific factual and legal issues that had been presented to the Full Commission for consideration was filed on February 13, 2013. A timely Petition for Rehearing pursuant to the Appellate Court Rules was filed with the Court of Appeals on February 28, 2013 and on March 27, 2013, the Court of Appeals withdrew the original Opinion and substituted and refiled its Opinion in the case again affirming the original Decision of the SC Workers' Compensation Commission. From that decision of the SC Court of Appeals, this Petition for a Writ of Certiorari follows.

STATEMENT OF FACTS

Mr. Brown requested a Hearing for a determination that he was entitled to an award for total and permanent disability. In his Form 50 (Request for Hearing) and in his Pre-hearing Brief, Mr. Brown listed that he had sustained injuries and medical problems resulting from the accident to his neck/back/arm and head, and an aggravation of his

pre-existing diabetic condition. (R. p. 27; p. 23). The Hearing Commissioner awarded Mr. Brown total and permanent disability benefits on the basis he had sustained a total and permanent loss of earning capacity under SC Code §42-9-10 and §42-1-120, and based on his total and permanent disability awarded lifetime causally related medical care for treatment of his cervical spine and diabetes. However, the Commissioner found as a fact in Findings in Fact #3:

> "In reference to the award simply being based under §42-9-30 for the loss of use of the back, the case of McLeod v. Piggly Wiggly calls the back a much more complicated area of the body and calls for expert medical opinions in those kinds of cases. There is no specific medical report that ties the lumbar problems to the injury at work." (Emphasis added). (R. p. 9).

Based on this singular finding the Commissioner did not award Mr. Brown lifetime medical care for his lower back.

Mr. Brown had also requested a review of the average weekly wage and resulting compensation rate and the Hearing Commissioner found that exceptional circumstances existed to determine the applicable average weekly wage and compensation rate. He determined that an average weekly wage of $740.38 with a resulting compensation rate of $493.84 should apply based on the testimony of the defense witness, Ms. Monica Reese. In his notes requesting a proposed Order, the Commissioner wrote:

> "Let's start with average weekly wage. Ms. Reese testified the top-end for truck drivers at Peoplease **(through Bulldog)** is $38,500 per

> year. Average weekly wage looks to the future. If the past is a predictor of the future, then the Claimant would reach that level, **as he earned more than that prior to his employment at Peoplease**. There is no documentary evidence to support the Claimant's testimony of having been promised .50 cents per mile. He could not even identify who told him that. The documents on a co-worker are only for one employee. So, I accept the testimony from Ms. Reese and use that number to calculate the average weekly wage." (Emphasis added). (R. pp. 385 & 386; see also: pp. 2-5).

Mr. Brown had requested that the average weekly wage be increased at least to $887.55 with a compensation rate of $591.73 based on his full year of income with his previous employer prior to leaving to go with Bulldog Hiway Express and on the evidence that his reason for changing work was he could make more money, was closer to home and would be paid a higher pay rate per mile (.50/mile per his testimony, $1.00/mile per company records). (R. pp. 160-168).

The Decision of the Hearing Commissioner finding the Petitioner totally and permanently disabled and entitled to lifetime medical treatment for his neck and radicular symptoms and aggravation of diabetes was not appealed and became the law of the case. Further the finding that the evidence established that exceptional circumstances existed for the determination of the average weekly wage and the resulting compensation rate and the compensation rate that was applied was not appealed. Thus, the application of the

law, the finding of exceptional circumstances and at a minimum the compensation rate awarded by the Commissioner also became the law of the case.

The decision of the Commissioner in refusing to grant the Petitioner lifetime benefits for treatment of his low back and the basis for that decision that, "there is no specific medical report that ties the lumbar problems to the injury at work," were appealed. The undisputed facts supporting an award of medical care for the low back and the fact that the Record contained no contrary evidence to support the Commission's denial of benefits are set out under Argument I of his brief to the Court of Appeals. In accordance with SCACR Rule 242(d)(4), the Petitioner would ask the Court to refer to that argument for a detailed analysis of the undisputed facts in the Record and would only submit the most pertinent evidence from the undisputed evidence which is contrary to the Commissioner's Finding. Dr. Leonard Forrest in his independent medical evaluation stated the following opinion:

> "It 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 automobile accident of May, 08.** . . . Despite having a three level fusion, in my opinion further evaluation at this time is needed. Mr. Brown is not at maximum medical improvement. . . .
>
> With regard to the back and related leg symptoms, this almost certainly seem to be related to the motor vehicle accident for the

> same reason as stated above, but has not been evaluated adequately at this point. It continues to be a problem for him. I would recommend a MRI and then he will most certainly need treatment for the back related component of his symptoms also." (R. p. 119).

As to the issues that were briefed and argued to the Full Commission, there is absolutely no decision nor are there any notes by any of the Commissioners in the Record. The only notation (which is actually a Form submitted by the Judicial Director not a Commissioner - "REQUEST FOR PROPOSED DECISION AND ORDER" sent to Defense Counsel asking to prepare a proposed Order) of any finding by the Commission simply states,

> "The Panel has considered the matter and find a **FULL AFFIRMATION** of the Single Commissioner's Decision and Order."

By letter dated June 3, 2011 Counsel for the Petitioner filed objection to the proposed Order as going beyond the direction of the Commission which was to simply provide a Full Affirmation and also objected specifically to the Commission's failure to write its own Order as follows:

> "I would renew my objection to a party writing an Order for the Commission as the Administrative Procedures Act, the Workers' Compensation Act, our case law and the Rules of the Commission require the Commission to make their own Findings of Fact particularly in a consensus order decision situation."

During the same time that the Full Commission rendered its Decision June 29, 2011 as is set out in the Motion for

Leave to Submit Additional Evidence and to Stay the Appeal in the SC Court of Appeals pending further hearing by the SC Workers' Compensation Commission filed with the Court of Appeals on July 27, 2011, the Petitioner in preparation for another hearing wherein he was requesting a lump sum of the benefits to be paid to him which occurred, located a card which confirmed his testimony that he was to be paid .50 cents per mile. As set out in the Motion, the Commission does not allow for Petitions for Rehearing and therefore the Motion was filed with the Court of Appeals as having jurisdiction over the matter after the Notice of Appeal was filed.

STANDARD AND BASIS FOR REVIEW

In support of his Petition for the granting of a Writ of Certiorari, the Petitioner would submit under SCACR Rule 242(1)(b) that upon review of the Opinion of the Court of Appeals the Court will find that the appeal involved novel questions of law; that the Opinion of the Court of Appeals is in conflict with the prior decisions of this Court and that there are substantial constitutional issues directly involved in the appeal.

As to the novel issues presented by the appeal, the case involves two (2) specific issues of first impression since the 2007 Amendments to the Workers' Compensation Statute which provide for direct appeal from the Commission

to the SC Court of Appeals. The first issue is the requirement in both the APA and the Workers' Compensation Act that the Commission must make its own Findings of Fact and Conclusions of Law which is paramount not only to the interests and rights of the Petitioner, but also has very broad ramifications as to the overall body of law under the Workers' Compensation Act. The other issue is the Decision by the Court of Appeals on the issue of the taking of additional evidence.

ARGUMENTS

I. THE COMMISSION ERRED AS A MATTER OF LAW BY NOT PERFORMING ITS JUDICIAL AND ADMINISTRATIVE FUNCTION REQUIRING IT TO WRITE ITS OWN APPELLATE PANEL ORDER, MAKING ITS OWN FINDINGS OF FACT, CONCLUSIONS OF LAW AND DECISION AND INSTEAD ALLOWING A PARTY TO WRITE THE ORDER AND MAKE FINDINGS, CONCLUSIONS AND A CONSENSUS DECISION FOR THE COMMISSION PANEL NOT CONTAINED IN THE RECORD.

On April 4, 2011, the Judicial Director issued a document entitled, "SC Workers' Compensation Commission, Request for proposed Decision and Order", noting that the Panel had reached a decision and requested Respondents' Counsel to, "please prepare a proposed Order and submit it to the Judicial Department within 30 days of this Notice." Thereafter Respondent's Counsel submitted a proposed Order which made detailed Findings of Fact and legal conclusions not contained anywhere in the Record of the Commission.

SC Code §42-17-40 and §42-17-50 require that the decisions of the Hearing Commissioner and the Commission

shall include, "a Statement of Facts, Rulings of Law and other matters pertinent to the questions at issue." Commission Review Regulation 67-709 implementing SC Code §42-17-50, in addition to generally requiring that the Commission make, "Findings of Fact or Conclusions of Law," specifically sets forth under Reg. 67-709(e)(2) that,

> "The Commissioners **together** shall agree upon a modification if any and **record their Findings of Fact and Conclusions of Law on a vote sheet.**" (Emphasis added).

It is clearly the intent of those Statutes and Regulations that the Commission whether it is reviewing a decision of a Hearing Commissioner or is making a decision upon remand from our Appellate Courts, to make its own Findings of Fact and Conclusions of Law as part of its Administrative/ Judicial responsibilities.

In addition to the requirements set out in the workers' compensation statutes and the Commission's own Regulations, this Court held, as reaffirmed on numerous occasions in its subsequent Decisions, in Drake v. Raybestos-Manhattan, Inc., 241 S.C. 116, 127 S.E.2d 288 (1962) that the,

> **"Duty to determine factual issues is solely on the Commission** and the Courts have no authority to determine such issues except in jurisdictional matters, and such duty requires that not only must Findings of Fact be made upon essential factual issues but they must be sufficiently definite and detailed to enable the Appellate Court properly to determine **whether the Findings of Fact are supported by**

> **the evidence and that the law has been properly applied to them.**" (Emphasis added).

Therefore this Court's Opinions place the responsibility on the Commission to make **its own** Findings of Fact and Conclusions of Law and to set those out in its Orders.

In addition to the requirements of the Workers' Compensation Act, the Commission's own Regulations and our case law, the SC Administrative Procedures Act requires under SC Code §1-23-350 that the Agency (the Workers' Compensation Commission) must make a final decision containing, "Findings of Fact and Conclusions of Law separately stated."

More importantly, SC Code §1-23-340 specifically provides that where the majority of the officials of an Agency (the Commissioners), who render a Decision did not hear the case that the parties should be given an opportunity to present briefs and oral arguments on the Finding of the Agency and specifically that, "the proposal" for Decision,

> "shall contain a statement of the reasons therefore and of each issue of fact or law necessary to the proposed Decision, **prepared by the person who conducted the hearing or one who has read the Record.**" (Emphasis added).

Therefore, there is no question that the Administrative Procedures Act, the Commission's Regulations, the statutes and our case law all contemplate that the Commission, especially in the appellate process, shall prepare its own Order and make its own detailed Findings of Fact and Conclusions of Law.

In this case, for the Commission Panel to state that it had made a decision and to tell Respondent's Counsel to fill in the blanks as to what its Findings of Fact and Conclusions of Law are, is to abdicate the responsibility of the Commission to make and "**prepare**" its own specific Findings of Fact and Conclusions of Law and denies Mr. Brown the most fundamental of due process requirements. (Emphasis added). This process clearly abdicates the responsibility of the Commission and denies the Petitioner due process of law especially in the appellate process involving a review of that decision (i.e., notice of the issues). Also for Respondents' Counsel to be allowed to draft the Commission Order in this situation prevents the Court, the Petitioner or anyone else from being able to have an understanding of the basis upon which the Commission made its Decision. The law does not contemplate or allow a party to draft an Order of an appellate nature, especially a multimember consensus Order, but instead contemplates the Commission making its decision so the Appellate Courts reviewing it will know what the Agency's decision is and what the basis for that decision was from that review. This is also a novel issue based on Drake v. Raybestos, supra, and its progeny, the provisions of the APA and the 2007 Amendments allowing for direct appeal to the Court of Appeals. Prior to 2007, the Circuit Courts were well aware of the responsibility to require the Commission to

perform this statutory duty; as was the Court of Appeals and this Court. See for example: Davis v. La-Z-Boy Chair Co., 287 S.C. 121, 337 S.E.2d 238 (SC App. 1985); Nettles v. Spartanburg School District, 341 S.C. 580, 535 S.E.2d 146 (SC App. 2000); Shealy v. Algeron Blair, Inc., 250 S.C. 106, 156 S.E.2d 646 (1967). However, the decision of the Court of Appeals calls that fundamental principle into question.

II. THE COURT OF APPEALS ERRED AS A MATTER OF LAW BY DENYING THE PETITIONER'S MOTION FOR REMAND TO BE ALLOWED TO SUBMIT ADDITIONAL EVIDENCE PURUSANT TO SC CODE §1-23-380(3).

The Court of Appeals denied the Motion to Remand to submit additional evidence on the basis: that the evidence Petitioner sought to admit was not material; and that he did not present any good reason for his failure to present the evidence during the hearing before the Commissioner.

However, in making this decision the Court of Appeals did not set out any basis for the determination that the evidence was not material nor that the Petitioner failed to establish the existence of a good reason for his failure to introduce such evidence at the original hearing. While not setting out any basis for these decisions, the Court of Appeals did cite to this Court's decision in Byars v. SC Alcoholic Beverage Control Commission, 305 S.C. 243, 407 S.E.2d 653 (1991). A review of the Byars decision will indicate why the Court should grant the Petition for Cert and review both the facts and law as to this two (2) prong

test. In Byars, Justice Toal meticulously went through the factual basis that the Circuit Court set out in granting the Motion to Remand for Additional Evidence. The Court then went through and meticulously set out how the Legislature had amended the law and that based on that amendment why the evidence was not material. In this case, there is simply no such analysis either as to the materiality of the additional evidence sought to be introduced or as to whether or not there was good reason for the failure of the Petitioner to submit it at the original Hearing.

First, as to whether this evidence is material, the Court of Appeals either misunderstood or overlooked the fact that the Hearing Commissioner specifically based his ruling not granting a higher average weekly wage and compensation rate on the fact that the Petitioner's testimony that he was to be paid .50/mile was not, "supported by any documentary evidence". The Petitioner would ask the Court for its insight and a decision on what evidence could be more relevant or material on that finding by the Commission than a, "document" that actually sets forth evidence specifically supporting and confirming the Petitioner's testimony which had been disregarded and discredited by the Commission for not having supporting "documentary evidence".

Second, as to the Petitioner's failure to present this evidence at the hearing before the Single Commissioner, the Petitioner in his Pre-Hearing Brief had set forth a very detailed explanation of the evidence that he would submit at the hearing on the issue of an increase for exceptional reasons in the average weekly wage and compensation rate which included that he was promised he would make .50/mile. The Respondents' first timely submitted Pre-Hearing Brief did not even mention the average weekly wage and resulting compensation rate issue. It was not until less than 7 days before the hearing that the Petitioner was made aware that there was any contest whatsoever as to this issue. In that amended Pre-Hearing Brief, there is absolutely no mention that there would be any evidence concerning any contest to the mileage rate at which he said he was hired to be paid. Therefore, there was absolutely no notice to the Petitioner that his testimony in this regard would be challenged in any way or fashion. In fact, the Defendants did not put in any documentary evidence contrary to that sought to be admitted as additional evidence or any documentary evidence on the mileage rate. The only evidence concerning the mileage rate was the unsupported testimony of the Petitioner and the unsupported testimony of Ms. Reese about what Bulldog Peoplease drivers were paid. There is absolutely nothing in the Record to place the Petitioner on notice that his

veracity would be challenged or that he would need to support his credibility with documentation. Also 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. It was only later in preparation for a subsequent hearing that he in fact found the card going through records concerning bills. The Petitioner would ask the Court for a review on this basis and he believes the Court will find he has put forth valid and sufficient cause for having not produced this document or knowing that he needed to produce such a document at the hearing. The Petitioner hopes that this Court will make a detailed analysis on this two pronged test and will then grant him the opportunity to submit that evidence to the Commission for consideration.

III. HAVING DETERMINED THAT EXECEPTIONAL CIRCUMSTANCES EXISTED UNDER SC CODE §42-1-40, THE COMMISSION AND COURT OF APPEALS ERRED AS A MATTER OF LAW BY APPLYING THE WRONG LEGAL STANDARD AND NOT RAISING THE COMPENSATION RATE TO $591.73.

The Decision of the Commission finding that exceptional circumstances existed for a determination of the average weekly wage was not appealed and is the law of the case. Thus the question is did the Commission and the Court of Appeals apply the right or wrong legal standard having determined that exceptional circumstances existed under SC Code §42-1-40.

Under SC Code §42-1-40 and this Court's Opinions,

> "The objective of wage calculation is to arrive at a fair approximation of the injured worker's probable future earning capacity; his disability reaches into the future, not the past and that loss as a result of the injury must be thought of in terms of its impact on his or her probable future earnings." Bennett v. Gary Smith Builders, 271 S.C. 94, 245 S.E.2d 129 (1978) (Emphasis added).

See also: Sellers v. Pinedale Residential Center, 350 S.C. 183, 564 S.E.2d 694 (SC App. 2002). Also, as this Court stated in Bennett, the Workers' Compensation Statute that concerns the determination of an average weekly wage and resulting compensation rate sets forth different methods for that determination and provides, "an elasticity or flexibility is permitted with a view towards always achieving the ultimate objective of reflecting fairly a Claimant's probable future earning loss." As this Court stated in Stephenson v. Rice Services, Inc., 323 S.C. 113, 473 S.E.2d 699 (1996) and as restated by the Court of Appeals in Pilgrim v. Eaton, 391 S.C. 38, 703 S.E.2d 241 (SC App. 2010), the overriding goal in a workers' compensation case is to compensate the injured worker for the reduction in his or her earning capacity or earning power caused by the work-related injury. Therefore, having found that exceptional reasons existed for increasing the Petitioner's average weekly wage, the appropriate legal standard to be applied to that determination is being to

arrive at a fair approximation of Mr. Brown's probable future earning capacity and not as the Commission did to determine just what his future earnings would have been with his employer. His disability will reach into the future, not into the past and his loss must be thought of in terms of its impact on probable future earnings and he is to be compensated for that loss to the extent possible under the Act.

The Record establishes that Mr. Brown had been employed by Boyd Brothers, where he made a lot more money than with the Respondents. He testified that he left Boyd Brothers for several reasons: the first of which was to come off the road and be able to run more local routes; and the second was that he could make more money per mile according to what he was being told by the employer, Bulldog Hiway Express. Mr. Brown testified that he was told when he began work for Bulldog that he would make .50 cents per mile. He also produced documentary evidence supporting his claim in the form of paychecks with Bulldog which not only confirmed his testimony but further established that he was paid as much as a $1.00/mile. (R. pp. 160-163). The Respondents presented the testimony of Ms. Monica Reese concerning the rate of pay and the average weekly wage of people that worked for Bulldog but nothing contrary to his testimony on earning capacity. (R. p. 356, ll. 13-25; p. 362, ll. 4-22).

Mr. Brown testified that when he left Boyd Brothers that he was being paid approximately .39 cents per mile and the Record contained the evidence supporting his far higher income at Boyd Brothers (even at this lower mileage rate) and that based on his prior income, his average weekly wage would be $887.55 with a resulting compensation rate of $591.73. Thus while stating that the Petitioner's excellent past work history and the far greater amount of income that he made with Boyd Brothers was taken into consideration, it really was not as is required by our Appellate Court decisions as the Commission only raised the compensation rate to what Mr. Brown would have made with the Respondent Employer and did not address what his loss of earning capacity would be in the future. Therefore the Commission and the Court of Appeals erred as a matter of law by not applying the correct legal standard and establishing his future loss of earning capacity in any employment which at a minimum was $887.55 with a resulting compensation rate of $591.73.

IV. BASED ON A REVIEW OF THE RELIABLE, PROBATIVE AND SUBSTANTIAL EVIDENCE IN THE RECORD AS A WHOLE, THE COMMISSION ERRED AS A MATTER OF LAW BY NOT GRANTING THE PETITIONER LIFETIME MEDICAL CARE FOR THE PROBLEMS HE HAS WITH HIS LOW BACK.

A review of the evidence establishes that the Commission either overlooked or disregarded the undisputed evidence in the Record that the Petitioner's low back problems were

caused by the accident and as a matter of law erred by failing to award lifetime medical care for his low back.

While it is axiomatic having been decided numerous times by this Court that any Appellate Court reviewing a decision of the SC Workers' Compensation Commission may not substitute its judgment for that of the Agency concerning the weight of the evidence; that the Commission is the ultimate fact-finder; and that the Commission's decision on the facts is conclusive if supported by the evidence, the test is whether the Decision of the Commission is supported by substantial evidence. As this Court has repeatedly held and as the Court of Appeals has regurgitated ad nauseam, substantial evidence is not a mere scintilla of evidence nor is it evidence that may be viewed blindly from one side or the other, but it is evidence which considering the Record as a whole would allow reasonable minds to reach the same conclusion that the Administrative Agency reached in order to justify its decision. However, with that said, the Decision of the Commission may and should be reversed where the substantial rights of the Petitioner have been prejudiced because the administrative findings of the Workers' Compensation Commission are clearly erroneous in view of the substantial evidence on the Record as a whole. Medlin v. Upstate Plaster Service, 329 S.C. 92, 495 S.E.2d 447 (1997) (J. Toal for the Court); Mullinax v. Winn Dixie

Stores, Inc., 318 S.C. 431, 458 S.E.2d 76 (SC App. 1995). Further, where the evidence is susceptible of but one reasonable interference or where there is an absence of evidence to support the decision of the Commission, the question becomes one of law for the Court rather than one of fact for the Commission and the Decision should be reversed. Massey v. W.R. Grace & Co., 286 S.C. 434, 334 S.E.2d 122 (1985); Grayson v. Carter Rhoad Furniture, 317 S.C. 306, 454 S.E.2d 320 (1995), affirmed as modified, 312 S.C. 250, 439 S.E.2d 859 (SC App. 1993).

The Court's review will show that following the accident, Mr. Brown initially was referred to and was seen by Dr. Denise Algood and had to go to the Emergency Room at the Regional Medical Center on July 6, 2008, wherein the doctor recorded a history,

> "pt (patient) was in mvc (motor vehicle accident) two months ago when he developed the pain. He does a lot of heavy lifting at work, which he believes has exacerbated the pain. . . . Also reports shooting pain down both legs with some numbness. . . ."

The doctor's final diagnosis was "**lumbar strain**, **sciatica**". On discharge he was referred to Dr. Abu-Ata (R. pp. 61-65). Where on July 10th **Dr. Abu-Ata's assessment** was,

> "This is a 58 year old male patient with history of **neck and back trauma after a motor vehicle accident** after which he is **complaining of intermediate frequent neck and back pain** in addition to bilateral arm and leg numbness, foot and hand numbness." (Emphasis added).

Based on his findings he had MRIs performed on both the cervical and lumbar spine especially since there was, "the history of back trauma". (R. p. 59; 69-70). When Dr. Abu-Ata reviewed the MRIs due to the severe condition in the cervical spine, he made an emergency referral to Dr. Scott Boyd, neurosurgeon, who recorded a history,

> "Mr. Brown is a very pleasant 58 year old truck driver who says that on May 2nd he was involved in a motor vehicle accident and shortly thereafter developed severe neck and **back pain.** He denies any previous problems with his neck **or back**. His greatest problem seems to be the neck which is radiating down to his arms bilaterally." (R. p. 95).

Due to the severe condition and problems that Mr. Brown was having with his cervical spine, Dr. Boyd immediately scheduled him for a three (3) level cervical spine fusion and on September 15, 2008 expressed the opinion to a reasonable degree of medical certainty that the problems that he had with:

> "his neck **and back** and his need for medical care either stem directly from the automobile accident on May 2, 2008 or the accident aggravated and caused to become symptomatic a pre-existing condition in his neck **and back** which resulted in need for medical care." (R. p. 90).

After that, Petitioner will readily concede treatment was concentrated on his cervical spine wherein he had to have not one (1) but two (2) separate cervical fusion surgeries and was placed on chronic pain medication to control the problems that he had with his neck. There 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 nor was any treatment ever not authorized and paid for by the Respondents.

On April 4, 2009, Mr. Brown underwent an independent medical evaluation by Dr. Blake Moore who found that he had suffered injuries in the motor vehicle accident on May 2, 2008 and he opined given the mechanism of the injury that his problems and need for continuing care for his neck and back were related to the automobile accident. (R. p. 112).

Also Mr. Brown underwent an evaluation by Dr. Leonard Forrest who after noting all of the treatment to the cervical spine and that, "I do not see any studies to the lumbar spine," stated the opinion:

> "It 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 automobile accident of May, 08.** . . .
>
> With regard to the back and related leg symptoms, this almost certainly seem to be related to the motor vehicle accident for the same reason as stated above, but has not been evaluated adequately at this point. It continues to be a problem for him. I would recommend a MRI and then he will most certainly need treatment for the back related component of his symptoms also." (R. p. 119).

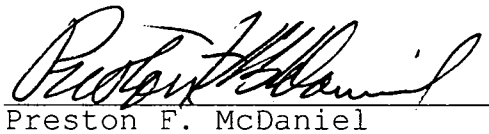
The Petitioner simply asks that the Court review the evidence and amend the Award to include lifetime medical

care for his problems with his low back based on the undisputed evidence.

CONCLUSION

For all the foregoing reasons, the Petitioner would request that the Court grant his Petition and review his entitlement to lifetime medical benefits for his low back problems; remand this case to the Commission to take further evidence and apply the appropriate legal standard and make a further ruling as to whether or not the compensation rate should be increased from that to which it was increased to $591.79 or even greater based on the evidence submitted to the Commission.

Respectfully submitted,



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April 26, 2013908

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION

Opinion No. 5082
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.

PROOF OF SERVICE

I certify that I have served the **PETITION FOR WRIT OF CERTORARI** and **APPENDIX** by depositing a copy of it in the United States Mail, postage prepaid, on April 26, 2013, addressed to its attorneys of record, Weston Adams, III, Esquire, Helen F. Hiser, Attorney at Law, McAngus, Goudelock & Courie, Post Office Box 12519, Columbia, SC 29211-2519 **AND** SC Court of Appeals, Post Office Box 11629, Columbia, South Carolina 29211.

Dated: April 26, 2013

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